JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

11 July 2007 (*)

(Common foreign and security policy – Restrictive measures against certain persons and entities with a view to combating terrorism – Freezing of funds – Action for annulment – Statement of reasons)

In Case T-327/03,

Stichting Al-Aqsa, established in Heerlen (Netherlands), represented by V. Koppe and L. Janssen, lawyers,

applicant,

v

Council of the European Union, represented by M. Bishop and S. Marquardt, acting as Agents,

defendant,

supported by

Kingdom of the Netherlands, represented by S. Terstal and C. Wissels, acting as Agents,

intervener,

APPLICATION, originally, for annulment in part of Council Decision 2003/480/EC of 27 June 2003 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 2002/974/EC (OJ 2003 L 160, p. 81) and, subsequently, of Council Decision 2003/646/EC of 12 September 2003 implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2003/480 (OJ 2003 L 229, p. 22),

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

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 16 January 2007,

gives the following

Judgment

Legal framework and background to the dispute

1 On 28 September 2001 the Security Council of the United Nations ('the Security Council') adopted Resolution 1373 (2001) laying down strategies to combat terrorism by all means, in particular the financing thereof. Paragraph 1(c) of that resolution provides, inter alia, that all States must freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled by such persons; and of persons and entities acting on behalf of, or at the direction of, such persons and entities.

2 Taking the view that action by the Community was necessary in order to implement, in accordance with its Member States' obligations under the Charter of the United Nations, Security Council Resolution 1373 (2001), on 27 December 2001 the Council of the European Union adopted, under Articles 15 EU and 34 EU, Common Position 2001/930/CFSP on combating terrorism (OJ 2001 L 344, p, 90) and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

3 Article 1(1) of Common Position 2001/931 provides that it applies 'to persons, groups and entities involved in terrorist acts and listed in the Annex'. The applicant's name is not included in the list in the Annex

4 Article 1(2) and (3) of Common Position 2001/931 defines 'persons, groups and entities involved in terrorist acts' and 'terrorist act', respectively.

5 Article 1(4) of Common Position 2001/931 provides that the list in the Annex is to be drawn up 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, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation [sic] for such deeds. 'Competent authority' means a judicial authority, or, where judicial authorities have no competence in the area covered, an equivalent competent authority in that area.

6 Article 1(6) of Common Position 2001/931 provides that the names of persons and entities on the list in the Annex are to be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list.

7 Articles 2 and 3 of Common Position 2001/931 provide that the European Community, acting within the limits of the powers conferred on it by the EC Treaty, is to order the freezing of the funds and other financial assets or economic resources of persons, groups and entities listed in the Annex, and is to ensure that funds, financial assets or economic resources or financial or other related services are not made available, directly or indirectly, for the benefit of those persons.

8 Taking the view that a regulation was required in order to implement the measures set out in Common Position 2001/931 at Community level, on 27 December 2001 the Council adopted, on the basis of Articles 60 EC, 301 EC and 308 EC, Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70) ('the contested regulation'). Under that regulation, except as permitted thereby, all funds belonging to a natural or legal person, group, or entity included in the list referred to in Article 2(3) must be frozen. In the same way, it is prohibited to make funds or financial services available to those persons, groups or entities. The Council, acting unanimously, is to establish, review and amend the list of persons, groups and entities to which the Regulation applies, in accordance with the provisions of Article 1(4), (5) and (6) of Common Position 2001/931.

9 The original list of the persons, groups and entities to which the contested regulation applies was set out in Council Decision 2001/927/EC of 27 December 2001 establishing the list provided for in Article 2(3) of Regulation No 2580/2001 (OJ 2001 L 344, p. 83). The applicant's name is not included in it.

