JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

23 November 2011 (*)

(Common foreign and security policy – Restrictive measures against certain persons and entities with a view to combating terrorism – Common Position 2001/931/CFSP and Regulation (EC) No 2580/2001 – Annulment by a judgment of the General Court of a measure freezing funds – Non-contractual liability – Sufficiently serious breach of a rule of law conferring rights on individuals)

In Case T–341/07,

Jose Maria Sison, residing at Utrecht (Netherlands), represented by J. Fermon, A. Comte, H. Schultz, D. Gürses and W. Kaleck, lawyers,

applicant,

v

Council of the European Union, represented by M. Bishop, E. Finnegan and. R. Szostak, acting as Agents,

defendant,

supported by

Kingdom of the Netherlands, represented by C. Wissels, M. de Mol, Y. de Vries, M. Noort, J. Langer and M. Bulterman, acting as Agents,

by

United Kingdom of Great Britain and Northern Ireland, represented by S. Behzadi Spencer and I. Rao, acting as Agents,

and by

European Commission, represented initially by P. Aalto and S. Boelaert, and subsequently by S. Boelaert and P. Van Nuffel, acting as Agents,

interveners,

APPLICATION now, following the judgment of the General Court of 30 September 2009 in Case T–341/07 *Sison* v *Council* [2009] ECR II–3625, for compensation for damage allegedly sustained by the applicant as a result of the restrictive measures taken against him with a view to combating terrorism,

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of N.J. Forwood (Rapporteur), President, F. Dehousse, M. Prek, J. Schwarcz and A. Popescu, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing of 30 March 2011,

gives the following

Judgment

Background to the dispute

1 For a summary of the background to this dispute, reference is made, first, to the judgment of the General Court of 11 July 2007 in Case T-47/03 *Sison* v *Council*, not published in the ECR ('*Sison I*'), and, second, to the interlocutory judgment of the General Court of 30 September 2009 in Case T-341/07 *Sison* v *Council* [2009] ECR II-3625, '*Sison II*'.

Procedure

2 By application lodged at the Registry of the General Court on 10 September 2007, Jose Maria Sison, the applicant, brought the present action. Initially, the subject-matter of the action was, first, a claim for annulment in part of Council Decision 2007/445/EC of 28 June 2007 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 Decisions 2006/379/EC and 2006/1008/EC (OJ 2007 L 169, p. 58) pursuant to Article 230 EC and, secondly, a claim for compensation pursuant to Articles 235 EC and 288 EC.

3 On 13 November 2007, the Court (Seventh Chamber) decided to adjudicate under an expedited procedure as regards the action for annulment pursuant to Article 230 EC. At the parties' request, by order of the same day the President of the Seventh Chamber of the General Court stayed proceedings in respect of the action for compensation pursuant to Articles 235 EC and 288 EC until delivery of the judgment to be given on the action for annulment pursuant to Article 230 EC.

4 By the judgment in *Sison II*, the Court annulled Decision 2007/445, Council Decision 2007/868/EC of 20 December 2007 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2007/445 (OJ 2007 L 340, p. 100), Council Decision 2008/343/EC of 29 April 2008 amending Decision 2007/868 (OJ 2008 L 116, p. 25), Council Decision 2008/583/EC of 15 July 2008 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2007/868 (OJ 2008 L 188, p. 21), Council Decision 2009/62/EC of 26 January 2009 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2008/583 (OJ 2009 L 23, p. 25) and Council Regulation (EC) No 501/2009 of 15 June 2009 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2009/62 (OJ 2009 L 151, p. 14), in so far as those measures concerned the applicant. As that judgment did not close the proceedings, the costs were reserved.

5 Following the delivery of the judgment in *Sison II*, the proceedings were resumed in relation to the action for damages pursuant to Articles 235 EC and 288 EC.

6 The Council of the European Union not having lodged its defence within the prescribed period, the Court (Seventh Chamber) sought the applicant's views on the remainder of the proceedings, in the light of Article 122(1) of the Rules of Procedure.

7 By letter received at the Registry on 8 February 2010, the applicant asked the Court to accept the Council's defence, despite the fact that it had been lodged late, so as to enable the proceedings to resume on a normal *inter partes* basis. That request was granted by decision of the Court (Seventh Chamber) of the same date and the proceedings then followed the customary course.

8 The composition of the Chambers of the General Court having been changed, the Judge-Rapporteur was attached to the Second Chamber, to which this case was, in consequence, assigned.

9 Pursuant to Articles 14(1) and 51(1) of the Rules of Procedure and on the proposal of the Second Chamber, the General Court decided to assign the case to the Second Chamber, Extended Composition.

10 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber, Extended Composition) decided to open the oral procedure and, by way of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put a written question to the parties, asking them to reply to it in writing. All the parties except the United Kingdom of Great Britain and

Northern Ireland complied with this request within the prescribed period.

11 The oral arguments of the parties, except of the United Kingdom, which was not represented, and their replies to the questions asked by the Court, were presented at the hearing of 30 March 2011.

