

JUDGMENT OF THE COURT OF FIRST INSTANCE (Seventh Chamber)

4 December 2008 (*)

(Common foreign and security policy - Restrictive measures directed against certain persons and entities with a view to combating terrorism – Freezing of funds – Actions for annulment – Rights of the defence – Judicial review)

In Case T-284/08,

People's Mojahedin Organization of Iran, established in Auvers-sur-Oise (France), represented initially by J.-P. Spitzer, lawyer, and D. Vaughan QC, and subsequently by J.-P. Spitzer, D. Vaughan QC and M.-E. Demetriou, Barrister,

applicant,

v

Council of the European Union, represented initially by G.-J. Van Hegleson, M. Bishop and E. Finnegan, and subsequently by M. Bishop and E. Finnegan, acting as Agents,

defendant,

supported by

French Republic, represented by G. de Bergues and A.-L. During, acting as Agents,

and by

Commission of the European Communities, represented by P. Aalto and S. Boelaert, acting as Agents,

interveners,

APPLICATION for annulment of Council Decision 2008/583/EC of 15 July 2008 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 2007/868/EC (OJ 2008 L 188, p. 21), so far as it concerns the applicant,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Seventh Chamber),

composed of N. J. Forwood (Rapporteur), President, D. Šváby and L. Truchot, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 3 December 2008,

gives the following

Judgment

Background to the case

- 1 For an account of the earlier background to the present dispute reference is made to the judgments in Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665 ('the OMPI judgment'), paragraphs 1 to 26, and Case T-256/07 *People's Mojahedin Organization of Iran v Council* [2008] ECR II-0000 ('the PMOI judgment'), paragraphs 1 to 37.
- 2 By judgment of 7 May 2008, the Court of Appeal of England and Wales (United Kingdom) ('the Court of Appeal') dismissed the application of the Secretary of State for the Home Department ('the Home Secretary') for permission to appeal to that court against the decision of 30 November 2007 of the Proscribed Organisations Appeal Commission (United Kingdom) ('the POAC') by which it had allowed an appeal against the Home Secretary's decision of 1 September 2006 refusing to lift the proscription of the People's Mojahedin Organization of Iran ('the applicant' or 'the PMOI') as an organisation concerned in terrorism and ordered the Home Secretary to lay before the United Kingdom Parliament the draft of an Order removing the applicant from the list of organisations proscribed in the United Kingdom under the Terrorism Act 2000.
- 3 In that decision, the POAC inter alia described as 'perverse' the Home Secretary's conclusion, in his decision of 1 September 2006 refusing to lift the applicant's proscription, that the applicant was, at that period, still an organisation 'concerned in terrorism' within the meaning of the Terrorism Act 2000. According to the POAC's assessment, the only belief that a

reasonable decision maker could have honestly entertained, whether as at September 2006 or thereafter, was that the PMOI no longer satisfied any of the criteria necessary for the maintenance of their proscription. In other words, on the material before it, the POAC found that the PMOI was not at the time of its decision and had not been, as at September 2006, concerned in terrorism (see the PMOI judgment, paragraphs 168 and 169).

- 4 It appears from the POAC decision (paragraph 10) that the said material included some elements of information relating to events concerning the PMOI which had occurred in France. In particular, the POAC mentioned the fact that on 17 June 2003 the offices of the National Council of Resistance of Iran (NCRI) near Paris were raided, that a large number of NCRI members were arrested, some of whom were remanded in custody, but that, although a substantial sum of money was found at the premises, no prosecutions were brought.
- 5 In its judgment, the Court of Appeal upheld the POAC's findings and moreover stated that the closed material adduced by the Home Secretary reinforced the Court of Appeal's conclusion that the Home Secretary could not reasonably have considered that the PMOI intended in future to revert to terrorism.
- 6 By order of 23 June 2008, which entered into force on 24 June 2008, the Home Secretary therefore removed the PMOI's name from the list of organisations proscribed under the Terrorism Act 2000, and this was approved by both Houses of Parliament in the United Kingdom.
- 7 By Council Decision 2008/583/EC of 15 July 2008 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 2007/868/EC (OJ 2008 L 188, p. 21) ('the contested decision'), the Council nonetheless maintained, with others, the applicant's name on the list in the Annex to Council Regulation (EC) No 2580/2001 of 27 December 2001 adopting restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70) ('the disputed list').
- 8 Recital 5 in the preamble to the contested decision which, it is common ground, refers to the PMOI, states:

'In the case of one group, the Council has taken account of the fact that the decision by a competent authority on the basis of which the group was included on the list has not been in force since 24 June 2008. However, new information concerning the group has been brought to the Council's attention. The Council considers that this new information warrants the group's inclusion on the list.'

- 9 The contested decision was notified to the applicant under cover of a letter from the Council dated 15 July 2008 ('the letter of notification'). In that letter, the Council stated, in particular, the following:

'the Council has again decided to include [the PMOI] on the list ... The Council has taken note of the fact that the competent authority decision which served as a basis for including [the PMOI] on the list is no longer in force as of 24 June. However, the Council has been provided with new information relevant to this listing. Having considered this new information, the Council has decided that [the PMOI] should still be included on the above-mentioned list. Therefore, the Council has amended the statement of reasons accordingly.'