10 On 27 June 2003, the Council adopted, under Articles 15 EU and 34 EU, Common Position 2003/482/CFSP updating Common Position 2001/931 and repealing Common Position 2003/402/CFSP (OJ 2003 L 160, p. 100). The Annex thereto updates the list of persons, groups and entities to whom and to which Common Position 2001/931 is applicable. Part 2 of that Annex, headed 'Groups and entities', includes in particular the name of the applicant, described as follows:

'32. Stichting Al-Aqsa (a.k.a. Stichting Al-Aqsa Nederland, a.k.a. Al-Aqsa Nederland).'

11 By Decision 2003/480/EC of 27 June 2003 implementing Article 2(3) of the contested regulation and repealing Decision 2002/974/EC (OJ 2003 L 160, p. 81), the Council adopted an updated list of the persons, groups and entities to which the contested regulation applies. The applicant's name is repeated in that list under the heading 'Groups and entities', in the same terms as those used in the Annex to Common Position 2003/482.

12 On 12 September 2003 the Council adopted, under Articles 15 EU and 34 EU, Common Position 2003/651/CFSP updating Common Position 2001/931 and repealing Common Position 2003/482 (OJ 2003 L 229 p. 42). The applicant's name is repeated in the list set out in the Annex to that common position, in the same terms as those used in the Annex to Common Position 2003/482.

13 By Decision 2003/646/EC of 12 September 2003 implementing Article 2(3) of the contested regulation and repealing Decision 2003/480 (OJ 2003 L 229, p. 22), the Council adopted an updated list of the persons, groups and entities to whom and to which the contested regulation is applicable. The applicant's name is repeated in that list, in the same terms as those used in the Annexes to Common Positions 2003/482 and 2003/651 and in the Annex to Decision 2003/480.

14 Since then, the Council has adopted several common positions and decisions updating the lists provided for under Common Position 2001/931 and the contested regulation (as regards the common positions see, most recently, Council Common Position 2006/380/CFSP of 29 May 2006 updating Common Position 2001/931 and repealing Common Position 2006/231/CFSP (OJ 2006 L 144, p. 25); as regards the decisions, see, in particular, Council Decision 2003/902/EC of 22 December 2003 implementing Article 2(3) of the contested regulation No 2580/2001 and repealing Decision 2003/646 (OJ 2003 L 340, p. 63) and, most recently, Council Decision 2006/379/EC of 29 May 2006 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2005/930/EC (OJ 2006 L 144, p. 21)). The applicant's name has continued to appear in the list at issue as updated by the abovementioned measures.

Facts

15 The file shows that the applicant is a foundation governed by Netherlands law, constituted in 1993. It describes itself as an Islamic social welfare institution. It states that, according to its constitution, its objects include the social welfare and improvement of the living conditions of Palestinians living in the Netherlands and also the provision of assistance to Palestinians living in the territories occupied by Israel. One of its main objectives as a charitable institution is to help to alleviate the humanitarian emergencies in the West Bank and the Gaza Strip. To that end, it cooperates with several organisations in Israel and in the occupied territories, to which it gives financial support in order to carry out humanitarian projects. It also provides emergency cash assistance, food and medical care and educational and psychological services. Its most substantial projects involve orphans. The applicant states that it is politically unaffiliated and claims to have collected almost EUR 1 million by way of donations in the Netherlands in the financial year 2001-02.

16 On 3 April 2003 the Minister for Foreign Affairs of the Netherlands adopted, on the basis of Security Council Resolution 1373 (2001) and of the Sanctiewet 1977 (Netherlands Law on sanctions of 1977), as amended by a law of 16 May 2002, the Sanctieregeling Terrorisme 2003 (Regulation on sanctions for the suppression of terrorism 2003, *Staatscourant* of 7 April 2003, No 68, p. 11, 'the Sanctieregeling'), which ordered, inter alia, the freezing of all the applicant's funds and financial assets.

17 It is clear from the statement of reasons in the Sanctieregeling that, pending the adoption of a Community decision directed at the applicant on the basis of the contested regulation, the Sanctieregeling was adopted on the ground that there was evidence that the applicant had made transfers of funds to organisations supporting terrorism in the Middle East. The statement of reasons for the Sanctieregeling makes it clear that the latter will be repealed as soon as such a Community decision enters into force.