Forms of order sought

12 The applicant claims that the Court should:

– order the European Union to compensate him, on the basis of Articles 235 EC and 288 EC, in the amount of EUR 291 427.97, plus EUR 200.87 every month until delivery of the judgment to be given, and interest from October 2002 until payment in full;

– order the Council to pay the costs.

13 The Council, supported by the interveners, contends that the Court should:

– dismiss the action for damages as unfounded;

– order the applicant to pay the costs.

Law

Admissibility

14 The applicant has argued, in his pleadings, that he is entitled to claim compensation for the damage allegedly caused by all the measures freezing his assets adopted by the Council since October 2002, without distinguishing according to whether the damage was associated with the measures at issue in the case giving rise to *Sison I*, paragraph 1 above, or with those at issue in the present case.

15 With more particular regard to the measures contested in the case giving rise to the judgment in *Sison I*, the applicant thus argued in his pleadings that, because the judgment had retroactive effect, he ought to have been placed in the same legal position as that in which he found himself before those measures were adopted. Moreover, it is clearly established that the substantive unlawfulness tainting the measures annulled by *Sison II* was already present, and in the same way, in the measures at issue in the case which gave rise to the judgment in *Sison I*, even though, in the latter case, the Court was able to apply its judicial review only to the observance of procedural safeguards and was not therefore in a position to be able to sanction that substantive unlawfulness (see *Sison I*, paragraph 1 above, paragraph 225).

16 The Council in its pleadings has not contested that interpretation of the scope of the present action for damages.

17 None the less, the Court raised of its own motion the question whether the application for compensation for the damage allegedly caused by the measures at issue in the case giving rise to *Sison I*, paragraph 1 above, was inadmissible. Accordingly, by measure of organisation of procedure of 21 February 2011, the Court invited the parties to give their views in writing on whether the force of *res judicata* attaching to the judgment in *Sison I* precluded the applicant from being able to claim afresh, under Articles 235 EC and 288 EC, compensation for damage corresponding to that in respect of which the claim for compensation in the same terms had already been dismissed by that judgment (paragraph 243).

18 In his written observations, lodged at the Court Registry on 8 March 2011, the applicant claimed that the force of *res judicata* attaching to *Sison I*, paragraph 1 above, did not prevent his claiming compensation in the terms used in his pleadings. He argued, in essence, that the matters of fact and law concerned in that case had not been ‘actually or necessarily settled’ by *Sison I*, paragraph 1 above. More particularly, the Court did not in that judgment examine the damage caused by the Council’s conduct after 29 May 2006, or the damage caused by the ‘substantial illegality’ of the Council’s action. Moreover, in his view, dismissal of the present action for compensation, on the grounds of the *res judicata* exception, would prejudice his right to an effective remedy before an impartial tribunal in accordance with Article 47 of the Charter of Fundamental Rights of the European

Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

19 In their written observations, lodged at the Registry on 8 and 7 March 2011 respectively, the Council and the Kingdom of the Netherlands, on the one hand, and the European Commission, on the other, gave an affirmative reply to the question asked by the Court.

20 In this connection, it is to be recalled that the authority of a judgment, entailing the inadmissibility of an action if the proceedings are between the same parties and have the same purpose and the same legal basis as the action previously disposed of, presents an absolute bar to proceedings (see, to this effect, Case T–164/01 *Lucaccioni* v *Commission* [2003] ECR-SC I–A–67 and II–367, paragraph 28 and case-law cited) and, therefore, this plea of inadmissibility may, indeed must, be examined by the court of its own motion. According to settled case-law, the principle of *res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question (Joined Cases C–238/99 P, C–244/99 P, C–245/99 P, C–247/99 P, C–250/99 P to C–252/99 P and C–254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] I–8375, paragraph 44, and Case C–462/05 *Commission* v *Portugal* [2008] ECR I–4183, paragraph 23 and case-law cited).

21 In this instance, it is clear from comparison of the various heads of damage for which compensation was claimed, under the Community's non-contractual liability, in the action giving rise to *Sison I*, paragraph 1 above (see paragraph 228 of that judgment), with some of the heads of damage for which compensation is claimed, under that same liability, in the present action (see the Report for the Hearing, paragraphs 38, 41 and 49), that they in part overlap, *ratione temporis*, in that they relate to the period from October 2002 to the date of delivery of *Sison I*, paragraph 1 above. Furthermore, the applicant himself has maintained in his pleadings that all the damage arose from the same substantive illegality that vitiated the Council's conduct (see paragraph 15 above).

22 It is also to be recalled that, in *Sison I*, paragraph 1 above, the Court, while considering that it was not in a position to determine whether the condition relating to the unlawfulness of the Council's conduct complained of had been satisfied, and in particular, whether the Council had committed a manifest error of assessment in deciding to freeze the applicant's funds on the basis of the information available to it or whether it had manifestly and gravely disregarded the limits set on its discretion (*Sison I*, paragraph 1 above, paragraph 242), held that the claim for compensation must, in any event, be dismissed, for neither the fact and extent of the damage alleged, as set out in paragraph 228 of that judgment, nor the existence of a causal link between that damage and the instances of material unlawfulness pleaded in support of that claim, had been proved to the requisite legal standard (*Sison I*, paragraph 1 above, paragraphs 243 and 251).