- 10 In the statement of reasons enclosed with the letter of notification ('the statement of reasons'), the Council stated the following:

'The [PMOI] is a group formed in 1965 with the initial aim of overthrowing the imperial régime. Its members participated in the elimination of several thousand 'agents' of the old régime and were among the leaders in the taking of hostages at the US Embassy in Teheran. Although initially one of the most radical groups of the Islamic revolution, after being banned the PMOI went into hiding and carried out a number of attacks against the régime in place in Iran. The organisation was behind terrorist attacks, for instance the attack on the headquarters of the Party of the Islamic Republic on 28 June 1981, killing more than a hundred of the most senior members of the régime (ministers, parliamentarians, high-level officials), and the assassination on 30 August 1981 of President Rajai and his Prime Minister Javad Bahonar. In April 1992 the PMOI carried out terrorist attacks on Iranian diplomatic representations and installations in 13 countries. During the presidential campaign in 1993, the group openly claimed responsibility for attacks against oil installations, including Iran's largest refinery. In April 1999 the PMOI claimed responsibility for the assassination of Ali Sayyad Shirazi, the deputy chief of the Iranian Armed Forces General Staff. In 2000 and 2001 the organisation claimed that its members were involved in hit-and-run raids against the Iranian military and government buildings near the Iran-Iraq border and on 5 February 2000 carried out mortar attacks on official buildings in Teheran. Members of this organisation, located in various Member States of the European Union, are moreover currently being prosecuted for criminal activities aimed at funding their activities. These acts fall within Article 1(3), points (a), (b), (d), (f), (g), (h) and (i) of Common Position 2001/931/CFSP, and were committed with the aims set out in Article 1(3), points (i) and (iii) thereof.'

The [PMOI] falls within Article 2(3) (ii) of Regulation (EC) No 2580/2001.

In April 2001, the anti-terrorist prosecutor's office of the court of first instance [sic] of Paris opened a judicial inquiry into the charges of 'criminal associations for the preparation of terrorist acts' as provided for under French law by Act No 96/647 of 22 July 1996. The investigations conducted in the course of that judicial inquiry resulted in the targeting of alleged members of the [PMOI] for a series of offences all having a principal or subsidiary link with a collective undertaking whose aim is to seriously disrupt public order through intimidation or terror. In addition to the aforementioned criminal offence, the inquiry also focused on the 'financing of a terrorist group' as provided for under French law by Act No 2001/1062 of 15 November 2001 on security in everyday life.

On 19 March 2007 and 13 November 2007, the Paris anti-terrorist prosecutor's office brought supplementary charges against alleged members of the PMOI. These proceedings were prompted by the need to enquire into further elements arising from the investigations conducted between 2001 and 2007. They particularly focused on the charges of 'laundering the direct or indirect proceeds of fraud offences against particularly vulnerable persons and organised fraud' having a link with a terrorist undertaking as provided for under French law by Act No 2003/706 of 2 August 2003.

A decision in respect of the [PMOI] has therefore been taken by a competent authority within the meaning of Article 1(4) of Common Position 2001/931/CFSP.

The Council notes that these proceedings are still in progress and were given wider scope in 2007 as part of the combating of financing operations conducted by terrorist groups. The Council is satisfied that the reasons for including it on the list of persons and entities subject to the measures set out in Article 2(1) and (2) of Regulation (EC) No 2580/2001 remain valid.

Having considered these elements, the Council has decided that the [PMOI] should continue to be subject to the measures set out in Article 2(1) and (2) of Regulation (EC) No 2580/2001.'