18 The applicant brought proceedings against the Netherlands State before the Rechtbank te 's-Gravenhage, sector civiel recht, voorzieningenrechter (District Court of The Hague, civil law section, court hearing applications for interim measures ('the court hearing the application for interim measures') seeking, in particular, suspension of the application of the measures laid down by the Sanctieregeling.

19 By a first interim order of 13 May 2003, the court hearing the application for interim measures held that the Sanctieregeling was based primarily on an official memorandum sent by the director of the Algemene Inlichtingen- en Veiligheidsdienst (General Intelligence and Security Service) ('the AIVD') to the Director General of Political Affairs of the Netherlands Ministry of Foreign Affairs of 9 April 2003 (point 1.11). The court hearing the application for interim measures held that that memorandum contained only general assertions and that factual information to substantiate those assertions was lacking, with the result that neither it nor the applicant could assess the veracity of

that memorandum (point 3.8). It therefore considered that, in the circumstances of the case and in the light of the issues raised by the applicant, reference to that memorandum alone could not suffice to justify the position of the defendant State (point 3.9). The court hearing the application for interim measures next stated that the Netherlands Government had proposed that the court alone should inspect the information from the AIVD on the basis of which the memorandum had been drawn up, that the applicant had not disputed the Government's interest in keeping that information secret and that it had in addition agreed that matters should proceed in that way (point 3.10). In that regard, the court hearing the application for interim measures observed that confidential inspection of the relevant documents by the court appeared to be at odds with the fundamental principle that all parties should be heard, but that it was nevertheless possible for an exception to be made to that principle on grounds of public order (point 3.11). It took the view that that was the case in the circumstances, holding that it was important that the parties had agreed that such an exception should be made and, having regard to the administrative law aspects of the case, that confidential inspection by the judge is not unusual in that area of the law (ibid.). The court hearing the application for interim measures accordingly ordered the Netherlands Government to put it in a position in which it could carry out a confidential inspection of the AIVD's file of confidential information on which the memorandum was based. The Netherlands Government complied with that order and on 21 May 2003 the court hearing the application for interim measures inspected the file in question in the offices of the AIVD.

20 By a second interim order of 3 June 2003 ('the order of the court hearing the application for interim measures'), the court hearing the application for interim measures dismissed the proceedings brought by the applicant. In point 3.2 of that second order, the court hearing the application for interim measures held, on the basis of its investigations, that the findings of the AIVD provided adequate grounds to support the latter's conclusion that the funds collected by the applicant in the Netherlands had been used for the benefit of organisations linked to the Palestinian Islamist movement Hamas, and also the conclusion that several of those organisations linked to Hamas provided funds enabling the perpetration or facilitation of terrorist acts by Hamas. In point 3.3 of that order, the court hearing the application for interim measures added that it had uncovered no fact or circumstance that might show that the AIVD had performed improperly the task entrusted to it under the Wet op de inlichtingen- en veiligheidsdiensten (Law on the intelligence and security services).

21 The Sanctieregeling was repealed on 3 August 2003 (Stcrt. 2003, No 146).

Procedure and forms of order sought by the parties

22 By application lodged at the Registry of the Court of First Instance on 19 September 2003, the applicant brought this action against the Council and the Commission pursuant to the fourth paragraph of Article 230 EC, in which it claims that the Court should:

– annul Decision 2003/480 'and/or' Decision 2003/646 in so far as those acts concern the applicant;

– declare the contested regulation to be unlawful pursuant to Article 241 EC;

– order the Council and the Commission to pay the costs.

23 By separate document lodged at the Registry of the Court of First Instance on 12 December 2003, the Commission raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance against the action in so far as it was directed against that institution.

24 In its defence, the Council contends that the Court should:

– dismiss the action in its entirety;

– order the applicant to pay the costs.