23 Contrary to what the applicant maintains, those considerations relating to absence of proof of the fact and extent of the damage alleged or of the existence of a causal link between that damage and the instances of material unlawfulness pleaded cannot be described as 'obiter dicta' or as 'unnecessary' in the Court's assessment. Furthermore, the applicant is wrong to maintain that he would not have been entitled to bring an appeal against the dismissal of his action for compensation relying on the same considerations. Lastly, the principle of *res judicata* is a general principle common to the laws of the Member States, whose application in this instance could not in any circumstances be regarded as contrary to Article 47 of the Charter of Fundamental Rights of the European Union.

24 It follows that, for the period running from October 2002 until 11 July 2007, the day on which *Sison I*, paragraph 1 above, was delivered, the principle of *res judicata* attaching to that judgment means that the applicant may not claim afresh, pursuant to Article 235 EC and Article 288 EC, compensation for damage corresponding to the damage in respect of which a claim for compensation on the same grounds has already been rejected by that judgment (see, to that effect, the orders of the Court of Justice of 28 November 1996 in Case C–277/95 P *Lenz* v *Commission* [1996] ECR I–6109, paragraphs 52 to 54, and of 9 June 2010 in Case C–440/07 P *Commission* v *Schneider Electric*, not published in the ECR, paragraphs 52 and 53; judgments in Case T–237/00 *Reynolds* v *Parliament* [2005] ECR-SC I–A–385 and II–1731, paragraph 193, and of 15 October 2008 in Joined Cases T–457/04 and T–223/05 *Camar* v *Commission*, not published in the ECR, paragraph 79).

25 The action for damages must therefore be dismissed as inadmissible inasmuch as it seeks compensation for damage allegedly caused by the acts challenged in the case giving rise to *Sison I*, paragraph 1 above.

Substance

Introductory observations on the conditions for the incurring of the Community's non-contractual liability and on the effect of *Sison II*

26 The applicant contends that the three conditions for the incurring of the Community's non-contractual liability set forth in Article 235 EC and in the second paragraph of Article 288 EC have, in the circumstances of this case, been satisfied. In his view, the unlawfulness vitiating the measures contested in the present case constitutes a sufficiently serious breach of a rule of law intended to confer rights on individuals, and it has sufficiently directly caused him serious damage, which he details in four categories of damage, in addition to interest.

27 The Council contends that none of the three conditions for the incurring of the Community's non-contractual liability has, in the circumstances, been satisfied.

28 It is to be borne in mind that, according to consistent case-law, the incurring of the Community's non-contractual liability for the purpose of the second paragraph of Article 288 EC is conditional upon the satisfaction of a set of conditions, namely, the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of (see Joined Cases C–120/06 P and C–121/06 P *FIAMM and FIAMM Technologies* v *Council and Commission* [2008] ECR I–6513, paragraph 106 and case-law cited; Case T–351/03 *Schneider Electric* v *Commission* [2007] ECR II–2237, paragraph 113; and *Sison I*, paragraph 1 above, paragraph 232).

29 The cumulative nature of those conditions means that, if one of them is not satisfied, the action for damages must be dismissed in its entirety, and there is no need to examine the other conditions (Case C–122/01 P *T. Port* v *Commission* [2003] ECR I–4261, paragraph 30; *Schneider Electric* v *Commission*, paragraph 28 above, paragraph 120; and *Sison I*, paragraph 1 above, paragraph 233).

30 In the circumstances of this case, the Court considers it expedient to examine first whether the condition relating to the unlawfulness of the Council's conduct has been satisfied.

31 As to this, it must be recalled that, according to settled case-law, a finding of the unlawfulness of a legal measure – like the measures challenged in the present case and found to be unlawful in the light of Article 2(3) of Council Regulation No 2580/2001 of 27 December 2001 (OJ 2001 L 344, p. 70), and of Article 1(4) of Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93) – is not enough, however regrettable that unlawfulness may be, for it to be held that the condition for the incurring of the Community's non-contractual liability relating to the unlawfulness of the institutions' alleged conduct has been satisfied (see, to this effect, Case C–282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I–2941, paragraph 47; Case T–56/00 *Dole Fresh Fruit International* v *Council and Commission* [2003] ECR II–577, paragraphs 72 to 75; and Case T–212/03 *MyTravel* v *Commission* [2008] ECR II-1967, paragraphs 43 and 85).

32 Indeed, according to the case-law, the action for damages was established as an autonomous form of action with a particular purpose to fulfil within the system of legal remedies and its exercise is subject to conditions dictated by its specific object (Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle Erling and Others* v *Council and Commission* [1981] ECR 3211, paragraph 4; see also, to this effect, Case 175/84 *Krohn Import-Export* v *Commission* [1986] ECR 753, paragraph 32). Whereas actions for annulment and for failure to act seek a declaration that a legally binding measure is unlawful or that such a measure has not been taken, an action for damages seeks compensation for damage resulting from a measure or from unlawful conduct, attributable to an institution (Joined Cases T–3/00 and T–337/04 *Pitsiorlas* v *Council and ECB* [2007] ECR II–4779, paragraph 283). So, it is not the purpose of an action for damages to make good damage caused by all unlawfulness (Case T–429/05 *Artegodan* v *Commission* [2010] ECR II–491, paragraph 51).