Procedure

- 11 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 21 July 2008.
- 12 By separate document, lodged at the Court Registry on the same day, the applicant applied, pursuant to Article 76a of the Rules of Procedure of the Court of First Instance, for the case to be decided under an expedited procedure. The Council submitted its observations on that application on 30 July 2008 and lodged its defence on 10 September 2008. On 22 September 2008, the Court of First Instance (Seventh Chamber) granted that application, after which the written procedure was closed.
- 13 Having heard the report of the Judge-Rapporteur, the Court of First Instance (Seventh Chamber) decided to open the oral procedure and, by way of a measure of inquiry pursuant to Article 65 of the Rules of Procedure of the Court of First Instance, adopted by order of 26 September 2008, ordered the Council to provide to the Court all documents relating to the adoption of the contested decision, without those documents being communicated to the applicant at that stage of the proceedings if the Council claimed that they were confidential.
- 14 The Council complied with this measure of inquiry, first, by letter lodged at the Court Registry on 10 October 2008. To its answer were annexed eight documents, seven of which, no claim for their confidentiality having been made, were communicated to the applicant. The latter was requested to submit its written observations on the said seven documents and on the request for confidential treatment regarding the eighth document. The applicant complied with that request by letter lodged at the Court Registry on 5 November 2008.
- 15 The Council further complied with this measure of inquiry, second, by letter lodged at the Court Registry on 6 November 2008. To its answer were annexed four additional documents, which were communicated to the applicant.
- 16 By order of 10 November 2008, after the parties had been heard, the President of the Seventh Chamber of the Court of First Instance granted the French Republic and the Commission of the European Communities leave to intervene in support of the form of order sought by the Council.
- 17 By way of measures of organisation of the procedure pursuant to Article 64 of the Rules of Procedure, the Court of First Instance (Seventh Chamber) requested the Council, by letter of the Registry of 11 November 2008, first, to submit its written observations on certain new factual assertions and legal arguments contained in the applicant's observations lodged at the Court Registry on 5 November 2008, and, second, to produce all material documents in its possession describing, or relating to, the voting procedure leading to the adoption of the contested decision, including in particular the minutes of the meeting and of the vote. The Council complied with these measures by letter lodged at the Court Registry on 21 November 2008.
- 18 By way of the same measures and pursuant to Article 24 of the Statute of the Court of Justice, the Court of First Instance (Seventh Chamber) requested the United Kingdom, by letter of the Registry of 11 November 2008, to submit its written observations on the factual assertions made by the Applicant in its observations lodged at the Court Registry on 5 November 2008, in relation to the procedure leading to the adoption of the contested decision. The United Kingdom complied with these measures by letter lodged at the Court Registry on 20 November 2008.
- 19 By letter lodged at the Court Registry on 24 November 2008, the applicant made certain observations on the report for the hearing. The Council replied to those observations by letter lodged at the Court Registry on 28 November 2008.
- 20 The parties put oral arguments and gave their answers to the questions put by the Court at the hearing of 3 December 2008.

Forms of order sought by the parties

- 21 The applicant claims that the Court of First Instance should:
 - annul the contested decision, insofar as it applies to the applicant;
 - order the Council to pay the costs.
- 22 The Council contends that the Court of First Instance should:
 - dismiss the action as unfounded;

- order the applicant to pay the costs.

23 The French Republic and the Commission support the first of the Council's heads of claim.

Law

24 In support of its claim for annulment of the contested decision, the applicant advances, in essence, five pleas in law. The first alleges a manifest error of assessment of the evidence. The second alleges breaches of Article 1(4) of Common Position 2001/931 and of Article 2(3) of Regulation No 2580/2001 and a failure to discharge the burden of proof. The third alleges breach of the applicant's right to effective judicial protection. The fourth alleges breach of the rights of the defence and of the obligation to give reasons for a decision. The fifth alleges abuse or misuse of powers or procedures.

25 In its observations lodged at the Court Registry on 5 November 2008, the applicant advances a sixth plea in law, alleging breach of an essential procedural requirement. The Court considers that this new plea in law is admissible. First, it is based on matters of law or of fact which came to light in the course of the procedure, within the meaning of Article 48(2) of the Rules of procedure. Second, and in any event, this plea in law raises a matter of public policy since it is based on a breach of an essential procedural requirement affecting the conditions for the very adoption of the contested Community act.

26 It is appropriate to begin by examining this sixth plea in law, then the fourth plea and finally, the second and third pleas together.

The sixth plea in law, alleging breach of an essential procedural requirement

27 In its written observations on the first seven documents provided by the Council in compliance with the Court Order of 26 September 2008, lodged at the Court Registry on 5 November 2008, the applicant advances, inter alia, a new plea in law, alleging the irregularity of the voting process, within the Council, on all draft Community decisions in relation to the freezing of assets.

28 In support of this plea in law, the applicant refers to a statement made on 22 July 2008 by Lord Malloch-Brown, Minister of State to the Foreign and Commonwealth Office of the United Kingdom ('the Minister of State') to the House of Lords. More particularly, answering a question as to the reasons why the United Kingdom government had abstained during the vote in the Council on 15 July 2008 which led to the adoption of the contested decision, instead of opposing the continued inclusion of the applicant in the disputed list, in the light of the POAC decision and the subsequent judgment of the Court of Appeal, the Minister of State stated the following, according to the official Hansard transcript:

'We were determined to respect that court decision, which is why we were not able to support the [French] Government who brought to the table new information that had not been available earlier, on the basis of which they were able to persuade many Governments of Europe to support them. As to why we abstained rather than opposing the listing, the difficulty is that it is a total list with all terrorist organisations on it, and you have to vote up or down on that list. We were therefore faced with the unpalatable situation that either the old list would be retained, which would have done no good because the PMOI would have remained on it, or we would have been left with no listed terrorist organisations in Europe. We felt that was an unacceptable threat to the people of Britain as well as the rest of the Continent'.

29 The applicant contends that not allowing Member States the possibility of voting against including a particular organisation in the disputed list, assuming that was indeed the case, is wholly contrary to the appropriate Community legislation and the duty on the Council and Member States to evaluate in detail and individually whether there are grounds for keeping the organisation in question on the disputed list. The applicant further contends that it appears from the statement of the Minister of State that, had the United Kingdom been able to vote on individual organisations, this Member State (and, it believes, some other Member States) would have voted against its continued inclusion in the disputed list. Thus there would not have been the necessary unanimity required by Regulation No 2580/2001, which would necessarily have led to its withdrawal from the disputed list.