25 By document lodged at the Registry of the Court of First Instance on 12 January 2004, the Kingdom of the Netherlands sought leave to intervene in the present proceedings in support of the Council's first head of claim. By order of 11 February 2004 the President of the Second Chamber of the Court granted leave to intervene.

26 In its reply lodged at the Registry of the Court of First Instance on 12 March 2004, the applicant stated that it amended its heads of claim, pleas in law and arguments so as to refer to Decision 2003/902 and any subsequent decision of the Council which might retain its name in the list at issue. To refuse to allow the applicant to proceed in that way would, in its view, enable the Council de facto to evade review by the courts by constantly adopting new decisions.

27 The Council has stated that it has no objection to those amendments to the applicant's heads of claim, pleas in law and arguments. The Kingdom of the Netherlands considers that the action must be directed against the most recent of the decisions retaining the applicant's name in the list at issue, the previous decisions having been repealed.

28 By order of the Second Chamber of the Court of First Instance of 3 May 2004, the action was dismissed as inadmissible in so far as it was directed against the Commission.

29 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure.

30 The parties presented oral argument and replied to the questions put by the Court at the hearing on 16 January 2007.

31 In answer to a question put by the Court, the applicant stated that its claims, pleas in law and arguments were to be regarded as seeking annulment both of Decision 2006/379, in force at the date of the hearing, and of any other subsequent decision of the Council that might continue to include it in the list at issue, in so far as those acts concern the applicant, of which formal note was taken in the minutes of the hearing.

The procedural consequences of repealing and replacing Decisions 2003/480 and 2003/646

32 As is clear from paragraph 14 above, the acts originally challenged by this action, namely, Decisions 2003/480 ('the decision originally challenged') and Decision 2003/646 (taken together, 'the decisions originally challenged'), have been repealed and replaced on a number of occasions, since the application was lodged, by acts which have always continued to include the applicant in the list at issue. On the date on which the oral procedure was closed, the measure in question was Decision 2006/379.

33 It is to be observed that where a decision is, during the proceedings, replaced by another decision with the same subject-matter, this is to be considered a new factor allowing the applicant to adapt its claims and pleas in law. It would be contrary to the principle of the sound administration of justice and to the requirements of procedural economy to oblige the applicant to make a fresh application to the Court (Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 8; Joined Cases 351/85 and 360/85 *Fabrique de Fer de Charleroi and Dillinger Hüttenwerke* v *Commission* [1987] ECR 3639, paragraph 11; Case 103/85 *Stahlwerke Peine-Salzgitter* v *Commission* [1988] ECR 4131, paragraphs 11 and 12; and Joined Cases T-46/98 and T-151/98 *CCRE* v *Commission* [2000] ECR II-167, paragraph 33).

34 In its judgments in Case T-306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission* [2005] ECR II-3533 (now under appeal, '*Yusuf*'), paragraph 73, and Case T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-3649 (now under appeal, '*Kadi*'), paragraph 54, the Court applied that case-law to the situation in which a regulation of direct and individual concern to an individual is replaced, during the proceedings, by a regulation having the same subject-matter.

35 In accordance with that case-law, it is therefore appropriate in the present case to allow in part the applicant's requests, mentioned in paragraphs 26 and 31 above, to consider that his action, on the date of closure of the oral procedure, seeks annulment of Decision 2006/379, in so far as the latter concerns it, and to allow the parties to reformulate their claims, pleas and arguments in the light of those new factors, which implies, for those parties, the right to submit additional claims, pleas and arguments.

36 In addition, the Court considers that only actions for annulment of an act in existence adversely affecting the applicant may be brought before it. Therefore, even if, as held in the previous paragraph, the applicant may be permitted to reformulate its claims so as to seek annulment of acts

which have, during the proceedings, replaced the decisions originally challenged, that solution cannot authorise the speculative review of the lawfulness of hypothetical acts which have not yet been adopted (Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council* [2006] ECR II-0000, 'the *OMPI* judgment', paragraph 32, and case-law cited).

