FREEZING TERRORIST ASSETS AGAIN: WALKING A TIGHTROPE OVER THIN ICE?

INTERNATIONAL concern about terrorist activities remains at a high level, and actions to restrict access for terrorists to funding have remained similarly high on the enforcement agenda. In the European Union, the legal framework for freezing terrorists' assets involves a complex combination of United Nations Security Council Resolutions, Common Positions taken by the Council of the EU, EC Regulations and national authorities' decisions and enforcement actions against the assets of terrorist organisations and those suspected of connections with such groups. The combined operation of these different instruments and actors continues to pose difficult questions for both the authorities and those subject to decisions to freeze their assets, and more generally for the coherence and integrity of the system of judicial protection in the EU.

Recent judgments of both the Court of First Instance (CFI) and the European Court of Justice have sought to maintain a delicate balance between the practical operation of the asset freezing system and the need to provide adequate protection for the interests of those subjected to such measures (see, e.g., the cases discussed in Johnston, [2007] C.L.J. 273 and 523). The latest instalment in this saga exhibits similar tendencies, but also provides welcome clarification of the procedure which Member States and the EU's institutions must follow when deciding to place a given name on the relevant lists. Case T-47/03 *Sison* v. *Council* and Case T-327/03 *Stichting Al-Aqsa* v. *Council* (both judgments handed down 11 July 2007) concerned, respectively, the position of a political activist long since exiled from the Philippines and a self-proclaimed Islamic social welfare institution connected with certain Palestinian groups. Each was alleged to have sufficient links to terrorist activities to justify their name being placed on the asset freezing list. The *Al-Aqsa* case highlighted the need for the Council to make clear the basis of any EC decision to add a name to the list: simply relying upon the existence of *national* decisions (whether by the executive or the judiciary) as to the status of such names will not be sufficient, unless the reasons for taking action *at EC level* make clear reference to those national decisions. This complex interaction of the national and EC levels involved in a decision to add a particular person or organisation to "the list" was given extensive consideration in the *Sison* judgment, which contains much of interest on the operation of this system and which will repay closer reading by applicants, Member State governments and Council officials alike.

In *Sison*, the Court of First Instance laid down a detailed framework concerning the need to respect the rights of the defence when both Member State and EC authorities take a decision to add

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names to the terrorist asset freezing list. The applicant had earlier failed in his attempt to gain access to the Council documents which had led to his name being placed, and maintained, on that list: both the CFI (Cases T-110, 150 and 405/03, judgment of 26 April 2006) and the European Court of Justice (ECJ) (Case C-266/05 P, judgment of 1 February 2007) upheld the Council's refusal to disclose either the documents or the identity of the Member State which had provided the information that led to the decision to place Mr. Sison on the list (on grounds that disclosure would have undermined public security and international relations).

In parallel, Mr. Sison brought a separate action seeking the annulment of the Council Decisions relating to his inclusion on the list. In its judgment on that application for annulment, the CFI stressed that the process involved decisions taken at both the national and the EC levels, and that each part of that process had to respect the rights of the defence (including the giving of reasons and a right to be heard in response to allegations made). However, "in so far as the decision in question was adopted by a competent authority of a Member State, observance of the rights of the defence at Community level does not usually at that stage require the party concerned again to be afforded the opportunity to express his views on the appropriateness and validity of that decision" (at [168]). Indeed, the CFI invoked the principle of mutual co-operation enshrined in Article 10 EC to hold that the Council was required to show a considerable degree of deference to the decision adopted by the national authority on the seriousness and credibility of the evidence involved (at least where established by a national judicial authority): at [169]–[171]. This basic presumption would only be rebutted where the Council proposed to take its decision to add a name to the list where the competent national authority had *not* made its own assessment of the evidence. Finally, the CFI acknowledged that there may be good reasons in the interest of which such rights of the defence might have to be limited, including the security of the EC or its Member States and their conduct of their international relations (at [180]). The CFI was prepared to accept that this could preclude the communication of certain evidence to the parties, but it could also "concern the specific content of or the particular reasoning of that decision, or even the identity of the authority that took it" (at [183]).

Happily for the applicant, these caveats did not prevent the success of his application for annulment: the extensive requirements to offer the applicant a hearing and to provide him with sufficiently clear and precise reasons for the Council's decisions had clearly not been met. Further, given that the basis upon which the Council claimed to have relied was a Dutch court judgment, it was not open to the Council to

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argue that the disclosure of such reasons was somehow confidential or damaging to security interests (at [212]).

Less happy for the applicant, however, was the outcome of his claim for damages against the Council: although the CFI acknowledged that the breach of the applicant's rights of defence was sufficiently serious in principle to found a claim for compensation against the Council, it held that annulment of the measure amounted to sufficient "compensation": at [239]–[241]. Further, the CFI characterised a number of the heads of damage as being causally connected only to the actions of the Member State and not those of the EC (see, in particular, at [246]). This approach to the applicant's damages claim creates significant practical difficulties for those affected by a decision to freeze their assets: first, must they thus bring parallel claims before both the national courts and the CFI to cover their losses? Second, significant danger lurks behind the idea that mere annulment of the measure was sufficient to compensate the alleged losses, unless the CFI is prepared to examine each case on its own facts. Third, given that the CFI's earlier reasoning (at [183]) allows the Council to withhold significant information about the decision to freeze a given applicant's assets, this may make it virtually impossible for the applicant to know whether the Council, or a Member State (and if the latter, then which one?) should be taken to be responsible for the decision to add the applicant's name to the list. Without a clear answer on this point, how is the applicant to choose the appropriate defendant against which to bring his action?

In conclusion, the CFI's clarifications in the *Sison* case are a welcome development in fleshing out the procedural protections in the process of deciding to freeze the assets of those suspected of terrorist connections. However, there is still some distance to travel before this system can be said to have achieved a proper balance between its laudable anti-terrorist goals and the need for effective judicial protection of the interests of those who may be affected by orders to freeze their assets.

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ADOPTION, WELFARE AND THE PROCREATIVE ONE-NIGHT STAND

THE full impact of the welfare focus in the Adoption and Children Act 2002 has yet to be realised. In *Re C (a child) (adoption: duty of local authority)* [2007] EWCA Civ 1206, [2007] 3 F.C.R. 659, the Court of Appeal took a distinctly individualistic view of the issue. In that case,

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