30 By this plea in law, the applicant contends, in essence, that for the Council to proceed by means of an overall vote on the whole list, without providing for the possibility of a vote on particular individuals or organisations, when periodically re-examining Community fund-freezing measures, vitiates so seriously the entire decision-making process leading up to the adoption of those measures, that it has to be considered as a misuse both of powers and of procedures, a violation of an essential procedural requirement and a violation of Article 2(3) of Regulation No 2580/2001 and of Article 1(6) of Common Position 2001/931. In the light of those allegations, the Court adopted the measures of organisation of the procedure referred to at paragraphs 17 and 18 above.

31 In its written observations lodged at the Court Registry on 21 November 2008, however, the Council maintains that, when reviewing at regular intervals and at least once every six months the names of persons and entities on the disputed list, as provided for by Article 1(6) of Common Position 2001/931, each member of the Council has the right to express itself on all of the entries on the list individually and to indicate its position in relation to all or any of those entries. The Council adds that each entry on the disputed list must be agreed by unanimity, so that, if a Member State opposes the continued inclusion of a particular individual or group on the list, then the necessary unanimity for continuing to include that individual or group does not exist. As evidence for its allegations, the Council relies on the outcomes of proceedings of the meetings of the Council's working group on Common Position 2001/931 ('the CP 931 working group') on 2 and 24 June and 2 July 2008, attached as annexes 1, 3 and 4 to its answer of 10 October 2008 to the Court Order of 26 September 2008.

32 In its written observations on the factual assertions made by the applicant, in relation to the procedure leading to the adoption of the contested decision, lodged at the Court Registry on 20 November 2008, the United Kingdom merely submits that 'given the request [of the Court] relates to the conduct of members of the Council in their capacity as members of that institution, the Council itself is best placed to address any points relating to the adoption of legislation within the Council'.

- 33 In such circumstances, and whatever the meaning and scope to be attributed to the statement made by the Minister of State to the House of Lords on 22 July 2008, the Court can only find, in the light of the documents on the Court file, that there is no objective evidence making it possible to uphold the applicant's allegation that the Member States within the Council are constrained to vote 'up or down' on a 'total list', without being offered the possibility to take a position individually, case by case, on the question whether the inclusion or maintenance of a particular person or entity on the disputed list is, or remains, justified.
- 34 On the contrary, the documents produced by the Council show that such reviews on a case by case basis do occur within the CP 931 working group. More particularly, the outcomes of proceedings of the meeting of the said CP 931 working group on 2 July 2008 show that the Member States delegations were granted an extension of time, expiring on 4 July 2008, to indicate whether '[i]n the light of the further additional information provided by a Member State and the revised statement of reasons which had been circulated', they had 'any objection to one group being listed on the new basis proposed'. Since that reference obviously concerned the specific case of the applicant, it is clear that the Member States retained the possibility to oppose its continued listing but that they ultimately chose not to make use of that possibility.

- 35 It follows from the foregoing that the sixth plea in law must be rejected as unfounded.

The fourth plea in law, alleging breach of the rights of the defence

- 36 It is common ground that the Council adopted the contested decision without first informing the applicant of the new information or new material in the file which, in its view, justified maintaining it on the disputed list, namely, that relating to the judicial inquiry opened in April 2001 by the anti-terrorist prosecutor's office of the *Tribunal de grande instance* of Paris and to the supplementary charges brought in March and November 2007. A fortiori, the Council did not enable the applicant to effectively make known its view of the matter, prior to the adoption of the contested decision.

- 37 As regards the rights of the defence, it is therefore clear that the contested decision was adopted in disregard of the principles stated by the Court in the OMPI judgment (see, in particular, paragraphs 120, 126 and 131).

- 38 The Council submits, however, first, that the considerations expressed by the Court in paragraph 131 of the OMPI judgment as regards subsequent decisions to freeze funds do not take account of the particular situation in which the Council found itself in the present case. The Court presupposed, in that case, that the decision of a competent national authority which formed the basis for the initial decision to freeze funds would remain in force, without addressing the possibility that such decision might be revoked or withdrawn, in circumstances where the Council has nevertheless received new information justifying the continued inclusion of the party concerned on the disputed list. That was the case, in June 2008, in relation to the applicant. In the circumstances of the present case, the Council considered that the public interest objective pursued by the Community, pursuant to United Nations' Security Council Resolution 1373 (2001), could be attained only by the immediate replacement of the decision then in force by a new Council decision relying on the new information which had just been urgently considered. The Council submits that, by so doing, it struck the only balance possible between the need to take due account of the fact that the decision of the competent national authority which formed the basis of the initial decision to freeze the applicant's funds had been withdrawn, and the need to ensure that those funds remained frozen in the light of the new information made available to the Council which, in its view, warranted the continued application of the restrictive measures concerning the applicant. It adds that any interruption in the application of those measures would have immediately afforded the applicant the opportunity to gain access to its funds, which would have rendered the contested decision ineffective. In the Council's submission, nothing in the OMPI judgment suggests that, in view of the special circumstances of the case, it was not entitled to act as it did.