37 It follows that there are no grounds for allowing the applicant to reformulate its claims so that they are directed not only against Decision 2006/379 but also, as the case may be, against any other subsequent decision of the Council capable of including it in the list at issue, in so far as those acts concern the applicant.

38 For the purposes of the present action, the Court's review will therefore concern only that act already adopted and still in force and challenged on the date of closure of the oral procedure, that is to say, Decision 2006/379 ('the contested decision'), even if that decision has in turn been repealed and replaced by other decisions before the date of delivery of the present judgment.

39 In such circumstances, first, the applicant still has in fact an interest in obtaining annulment of the contested decision, in that the repeal of an act of an institution does not constitute recognition of the unlawfulness of that act and has effect ex nunc, unlike a judgment annulling an act, by which the act is removed retroactively from the legal order and deemed never to have existed. Moreover, if the contested decision were to be annulled, the Council would be obliged to take the measures necessary to comply with that judgment, pursuant to Article 233 EC, which might involve its amending or withdrawing, as the case may be, any acts which had repealed and replaced the acts contested after the closure of the oral procedure (the *OMPI* judgment, paragraph 35, and case-law cited).

The claim for annulment in part of the contested decision

40 In support of its heads of claim, the applicant relies on a series of pleas in law alleging infringement of essential procedural requirements and of Article 253 EC, infringement of the contested regulation and infringement of the general principles of Community law. It also pleads that the contested regulation is unlawful because it infringes the same procedural requirements and general principles of Community law, in particular the obligation to state reasons, the right to a fair hearing and the principle of proportionality.

41 It is appropriate to examine first the plea alleging infringement of Article 253 EC.

Arguments of the parties

42 The applicant maintains that the contested decision fails to satisfy the requirement to state reasons laid down by Article 253 EC.

43 In particular, the contested decision does no more than refer to the criteria set out in general terms in the contested regulation and in Common Position 2001/931, without specifying the particular facts on which it is based and without providing any explanation of the reasons for, and the detailed rules for implementing, those criteria in the present case. The applicant is accordingly not in a position either to know the reasons for the measure adopted or to defend its rights, and the Court is not in a position to exercise its power of review.

44 According to the applicant, the gravity of the sanctions imposed on it for an undefined period and the interests involved required, on the contrary, a high degree of precision in the reasons for the decision to include it in the list at issue. In view of the applicant's material interest in knowing the reasons for that measure, the Council was not entitled simply to refer to generalities such as the fight against terrorism or its funding.

45 In so far as the Council is of the view that it is also appropriate to take account of a decision taken by a competent national authority in order to assess whether the contested decision is adequately reasoned, the applicant adds that the Council is itself responsible for ensuring that persons concerned are informed of the reasons for their inclusion in the list at issue. To allow the Council to hide behind the Member States would make the requirement to state reasons meaningless.

46 The applicant observes that its request for access to the documents on the basis of which the Council adopted the decision originally challenged, made under Regulation (EC) No 1049/2001 of

the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), was rejected on the basis of the first and third indents of Article 4(1)(a) of that regulation, on the ground that the only document concerned, namely document '11 311/03 EXT 1 CRS/CRP', is classified as 'CONFIDENTIAL EU' and that its disclosure would undermine the protection of the public interest as regards public security and international relations. The applicant's request that the Council should reconsider its position was rejected for the same reason and, in addition, on the basis of the second indent of Article 4(2) of Regulation No 1049/2001, on the ground that to disclose the document in question would also undermine the protection of judicial proceedings. The applicant claims in that regard that there has been an infringement of the principle of transparency laid down in Article 255 (2) EC and in Regulation No 1049/2001, which aggravates the infringement of Article 253 EC alleged in this action.

47 In its reply, the applicant states that there is, moreover, a contradiction between those grounds for the decisions to refuse access to the document in question and the explanations given by the Council in its defence, stating that the only evidence supporting the inclusion of the applicant in the list at issue is a public document, namely, the order of the court hearing applications for interim measures of 3 June 2003 (paragraph 20 above). The grounds relied on by the Council are therefore confused and incoherent.