33 In order to satisfy the condition for the Community to incur non-contractual liability for the unlawfulness of the conduct of the institutions that is objected to, the case-law requires a sufficiently serious breach of a rule of law 'intended to confer rights on individuals' to be established (Case C–352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I–5291, paragraph 42, and *Holcim (Deutschland)* v *Commission*, paragraph 31 above, paragraph 47; *Sison I*, paragraph 1 above, paragraph 234) or, in the older wording, of a rule of law 'for the protection of the individual' (Case C–282/90 *Vreugdenhil* v *Commission* [1992] ECR I–1937, paragraph 19, and Case C–390/95 P

Antillean Rice Mills and Others v *Commission* [1999] ECR I–769, paragraphs 58 and 59), or, yet again, of a rule of law 'intended to protect individuals' (Case T–4/01 *Renco* v *Council* ECR II–171, paragraph 60). The Court considers these three expressions to be mere variations on a single legal concept, which is expressed below by the formula 'intended to confer rights on individuals'.

34 This requirement of a sufficiently serious breach of Community law, within the meaning of *Bergaderm and Goupil* v *Commission*, paragraph 33 above, is intended, whatever the nature of the unlawful act at issue, to avoid the risk of having to bear the losses claimed by the persons concerned obstructing the institution's ability to exercise to the full its powers in the general interest, whether that be in its legislative activity, or in that involving choices of economic policy or in the sphere of its administrative competence, without however thereby leaving individuals to bear the consequences of flagrant and inexcusable misconduct (see, to this effect, *Schneider Electric* v *Commission*, paragraph 28 above, paragraph 125; *MyTravel* v *Commission*, paragraph 31 above, paragraph 42; and *Artegodan* v *Commission*, paragraph 32 above, paragraph 55).

35 The decisive test for a finding that this requirement has been satisfied is whether the institution concerned has manifestly and gravely disregarded the limits of its discretion (*Bergaderm and Goupil* v *Commission*, paragraph 33 above, paragraph 43; *Holcim (Deutschland)* v *Commission*, paragraph 31 above, paragraph 47; and *Sison I*, paragraph 1 above, paragraph 235). The determining factor in deciding whether there has been such an infringement is therefore the discretion available to the institution concerned (Case C–198/03 P *Commission* v *CEVA and Pfizer* [2005] ECR I–6357, paragraph 66 and case-law cited). It is apparent from the criteria of the case-law that, if the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (*Bergaderm and Goupil* v *Commission*, paragraph 33 above, paragraph 44; Case C–312/00 P *Commission* v *Camar and Tico* [2002] ECR I–11355, paragraph 54; Case C–440/07 P *Commission* v *Schneider Electric* [2009] ECR I–6413, paragraph 160; and Joined Cases T–198/95, T–171/96, T–230/97, T–174/98 and T–225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II–1975, paragraph 134).

36 However, the case-law does not establish any automatic link between, on the one hand, the fact that the institution concerned has no discretion and, on the other, the classification of the infringement as a sufficiently serious breach (*Artegodan* v *Commission*, paragraph 32 above, paragraph 59).

37 The extent of the discretion enjoyed by the institution concerned, although determinative, is not the only yardstick. On this point, the Court of Justice has many times recalled that the system of rules it has developed with regard to the second paragraph of Article 288 EC also takes into account, in particular, the complexity of the situations to be regulated and the difficulties in applying or interpreting the texts (*Bergaderm and Goupil* v *Commission*, paragraph 33 above, paragraph 40; *Commission* v *Camar and Tico*, paragraph 35 above, paragraph 52; *Commission* v *CEVA and Pfizer*, paragraph 35 above, paragraph 62; *Holcim (Deutschland)* v *Commission*, paragraph 31 above, paragraph 50; *Commission* v *Schneider Electric*, paragraph 35 above, paragraph 161, and also *MyTravel* v *Commission*, paragraph 31 above, paragraph 38).

38 In particular, when the Commission's discretion is reduced (Case T-28/03 *Holcim (Deutschland)* v *Commission* [2005] ECR II–1357, paragraph 100) or considerably reduced, or even non-existent (*Commission* v *Schneider Electric*, paragraph 35 above, paragraph 166), the Court of Justice has upheld the validity of the General Court's examination of the complexity of the situations to be regulated in order to determine whether the alleged infringement of Community law is sufficiently serious (Case C–282/05 P *Holcim (Deutschland)* v *Commission*, paragraph 31 above, paragraph 51, and *Commission* v *Schneider Electric*, paragraph 35 above, paragraph 160].

39 It follows that only the finding of an irregularity that an administrative authority, exercising ordinary care and diligence, would not have committed in similar circumstances, can render the Community liable (*Artegodan* v *Commission*, paragraph 32 above, paragraph 62).