- 39 The Court finds that the Council's arguments totally fail to substantiate its claim that it was impossible for it to adopt the contested decision under a procedure that would have respected the applicant's rights of the defence.

- 40 More specifically, the alleged urgency is by no means established. Even assuming that the Council was not under an immediate duty to remove the applicant from the disputed list following the POAC decision of 30 November 2007, the possibility for the Council to continue to rely on the Home Secretary's decision which had served as a basis for the initial decision to freeze the applicant's funds came to an end as of 7 May 2008, when the Court of Appeal gave its judgment. Between that date and the date of adoption of the contested decision, more than two months lapsed. The Council does not explain why it was not possible for it to take steps immediately after 7 May 2008 with a view either to removing the applicant from the disputed list or to maintaining it in that list on the basis of new evidence.

- 41 Furthermore, even assuming that the first material relating to the judicial inquiry opened in April 2001 in Paris was communicated to the Council by the French authorities only in June 2008, this does not explain why this new material could not be communicated forthwith to the applicant, if the Council intended to rely on it against the applicant. That is all the more so given that the oral procedure in the PMOI case had been reopened by order of the Court of 12 June 2008, and that the time limit imparted to the parties for submitting their observations on the judgment of the Court of Appeal and on the observations lodged by the applicant on that judgment had been set at the date of 7 July 2008. Throughout that period, the Council was in a position to communicate the 'new material' to the applicant, and if need be to the Court, in the course of the pending proceedings in the PMOI case. It should be noted that, in its observations lodged at the Court Registry on 7 July 2008 in that case, the Council expressly stated that it intended to take a position as a matter of urgency on the 'new elements' brought to its attention. It must also be noted, however, that the Council refrained from communicating those new elements to the applicant, without alleging the existence of any material or legal obstacle to doing so, and even though, by the OMPI judgment, the Court had annulled one of its earlier decisions, precisely on the ground that no such communication of the elements relied on had been made prior to its adoption.

- 42 Moreover, neither the judgment of the Court of Appeal nor the Home Secretary's order of 23 June 2008 had an automatic and immediate effect on Decision 2007/868 to freeze funds which was then in force. In accordance with the presumption of legality attaching to Community acts, that decision remained in force and continued to produce legal effects, even though its national 'substratum' had disappeared, as long as it was not withdrawn, declared void in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (PMOI judgment, paragraph 55 and the case-law cited).

- 43 It is therefore incorrect, both in law and in fact, to state that, following the entry into force of the Home Secretary's order and the communication, more or less simultaneously, of new material by the French authorities, a new decision to freeze funds had to be adopted as a matter of such urgency that it was not possible to comply with the applicant's rights of the defence.
- 44 Furthermore, the Court considers that the Council's omission to comply in the present case with a procedure clearly defined in the OMPI judgment, made with full knowledge of the facts and without any reasonable justification, may be material to any consideration of the abuse or misuse of powers or procedures alleged in the fifth plea in law.
- 45 The Council submits, second, that the statement of reasons notified to the applicant enables it to exercise its right to bring an action and the Community judicature to carry out its review. The applicant has also had the opportunity of making its observations on the statement of reasons, in compliance with its rights of the defence, since its application herein was immediately transmitted by the Council to the Member States' delegations.
- 46 This argument, which proceeds from a confusion between the safeguarding of the right to a fair hearing in the context of the administrative procedure itself and that resulting from the right to an effective judicial remedy against the act having adverse effects which may be adopted at the end of that procedure, has already been expressly dismissed by the Court in the OMPI judgment (paragraph 94 and the case-law cited).
- 47 In short, the Court finds that the continued freezing of the applicant's funds by the contested decision was the result of a procedure during which the applicant's rights of the defence were not respected. That finding cannot but lead to the annulment of the contested decision, in so far as it concerns the applicant.
- 48 Although it is not necessary, in those circumstances, to consider the other pleas in law, the Court will also examine the second and third pleas in law, having regard to their importance in relation to the fundamental right to effective judicial protection.
- The second plea in law, alleging breaches of Article 1(4) of Common Position 2001/931 and of Article 2(3) of Regulation No 2580/2001 and a failure to discharge the burden of proof, and the third plea in law, alleging breach of the applicant's right to effective judicial protection*
- 49 In the OMPI and PMOI judgments, the Court clarified: i) the conditions for implementing Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001; ii) the burden of proof incumbent on the Council in such a context; and iii) the scope of judicial review in such matters.
- 50 As the Court pointed out in paragraphs 115 and 116 of the OMPI judgment and in paragraph 130 of the PMOI judgment, the matters of fact and law capable of affecting the application of a fund-freezing measure to a person, group or entity are determined by Article 2(3) of Regulation No 2580/2001. In the words of that provision, the Council, acting by unanimity, is to establish, review and amend the list of persons, groups and entities to which that regulation applies, in accordance with the provisions laid down in Article 1(4) to (6) of Common Position 2001/931. The list in question must, therefore, be drawn up, in accordance with Article 1(4) of Common Position 2001/931, on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, or an attempt to perpetrate, participate in or facilitate such an act, based on serious and credible evidence or clues [sic], or condemnation [sic] for such deeds. 'Competent authority' means a judicial authority or, where judicial authorities have no competence in that area, an equivalent authority in that sphere. In addition, the names of the persons and entities appearing in that list must be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list, in accordance with Article 1(6) of Common Position 2001/931.
- 51 In paragraph 117 of the OMPI judgment and in paragraph 131 of the PMOI judgment, the Court inferred from those provisions that the procedure which may culminate in a measure to freeze funds under the relevant rules therefore takes place at two levels, one national, the other Community. In the first phase, a competent national authority, in principle judicial, must take in respect of the party concerned a decision meeting the definition in Article 1(4) of Common Position 2001/931. If it is a decision to investigate investigations or to prosecute, it must be based on serious and credible evidence or 'clues'. In the second phase, the Council, acting by unanimity, must decide to include the party concerned in the disputed list, on the basis of precise information or material in the relevant file which indicates that such a decision has been taken. Next, the Council must, at regular intervals, and at least once every six months, be satisfied that there are grounds for continuing to include the party concerned in the list at issue. Verification that there is a decision of a national authority meeting that definition is an essential precondition for the adoption, by the Council, of an initial decision to freeze funds, whereas verification of the consequences of that decision at the national level is imperative in the context of the adoption of a subsequent decision to freeze funds.
- 52 In paragraph 123 of the OMPI judgment and in paragraph 132 of the PMOI judgment, the Court noted that under Article 10 EC, relations between the Member States and the Community institutions are governed by reciprocal duties to cooperate in good faith (see Case C-339/00 *Ireland v Commission* [2003] ECR I-11757, paragraphs 71 and 72, and case-law cited). That principle is of general application and is especially binding in the area of police and judicial cooperation in criminal matters (commonly known as 'Justice and Home Affairs') (JHA) governed by Title VI of the EU Treaty, which is moreover entirely based on cooperation between the Member States and the institutions (Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 42).
- 53 In paragraph 124 of the OMPI judgment and in paragraph 133 of the PMOI judgment, the Court found that, in a case of application of Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001, provisions which introduce a specific form of cooperation between the Council and the Member States in the context of combating terrorism, that principle entails, for the Council, the obligation to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, in particular in respect of the existence of 'serious and credible evidence or clues' on which its decision is based.
- 54 As the Court ruled at paragraph 134 of the PMOI judgment, it follows from the foregoing that, although it is indeed for the