48 In their written pleadings, the Council and the Kingdom of the Netherlands accept that the contested decision, which consists merely of an updated list of persons and entities covered by the contested regulation, does not itself contain a detailed statement of reasons. It is none the less clear, in their view, from the legal base cited and the recitals in the preamble that that implementing decision is based on that regulation, Article 2(3) of which sets out the criteria governing the inclusion of persons in the list at issue and Article 1(4) of which defines a terrorist act by reference to Article 1(3) of Common Position 2001/931. Furthermore, the objective of Regulation No 2580/2001, namely, to combat any form of financing of terrorist activities, is made clear in the second recital. It also makes reference to Security Council Resolution 1373 (2001) which itself sets out the grounds for the measures imposed on the Member States of the United Nations. The contested regulation must also be read together with Common Position 2001/931, which contains further relevant material.

49 The contested acts, taken together, thus satisfy the obligation to state reasons set out in Article 253 EC, as interpreted in the case-law. In that regard, the Council and the Kingdom of the Netherlands emphasise that it is not necessary for details of all relevant factual and legal aspects to be given and that regard should be had to the context and to all the legal rules governing the matter in question. The degree of precision of the statement of reasons for a decision must also be weighed against practical realities and the time and technical facilities available for making the decision (Case 16/65 *Schwarze* [1965] ECR 877, 888, and Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16). Now, according to the Council, it would not have been possible to provide, in respect of each person, group or entity to be included in the list at issue, the specific factual elements on which the Council based its decision.

50 The Kingdom of the Netherlands adds that in Case T-199/99 *Sgaravatti Mediterranea* v *Commission* [2002] ECR II-3731, paragraph 45, the Court of First Instance ruled that the Commission could legitimately rely on the detailed findings of fact made by the national authorities and was not obliged to conduct a fresh investigation. The same principle ought, in the view of that Member State, also to apply to the Council in the circumstances of the present case.

51 With respect to the applicant's argument summarised at paragraph 45 above, the Council considers that it proceeds from confusion of the question of the reasons given for the contested decision with the question of observance of the rights of the defence. The Council submits in that regard that the obligation to state reasons, which serves the purpose of enabling the Court to exercise proper judicial review and the person concerned to defend his rights, must be distinguished from the question whether the applicant had a right to be heard before the contested decision was adopted.

52 With respect to the applicant's arguments summarised at paragraphs 46 and 47 above, the Council contends that a clear distinction falls to be drawn between the rules governing access by the public to documents held by the institutions and the principles relating to observance of the rights of the defence. In its view, the purpose of those rules is not to ensure that persons are given a 'fair hearing' when a decision implementing a legislative instrument such as the contested regulation is adopted.

Findings of the Court

53 In the *OMPI* judgment (paragraph 109), the Court held that, as a rule, the safeguard relating to the obligation to state reasons provided for by Article 253 EC is fully applicable in the context of the adoption of a decision to freeze funds under the contested regulation. That principle has not been called in question by any of the parties.

54 Again in the *OMPI* judgment (paragraph 151 and, by reference, paragraphs 116, 125 and 126), the Court has inferred from that principle, interpreted in the light of the case-law, that the statement of reasons for an initial decision to freeze funds as referred to in Article 1(4) of Common Position 2001/931 must at least make actual and specific reference to the reasons why the Council considers, having regard to the precise information or material in the relevant file available to it, that a decision satisfying the definition given in Article 1(4) has been taken by a competent authority of a Member State in respect of the person concerned, unless overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, militate against it, and subject also to the possibility of publishing a non-confidential version of that decision in the *Official Journal*, in accordance with what was held in paragraph 147 of that judgment. The statement of the reasons for such a decision must, furthermore, indicate why the Council takes the view, in the exercise of its discretion, that the person concerned must be the subject of such a measure. Moreover, the statement of reasons for a subsequent decision to freeze funds as referred to in Article 1(6) of Common Position 2001/931 must, subject to the same reservations, indicate the actual and specific reasons why the Council considers, following re-examination, that there are still grounds for the freezing of the funds of the party concerned, where appropriate on the basis of fresh information or evidence. On this head it may be added, in answer to an argument put forward by the Council at the hearing, that when the grounds of such a subsequent decision are in essence the same as those already relied on when a previous decision was adopted, a mere statement to that effect may suffice, particularly when the person concerned is a group or entity.