40 It is, consequently, for the Union judicature, once it has first determined whether the institution concerned enjoyed any discretion, next to take into consideration the complexity of the situations to be regulated, any difficulties in applying or interpreting the legislation, the clarity and precision of the rule infringed, and whether the error made was inexcusable or intentional (see, to this effect, *Comafrica and Dole Fresh Fruit Europe* v *Commission*, paragraph 35 above, paragraphs 138 and 149, and Case T–364/03 *Medici Grimm* v *Council* [2006] ECR II–79, paragraphs 79 and 87; see also, by

analogy, with regard to the non-contractual liability of a Member State for infringement of Community law, Case C-424/97 *Haim* [2000] ECR I-5123, paragraphs 41 to 43). On any view, an infringement of Community law is sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement (see, by analogy, Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 120 and case-law cited).

41 In the instant case, the applicant pleads infringement of Article 2(3) of Regulation No 2580/2001, read in conjunction with Article 1(4) of Common Position 2001/931, on the one hand, and breach of his fundamental rights, on the other, in particular, breach of the right to respect for his private life and of the right to respect for his property.

42 The Council maintains, first, that Article 2(3) of Regulation No 2580/2001 and Article 1(4) of Common Position 2001/931 are not rules of law conferring rights on individuals and that, in any case, their breach is not serious enough in the circumstances of the case. Secondly, it maintains that breach of the applicant's fundamental rights has not been satisfactorily proved.

43 It is important to note, in this regard, that the plea alleging infringement of Article 2(3) of Regulation No 2580/2001 and Article 1(4) of Common Position 2001/931 was accepted by the Court in *Sison II*, paragraph 1 above, paragraphs 122 and 138. This infringement must, therefore, be considered to have been established, as the parties recognise. In contrast, the Court rejected the pleas alleging breach of the duty to state reasons (*Sison II*, paragraph 1 above, paragraph 71) and a manifest error of assessment (*Sison II*, paragraph 1 above, paragraphs 89 and 122). Moreover, the Court did not, in *Sison II*, paragraph 1 above, rule on the pleas alleging breach of the principle of proportionality and breach of general principles of Community law and of fundamental rights (*Sison II*, paragraph 1 above, paragraphs 123 and 138).

44 Consequently, it must first be ascertained, in the light of the criteria laid down in the case-law and set forth above, whether the Council, in disregard of Article 2(3) of Regulation No 2580/2001 and Article 1(4) of Common Position 2001/931, has breached, sufficiently seriously, rules of law intended to confer rights on individuals. It has then to be ascertained whether the alleged breach of the applicant's fundamental rights has been established and, if so, whether the breach is sufficiently serious.

Whether the Community has incurred liability by reason of infringement of Article 2(3) of Regulation No 2580/2001 and Article 1(4) of Common Position 2001/931

45 In the light of the Council's arguments, it must in the first place be considered whether those provisions are indeed intended to confer rights on individuals, for the purpose of the settled case-law cited at paragraph 33 above, as the applicant contends.

46 Contrary to what is maintained by the applicant, the judgment in Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraphs 110 and 111, offers no guidance of any relevance to the present case. That judgment concerned an action for annulment, and the Court of Justice expressed no view at all as to whether the provisions at issue in the circumstances of that case were intended to confer rights on individuals.

47 Nevertheless, it follows from the case-law that that condition is met if the rule of law breached, while in the main concerning interests of a general nature, also protects the individual interests of the persons concerned (see, to this effect, Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245, 263; Case T-209/00 *Lamberts* v *Ombudsman* [2002] ECR II-2203, paragraph 87; and *Artegodan* v *Commission*, paragraph 32 above, paragraph 72).

48 Contrary to what is contended by the Council, which refers in particular to Case T-256/07 *People's Mojahedin Organization of Iran* v *Council* [2008] ECR II-3019 ('*PMOI I*'), the provisions at issue in the instant case are not designed to delimit the respective competences of the Community and the Member States, in connection with the two-level cooperation mechanism provided by the fund-freezing procedure established by Common Position 2001/931, by determining which national decisions may give rise to the adoption of a Community measure (see, in this regard, *PMOI I*, paragraph 133).

49 In the system set up by Regulation No 2580/2001, which is intended to give effect, at Community

level, to the specific restrictive measures taken in respect of certain persons and entities with a view to combating terrorism described in Common Position 2001/931, Article 2(3) of that regulation, in conjunction with Article 1(4) of the Common Position, sets out instead the statutory conditions on which such measures may be taken by the Community, whose powers in this sphere are considered to have been established (*Sison II*, paragraph 1 above, paragraph 91 et seq.). They are not, therefore, merely rules conferring powers or relating to the legal basis, like those at issue in the cases pleaded by the Council or in the case giving rise to *Artegodan* v *Commission*, paragraph 32 above. The decisions in those cases are not, consequently, relevant in the circumstances of this case.

50 Moreover, it is to be observed, as the applicant has done, that those restrictive measures, consisting in the freezing of all the assets of the persons concerned, quite plainly amount to interference by official authority with the exercise of the fundamental rights of the persons to whom those measures are applied. Although whether that interference was legitimate in the circumstances is a separate matter that will, if necessary, have to be considered in connection with the examination of the alleged breach of those rights, the very fact that such interference is not acceptable except on certain conditions, laid down in instruments relating to the protection of human rights (see, for example, Article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, 'the ECHR', so far as concerns the right to respect for private life), entails certain consequences for the status of the rules that give effect to those conditions.