Council to prove that freezing of the funds of a person, group or entity is or remains legally justified, in the light of the relevant legislation, that burden of proof has a relatively limited purpose in respect of the Community procedure for freezing funds. In the case of an initial decision to freeze funds, the burden of proof essentially relates to the existence of precise information or material in the relevant file which indicates that a decision by a national authority meeting the definition laid down in Article 1(4) of Common Position 2001/931 has been taken with regard to the person concerned. Furthermore, in the case of a subsequent decision to freeze funds, after review, the burden of proof essentially relates to whether the freezing of funds is still justified, having regard to all the relevant circumstances of the case and, most particularly, to the action taken upon that decision of the competent national authority.

55 With regard to the control exercised by the Court, the latter has recognised, in paragraph 159 of the OMPJ judgment and in paragraph 137 of the PMOI judgment, that the Council has broad discretion as to what to take into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60 EC, 301 EC and 308 EC, consistent with a common position adopted on the basis of the CFSP. This discretion concerns, in particular, the assessment of the considerations of appropriateness on which such decisions are based. However (see paragraph 138 of the PMOI judgment), although the Court acknowledges that the Council possesses broad discretion in that sphere, that does not mean that the Court is not to review the interpretation made by the Council of the relevant facts. The Community judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it. However, when conducting such a review, it must not substitute its own assessment of what is appropriate for that of the Council (see, by analogy, Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, paragraph 57, and case-law cited).

56 In the present case, the Court finds that neither the information contained in the contested decision, its statement of reasons and the letter of notification, nor even those contained in the Council's two answers to the Court order of 26 September 2008, comply with the requirements in respect of proof which have been recalled above. In consequence, it has not been established to the required legal standard that the contested decision was adopted in accordance with the provisions laid down in Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001.

57 More specifically, the Council has not provided the Court with any precise information or material in the relevant file which indicates that the judicial inquiry opened by the anti-terrorist Prosecutor's office of the *Tribunal de grande instance* of Paris in April 2001 and the supplementary charges brought in March and November 2007 constitute, in respect of the applicant, a decision meeting the definition in Article 1(4) of Common Position 2001/931. Thus, the Council makes that allegation without adducing any evidence in support of its contention.

58 In this respect, it is appropriate to quote extensively the most relevant excerpts of the Council's first answer to the Court order of 26 September 2008:

'3. Four meetings of the CP 931 Working Party took place in order to prepare the adoption by the Council of the decision in question, in so far as it concerned the Applicant. These meetings took place on 2 June, 13 June, 24 June and 2 July 2008. [...]

[...]