55 In the circumstances of the present case, neither the decisions originally challenged nor the contested decision satisfy the requirement of a statement of reasons as set out above, for they do no more than state, in the second recital in the preambles thereto, that it is 'desirable' or that it has been 'decided' to adopt an up-to-date list of the persons, groups and entities to which the contested regulation applies.

56 That finding is not shaken by the argument, adduced at the hearing by the Council and the intervening Government, that actual and specific reasoning was not required in this case since the applicant was, in their view, quite well aware that the contested decision had been adopted on 27 June 2003, following and in light of only the order of 3 June 2003 made by the court hearing the application for interim measures. According to the Council and the Kingdom of the Netherlands, that situation distinguishes the facts of the present case from those at issue in the case giving rise to the *OMPI* judgment.

57 That argument is based not only on mere speculation as to what the applicant might have been aware of, but also on the mistaken premiss that there was a clear and unambiguous link between the order made by the court hearing the application for interim measures and the adoption of the decision originally challenged.

58 Here it is to be borne in mind that, according to settled case-law, the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for an act adversely affecting a party are sufficient if it was adopted in circumstances known to the party concerned which enable him to understand the scope of the measure concerning him (the *OMPI* judgment, paragraph 141, and the case-law cited).

59 In the circumstances, as has been stated in paragraph 17 above, it was stated in the reasons given for the Sanctieregeling that that measure was adopted, pending the adoption of a Community decision directed at the applicant, on the ground that there was evidence that the applicant had made transfers of funds to organisations supporting terrorism in the Middle East, and that it would be repealed as soon as such a decision entered into force. It would thus seem that the Netherlands Minister for Foreign Affairs considered that the Sanctieregeling, at the time of its adoption, constituted in itself a decision of a competent national authority within the meaning of Article 1(4) of

Common Position 2001/931, so permitting the Council to adopt the decision originally challenged.

60 In those circumstances, and having regard to the case-law cited in paragraph 58 above, the mere fact that the applicant knew of the order made by the court hearing the application for interim measures does not suffice to mitigate the lack of reasons for the decision originally challenged. In particular, taking account of the words used by the Netherlands Minister for Foreign Affairs in the Sanctieregeling, and in the absence of any reasoning expressly appearing in the decision originally challenged, the applicant has not been put in a position in which it is able to understand, clearly and unequivocally, the reasoning following which the Council took the view that the conditions laid down in Article 1(4) of Common Position 2001/931 and in Article 2(3) of the contested regulation had been satisfied in the circumstances of the case. In particular, it had not been able to understand whether the Council meant to take as the basis the Sanctieregeling itself, or the order made by the court hearing the application for interim measures or some other decision of which it had no knowledge.

61 The state of uncertainty in which, on the contrary, the applicant has been left, regarding the actual and specific reasons for its inclusion in the list at issue, has been exacerbated by the reply given, even before this action was brought, to its request for access to all the documents made use of by the Council before adopting the decision originally challenged. That request, made pursuant to Regulation No 1049/2001 and lodged as early as 26 August 2003, was rejected by decision of the Secretary General of the Council of 5 September 2003, notified to the applicant that same day, on the ground that the only document concerned, namely document '11 311/03 EXT 1 CRS/CRP', was classified as 'CONFIDENTIAL EU' and that its disclosure would undermine the protection of the public interest as regards public security and international relations.