51 So, although Regulation No 2580/2001, taken together with Common Position 2001/931, is intended essentially to permit the Council to impose certain restrictions on individuals' rights, with a view to, and in the name of, combating international terrorism, the provisions of that regulation and that common position, which set forth exhaustively the conditions in which such restrictions are permitted, such as Article 2(3) of the regulation read in conjunction with Article 1(4) of the common position, are, *a contrario*, intended essentially to protect the interests of the individuals concerned, by limiting the cases of application, and the extent or degree of the restrictive measures that may lawfully be imposed on those individuals.

52 Such provisions thus ensure that the individual interests of the persons liable to be concerned are protected and they are, therefore, to be considered to be rules of law intended to confer rights on individuals, for the purpose of the settled case-law cited at paragraph 33 above. If the fundamental conditions set out in Article 2(3) of the regulation, read in conjunction with Article 1(4) of the Common Position, are not satisfied, the individual concerned is entitled not to have the measures in question imposed on him. Such a right necessarily implies that the individual on whom restrictive measures are imposed in circumstances not provided for by the provisions in question may seek compensation for the harmful consequences of those measures, if it should prove that their imposition was founded on a sufficiently serious breach of the substantive rules applied by the Council (see, by analogy, *MyTravel* v *Commission*, paragraph 31 above, paragraph 48).

53 In the second place, with regard to the condition relating to a sufficiently serious breach of those rules, the extent of the discretion enjoyed by the Council in the circumstances of the present case must be determined.

54 It must be pointed out that, although the Council has broad discretion as to what matters 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 common foreign and security policy, concerning in particular the assessment of the considerations of appropriateness on which such decisions are based (*Sison II*, paragraph 1 above, paragraph 97 and case-law cited), it is, in contrast, bound by the statutory conditions for the application of a fund-freezing measure to a person, group or entity, as determined by Article 2(3) of Regulation No 2580/2001, read in conjunction with Article 1(4) of Common Position 2001/931 (*Sison II*, paragraph 1 above, paragraph 92 and case-law cited).

55 Under Article 2(3) of Regulation No 2580/2001, the Council, acting by unanimity, is to establish, review and amend the list of persons, groups and entities to whom and 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, in accordance with Article 1(4) of Common Position 2001/931, 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 that decision 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 still grounds for keeping them in the list, in accordance with Article 1(6) of Common Position 2001/931.

56 At paragraph 93 of *Sison II*, paragraph 1 above, the General Court recalled that it had, in earlier judgments, inferred from those provisions that verification that there is a decision of a national authority meeting the definition in Article 1(4) of Common Position 2001/931 is an essential precondition for the adoption, by the Council, of an initial decision to freeze funds, whereas verification of the sequels to that decision at the national level is imperative in the context of the adoption of a subsequent decision to freeze funds.

57 It is apparent from this settled case-law of the General Court that there is no margin of appreciation for the Council when it determines whether the matters of law and of fact, that may be preconditions for the application of a fund-freezing measure to a person, group or entity, as defined by Article 2(3) of Regulation No 2580/2001 in conjunction with Article 1(4) of Common Position 2001/931, have been established in any given case. This holds, most particularly, for the verification of the existence of precise information or material in the relevant file indicating that a decision has been taken by a national authority with regard to the person concerned that meets the definition laid down in Article 1 (4) of Common Position 2001/931 and, at a later stage, for the verification of the action taken following that decision at national level (see *Sison II*, paragraph 1 above, paragraph 96 and case-law cited, relating to the cases concerning the freezing of the funds of the Organisation des Modjahedines du peuple d'Iran/People's Mojahedin Organization of Iran).

58 However, contrary to the claims made by the applicant, that fact alone is not enough for it to be considered that the breach of those provisions is in the instant case sufficiently serious for the Community's liability to be incurred. As has been noted (see paragraphs 37 to 39 above), the court must also take into consideration, in particular, the legal and factual complexity of the situations to be regulated and the difficulties in applying or interpreting the texts.

59 In this instance, it is also to be pointed out that the restrictive measures provided for by Regulation No 2580/2001 and Common Position 2001/931 are designed to give effect, at Community level, to Resolution 1373 (2001) of the United Nations Security Council of 28 September 2001 laying down strategies to combat terrorism, in particular the financing of terrorism, by all possible means (*Sison I*, paragraph 1 above, paragraphs 4 to 12).

60 As the Court of Justice has already held in connection with another Community regime of restrictive measures of an economic nature also giving effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the fight by all means, in accordance with that Charter, against the threats to international peace and security posed by acts of terrorism, constitutes a fundamental objective of general interest for the international community, which justifies in principle the adoption of restrictive measures, such as those at issue in the present case, in respect of certain persons (Joined Cases C–402/05 P and C–415/05 P *Kadi and Al Barakaat* v *Council and Commission* [2008] ECR I–6351, '*Kadi* on appeal', paragraphs 361 to 363). The fundamental importance of this objective of general interest and the particular constraints imposed by its pursuit 'by all means' on the institutions of the Union concerned, at the urgent request of the United Nations Security Council, are also factors that must necessarily be taken into consideration, in accordance with the case-law cited at paragraph 34 above.