6. For the purposes of these meetings the French Republic also circulated three documents to delegations setting out the new proposed basis for listing the Applicant and explaining the reasons for its proposal. The third document comprised, in part, the text which became the Statement of Reasons as agreed by the Council and which already forms part of the file in these proceedings. At the time of circulation these documents were classified as confidential by the French Republic. The Council has informed the French Republic of the Court's Order and the French Republic is currently examining the issue of declassifying the documents in question. However, the Council has been informed that the need to comply with domestic legal requirements means that a decision on this matter cannot be taken within the time limit set by the Registrar. Therefore, at the moment the Council is unable to comply with the Court's Order in relation to these documents as it does not have authorisation to provide them to the Court, even on a confidential basis. The Council respectfully asks for the Court's understanding on this matter and undertakes to inform the Court immediately of any decision by the French Republic concerning the documents in question.

[...]

11. In particular, the Council wishes to point out that it has not been provided with any additional evidence relating to the French judicial inquiry beyond that which has been set out in the Statement of Reasons. It understands that such additional evidence must, under French law, remain confidential during the course of the inquiry. The Council has reproduced all of the essential elements concerning the inquiry which were made available to it in the Statement of Reasons. One of the documents referred to in paragraph 6 did provide a more detailed list of the offences under investigation but these are all covered by the general description provided in the Statement of Reasons (namely, a series of offences all having a principal or subsidiary link with a collective undertaking whose aim is to seriously disrupt public order through intimidation or terror, as well as financing of a terrorist group and the laundering of direct or indirect proceeds of fraud offences against particularly vulnerable persons and organised fraud having a link with a terrorist undertaking).

12. Apart from the nature of the offences under investigation, and the details concerning the date when the inquiry commenced and when the supplementary charges were subsequently brought, the Council does not have any other information concerning the inquiry. The Council has not been informed of the specific identity of the persons under investigation; it knows only that these persons are alleged members of the Applicant, as indicated in the Statement of Reasons. Nor does it have any information about possible future steps in the inquiry. In short, no other evidence 'adduced against the applicant' in the context of the judicial inquiry was available to the Council when the contested decision was adopted beyond that which appears in the Statement of Reasons.'

59 In the light of the applicant's factual and legal contentions, neither the explanations so provided by the Council, nor the documents produced by it, make it possible to consider that the contested decision is well-founded in law, more particularly with regard to the provision laid down in Article 2(3) of Regulation No 2580/2001.

- 60 That conclusion holds good even taking into account the Council's second answer to the Court order of 26 September 2008, to which the Council annexed the non confidential version of the three documents referred to at paragraph 58 above, namely, those by which the French authorities communicated to it, in June 2008, information relating to the judicial inquiry opened in Paris in April 2001 and extended in 2007, on the basis of which the contested decision was adopted.
- 61 In this respect, the applicant submits, inter alia, that the judicial inquiry opened in France in April 2001 was an investigation against 'X', which may have been directed at some of its members or supporters, but not directly at PMOI as such.
- 62 Indeed, it is clear that, in the first of the three documents referred to at paragraph 58 above, dated 9 June 2008, the French authorities merely stated 'that a judicial investigation was opened on 9 April 2001 concerning seventeen persons suspected of belonging to [PMOI]', that '[t]hat investigation is still in progress' and that '[t]wenty-four persons are now being investigated'. No explanation was given as to the reasons why the said authorities had reached the conclusion, in the same document, that '[t]hese proceedings constitute a decision concerning PMOI taken by a competent authority within the meaning of Article 1(4) of Common Position 2001/931'.
- 63 In answer to the argument that the national decision relates to individuals who are allegedly members of the applicant, and not to the PMOI as such, the Council contends that such a situation is, in the context of the freezing of the funds of an organisation such as the applicant, not only possible, but even logical and appropriate. First, offences such as criminal association for the purpose of preparing terrorist acts, financing of a terrorist organisation, and money-laundering in connection with a terrorist organisation, cannot be committed by the organisation itself, but only by the individuals who belong to it. Second, since the applicant itself is not a legal person, it could not be the subject of criminal proceedings.
- 64 However, that explanation is, firstly, inconsistent with the literal wording of Article 1(4) of Common Position 2001/931, which provides that a decision must have been taken 'in respect of the persons, groups and entities concerned'.
- 65 Second, even assuming that one should not follow a literal interpretation of that provision, it would still be necessary, for the Council's argument to succeed, that that institution or the competent national authority concerned should provide an explanation as to the actual and specific reasons why, in the circumstances of the case, the acts ascribed to individuals allegedly members or supporters of the PMOI should be imputed to the PMOI itself. As already noted above, such an explanation is completely missing in the present case.
- 66 Nor is it possible, in the absence of more accurate information, to verify the truthfulness and relevance of the allegation made in the statement of reasons, according to which several of the alleged members of the applicant are being prosecuted for a series of offences in connection with a terrorist undertaking. In this respect, the applicant maintains that, apart from the judicial inquiry opened in France in 2001, it knows of no member or supporter whatsoever being prosecuted in a Member State for financing terrorist activities or any other criminal activity in relation to the applicant, contrary to what is asserted in the statement of reasons. Moreover, none of its members or supporters has ever been convicted of unlawful activities relating to terrorism or its financing. The Council did not in any way refute those assertions in its defence.
- 67 As regards the supplementary charges brought on 19 March and 13 November 2007, the applicant also contends that they do not concern it in any way and that they do not even contain any reference to it. In its first answer to the Court order of 26 September 2006, the Council admits that it has not been informed of the specific identity of the persons under investigation and that it knows only that these persons are alleged members of the applicant. Here again, neither the connection between the persons in question and the applicant nor the reasons which might justify imputing to the latter the deeds of the former are explained in any way.
- 68 It must also be noted that nothing in the file makes it possible to establish that the judicial inquiry opened in France in April 2001, even assuming that it is attributable to a 'judicial authority', which is denied by the applicant, is based, in the assessment of that authority, on serious and credible evidence or 'clues', as prescribed by Article 1(4) of Common Position 2001/931.
- 69 It is true that, at point 3 b), second bullet point of the last of the three documents referred to at paragraph 58 above, dated 26 June 2008, the French authorities within the Council claimed that the existence of that judicial inquiry 'proves that the judicial authorities have the 'serious and credible evidence or clues' required under Article 1(4) of the Common Position and which link the [PMOI] to recent terrorist activities'.
- 70 However, not only was that assessment not made by the competent national judicial authorities, but, in a letter to the Council dated 3 November 2008, attached as annex 4 to the Council's second answer to the Court order of 26 September 2008, the French Ministry of Foreign and European Affairs stated, with specific reference to the said point 3 b), second bullet point of the last of the three documents referred to at paragraph 58 above, that it deemed it 'useful and indeed in keeping with legal requirements to point out that these [were] conclusions drawn by the Ministry on the basis of objective elements of the French procedure, communicated by the prosecutor's office of the Paris Tribunal de Grande Instance pursuant to the third paragraph of Article 11 of the Code of Criminal Procedure, which commit only the Ministry of Foreign and European Affairs'.
- 71 Finally, the Court notes that, at the request of the French authorities, the Council has refused to declassify point 3 a) of the last of the three documents referred to at paragraph 58 above, setting out a 'summary of the main points which justify the keeping of [the PMOI] on the EU list', drawn up by the said authorities for the attention of certain Member States delegations. According to the abovementioned letter from the French Ministry of Foreign and European Affairs, the passage in question 'contained information of a security nature with implications for national defence which is therefore, under Article 413-9 of the Penal Code, subject to protective measures to restrict its circulation', so that 'the Ministry is unable to authorise its communication to the CFI'.
- 72 As regards the Council's contention that it is bound by the French authorities' claim for confidentiality, this does not explain why the production of the relevant information or material in the file to the Court would violate the principle of confidentiality, whereas their production to the members of the Council, and thus to the governments of the 26 other Member States, did not.