62 While there is indeed reason, as the Council emphasises, to distinguish clearly the rules governing access by the public to documents held by the institutions from the principles relating to observance of the rights of the defence or the obligation to state reasons, the fact nevertheless remains that, in this case, the grounds of the decision to refuse access to the Council's documents may have led the applicant to regard, in all good faith, as impossible the notion that the decision originally challenged, the basis of which, according to those grounds, is a document classified as 'CONFIDENTIAL EU', had been adopted having regard only to the order of the court hearing the application for interim measures, an official act which is, as a rule, publicly accessible. At the very least, it cannot be inferred from that context that the applicant 'must necessarily know' that the decision originally challenged had been adopted in light of that order alone.

63 It is also clear from the application that the applicant has established no clear and unambiguous link between the order made by the court hearing the application for interim measures and the decision originally challenged. So, in its second plea, the applicant has maintained, first, that in contravention of Article 2(3) of the contested regulation and of Article 1(4) of Common Position 2001/931, that when the decision originally challenged was adopted there was no precise information or material in the file to show that a decision concerning it had been taken by a competent authority, judicial or equivalent thereto. The applicant has moreover asserted that it had been included in the list at issue on the basis of material in the confidential files of security services supplied by the Netherlands Government, when those matters have not been checked by a competent authority and when it has never been charged with the commission of a criminal offence and when no investigations relating to the commission of, or an attempt to commit, or participation in or facilitation of the commission of, acts of terrorism, have been conducted. The applicant has also mentioned, in its application, that the decision originally challenged might have been adopted by the Council on the basis of information other than that, examined by the court hearing the application for interim measures, on the basis on which the Sanctieregeling was adopted.

64 In the absence of any indication, in the contested decision, of the actual and specific reasons justifying it, the applicant has not been placed in a position to avail itself of its right of action before the Court, given the connection between the safeguarding of the obligation to state reasons and the safeguarding of the right to an effective legal remedy (the *OMPI* judgment, paragraph 89). In particular, the applicant has been unable to make an effective challenge, from the moment this action was brought, to the Council's opinion that the order made by the court hearing the application for interim measures satisfied the definition given by Article 1(4) of Common Position 2001/931, a challenge that it was unable to make except purely hypothetically in its application and that it really developed with full knowledge of the facts only at the stage of its reply, in connection with the plea alleging infringement of the contested regulation and of Common Position 2001/931.

65 On this head, it is to be borne in mind that, according to the case-law, failure to state reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the

proceedings before the Community judicature (*OMPI*, paragraph 139, and the case-law cited). In fact, the possibility of remedying the total absence of a statement of reasons after an action has been brought would prejudice the rights of the defence because the applicant would have only the reply in which to set out his pleas contesting the reasons which he would not know until after he had lodged his application. The principle of equality of the parties before the Community judicature would accordingly be adversely affected (the *OMPI* judgment, paragraphs 139 and 165, and the case-law cited).

66 The foregoing considerations cannot but lead to the annulment of the contested decision, in so far as it concerns the applicant, and there is no need to give a ruling on the other pleas in law and arguments in the action.

67 That being so, there is no need to rule on the claim for a declaration, pursuant to Article 241 EC, that the contested decision is unlawful.

Costs

68 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 defendant has been unsuccessful, it must be ordered to pay the costs, as applied for by the applicant.

69 Under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Annuls Council Decision 2006/379/EC of 29 May 2006 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 2005/930 in so far as it concerns Stichting Al-Aqsa;

2. Declares that there is no need to rule on the claim for a declaration, pursuant to Article 241 EC, that Council Regulation No 2580/2001 of 27 December 2001 is unlawful;

3. Orders the Council to bear, in addition to its own costs, the costs of Stichting Al-Aqsa:

4. Orders the Kingdom of the Netherlands to pay its own costs.

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 11 July 2007.

E. Coulon J. Pirrung

Registrar President

* Language of the case: English.