61 Consequently, it is for the General Court to examine the legal and factual complexity of the situation to be regulated, in the applicant's particular case, and the difficulties in applying or interpreting the relevant provisions of Regulation No 2580/2001 and of Common Position 2001/931, taking into account, in particular, the importance of the objectives of general interest pursued, in order to ascertain whether the error of law committed by the Council is an irregularity that an administrative authority exercising ordinary care and diligence would not have committed in similar circumstances (see paragraph 39 above).

62 In those circumstances, although the infringement of Article 2(3) of Regulation No 2580/2001, read in conjunction with Article 1(4) of Common Position 2001/931, has been clearly established (*Sison II*, paragraph 1 above, paragraph 113), it is important to take into consideration the particular difficulties attaching to the interpretation and application, in this case, of those provisions. The Court considers that the difficulties attaching to the literal, systematic interpretation of the conditions for the adoption of a fund-freezing measure, laid down in those provisions, in the light of the objectives of general interest pursued, could reasonably explain, in the absence of well-established precedent in the case-law on the point, the error of law made by the Council in applying those provisions, inasmuch as it wrongly relied on the judgment of the Raad van State (Council of State, Netherlands)

of 21 February 1995 ('the judgment of the Raad van State') and on the decision of the Arrondissementsrechtbank te 's-Gravenhage (The Hague District Court, 'the Rechtbank'), Sector Bestuursrecht, Rechtseenheidskamer Vreemdelingenzaken (Administrative Law Section, Chamber responsible for the uniform application of the law, cases involving aliens) of 11 September 1997 ('the decision of the Rechtbank').

63 It must be stated at the outset, that the actual wording of those provisions is particularly confused. So, according to Article 1(4) of Common Position 2001/931, 'competent authority' means a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area. No definition is given of what might be a 'competent authority' equivalent to a judicial authority with competence in 'the area covered by [this] paragraph', namely, the field of decisions to instigate investigations or to prosecute, in connection with terrorist activity. It is, furthermore, hard to imagine that the judicial authorities of any Member State whatsoever of the European Union, established in a State governed by the rule of law and a Member of a Union governed by the rule of law, may 'have no competence' in this area. Likewise, as a corollary, it is not easy either to ascertain the meaning of 'instigation of investigations or prosecution' for acts of terrorism or of 'condemnation for such deeds'. Furthermore, it is not made clear whether those provisions are to be interpreted by reference and *renvoi* to national law or whether they possess an autonomous meaning in European Union law, which it is then for the Union judicature alone to determine. In either case, it is not apparent that the differing language versions of these provisions cover the same national factual situations. Thus, in certain language versions, the terms used may be those of criminal law *sensu stricto*, whereas in other language versions their interpretation may fall outside the strictly criminal context.

64 In addition, it is to be noted that, in the present case, the Council's liability is not questioned as the legislative authority, author of the provisions in question, but rather as that of an administrative authority, responsible for putting them into effect.

65 The aforementioned difficulties in interpreting the provisions in question have necessarily given rise to considerable difficulties in giving them effect, as shown by the copious case-law of the General Court on cases of this particular kind (see, in addition to *Sison I* and *Sison II*, paragraph 1 above, Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council* [2006] ECR II-4665, ('*OMPI*'); the judgment of 11 July 2007 in Case T-327/03 *Al-Aqsa* v *Council* (not published in the ECR, '*Al-Aqsa I*'); *PMOI I*, paragraph 48 above; Case T-284/08 *People's Mojahedin Organization of Iran* v *Council* [2008] ECR II-3487 ('*PMOI II*'), at present under appeal in Case C-27/09 P; the judgment of 2 September 2009 in Joined Cases T-37/07 and T-323/07 *El Morabit* v *Council* (not published in the ECR); Case T-348/07 *Al-Aqsa* v *Council* [2010] ECR II-0000 ('*Al-Aqsa II*'); and Case T-49/07 *Fahas* v *Council* [2010] ECR II-0000). It is thus only through its consideration of some 10 cases, spread over several years, that the Court has by degrees constructed a rational, consistent framework for the interpretation of the provisions at issue. This process of gradual development of the case-law is especially apparent from paragraph 91 et seq. of *Sison II*, paragraph 1 above, which summarise the earlier judgments in this sphere.

66 More specifically, it must first of all be observed that in *Sison I*, paragraph 1 above, the General Court gave no indication of whether the judgment of the Raad van State and the decision of the Rechtbank could be regarded as decisions taken by a competent national authority within the meaning of Article 2(3) of Regulation No 2580/2001 and Article 1(4) of Common Position 2001/931 (see, in this respect, *Sison I*, paragraph 1 above, paragraph 242). That judgment could not, therefore, serve as a precedent for the Council, for the purpose of the case-law cited at paragraph 40 above, in the process of adopting the acts contested in this instant case.