- 73 In any case, the Court considers that the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community judicature whose task is to review the lawfulness of that decision.
- 74 It is to be borne in mind that in the OMPI judgment (paragraph 154), the Court has already held that the judicial review of the lawfulness of a decision to freeze funds extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based, as the Council expressly recognised in its written pleadings in the case giving rise to the judgment in Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533, annulled on appeal in joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008], not yet reported. The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in order to justify disregarding those rights, are well founded.
- 75 In the current context, that review is all the more essential because it constitutes the only safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights. Since the restrictions imposed by the Council on the rights of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial (see, to that effect, Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 66), the Community courts must be able to review the lawfulness and merits of the measures to freeze funds without its being possible to raise objections that the evidence and information used by the Council is secret or confidential (OMPI judgment, paragraph 155).
- 76 In the present case, the refusal by the Council and the French authorities to communicate, even to the Court alone, the information contained in point 3 a) of the last of the three documents referred to at paragraph 58 above has the consequence that the Court is unable to review the lawfulness of the contested decision.
- 77 It follows that, in the circumstances of the case, as described above, the production of only the information contained in the Council's answers to the Court order of 26 September 2008 and in their annexes does not enable either the applicant or the Court to verify that the contested decision was adopted in compliance with Article 1(4) of Common Position 2001/931 and of Article 2(3) of Regulation No 2580/2001 and is not vitiated by a manifest error of assessment.
- 78 In such circumstances, it must be concluded, first, that it has not been established that the contested decision was adopted in compliance with the provisions of Article 1(4) of Common Position 2001/931 and of Article 2(3) of Regulation No 2580/2001 and, second, that the very circumstances of its adoption infringe the applicant's right to effective judicial protection.
- 79 It follows from the foregoing that the second and third pleas in law are founded.

Costs

- 80 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant.
- 81 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States and institutions intervening in the proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Seventh Chamber)

hereby:

- 1. Annuls Council Decision 2008/583/EC of 15 July 2008 implementing Article 2(3) of Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/868/EC, in so far as it concerns the People's Mojahedin Organization of Iran.**
- 2. Orders the Council to bear, in addition to its own costs, the costs of the People's Mojahedin Organization of Iran.**
- 3. Orders the French Republic and the Commission to pay their own costs.**

Forwood
Delivered in open court in Luxembourg on 4 December 2008.

Šváby

Truchot