67 In the present case, in contrast, the Court dwelt at length on the examination of the content, meaning and context of the decisions of the national authorities which were the basis for the contested acts, namely, the judgment of the Raad van State and the decision of the Rechtbank, at paragraphs 46 to 70 of *Sison I*, paragraph 1 above, and paragraphs 88, 90 and 100 to 106 of *Sison II*, paragraph 1 above, to which reference is now made.

68 With regard to the classification of those national decisions for the purposes of Article 2(3) of Regulation No 2580/2001 and Article 1(4) of Common Position 2001/931, which was undertaken at paragraph 107 et seq. of *Sison II*, paragraph 1 above, it is to be noted that, at paragraph 111 of *Sison II*, the Court for the first time set forth certain general criteria for the interpretation and application of those provisions. Thus, it 'consider[ed]' that, having regard both to the wording, context and objectives of the provisions at issue in this case and to the major part played by the

national authorities in the fund-freezing process provided for in Article 2(3) of Regulation No 2580/2001, a decision to 'instigat[e] … investigations or prosecut[e]' must, if the Council is to be able validly to invoke it, form part of national proceedings seeking, directly and principally, the imposition on the person concerned of measures of a preventive or punitive nature, in connection with the combating of terrorism and by reason of that person's involvement in terrorism. The Court made it clear that that requirement is not satisfied by a decision of a national judicial authority ruling only incidentally and indirectly on the possible involvement of the person concerned in such activity, in relation to a dispute concerning, for example, rights and duties of a civil nature.

69 In the present case, at paragraph 113 of *Sison II*, paragraph 1 above, the Court deduced, from the criterion of restrictive interpretation that it had just identified, that the procedures involving the applicant before the Raad van State and the Rechtbank were in no way directed at punishing his possible participation in past acts of terrorism, but were solely concerned with the review of the lawfulness of the decision of the Dutch Secretary of State for Justice refusing to grant him refugee status and a residence permit in the Netherlands.

70 Nevertheless, the Court also acknowledged, at paragraph 114 of *Sison II*, paragraph 1 above, that the Raad van State and the Rechtbank, in the course of those procedures, had studied the file of the Netherlands internal security service ('the BVD') relating to the applicant's alleged involvement in certain terrorist activities in the Philippines, although they did not decide for that reason to open an investigation into those facts, still less to instigate a prosecution of the applicant.

71 Moreover, it is to be stressed that, contrary to what the applicant maintains, the refusal of the Dutch Secretary of State for Justice to grant him refugee status and a residence permit in the Netherlands, on the ground in essence that he had, from the Netherlands, led or attempted to lead the New People's Army ('the NPA'), the military wing of the Communist Party of the Philippines ('the CPP') responsible for a great number of acts of terrorism in the Philippines, was approved in substance by the Rechtbank, following the judgment of the Raad van State and after that court had studied the BVD file (see *Sison I*, paragraph 1 above, paragraphs 63, 66 and 68 to 70). The Council did not, therefore, make any error of assessment in referring to those factual circumstances, or disregard the limits set on its discretionary power.

72 Lastly, it is to be borne in mind that in *Sison II*, paragraph 1 above (paragraphs 88, 89 and 122), the Court rejected the applicant's plea alleging a manifest error of assessment of the facts. In particular, it found that the factual allegations included in the summaries of reasons annexed to the contested acts were properly supported by material in the file submitted to it and, more particularly, by the findings of fact made by the Raad van State and the Rechtbank in their absolute discretion. Those factual allegations concern the applicant's involvement in acts of terrorism committed in the Philippines, by reason of his leading role in the CPP and the NPA, and the contacts he had had with the leaders of other terrorist organisations (see, in this regard, paragraphs 46 to 70 of *Sison I*, paragraph 1 above, also reproduced at paragraph 106 of *Sison II*, paragraph 1 above).

73 In those circumstances, having regard first, to the complexity of the legal and factual assessments required in order to settle the present case, second, to the difficulties in interpreting and applying Article 2(3) of Regulation No 2580/2001, read in conjunction with Article 1(4) of Common Position 2001/931, in the circumstances of the case and given the lack of well-established precedent in the case-law before judgment was delivered in *Sison II*, paragraph 1 above, and, third, to the fundamental importance of the objectives of general interest linked to the combating of international terrorism pursued by that regulation, it must be held that the Council's infringement of those provisions, while clearly established, may be accounted for by the particular constraints and responsibilities borne by that institution, and that it constitutes an irregularity that an administrative authority exercising ordinary care and diligence could have committed if placed in similar circumstances.

74 In consequence, the Court considers that, in the circumstances of the case, the infringement of Article 2(3) of Regulation No 2580/2001 and Article 1(4) of Common Position 2001/931, although clearly established, cannot be regarded as a sufficiently serious breach of Community law, so as to incur the non-contractual liability of the Community to the applicant.

Whether the liability of the Community has been incurred by reason of the alleged breach of the applicant's fundamental rights

75 It is, here, not in dispute that the fundamental rights that the applicant claims have been breached constitute rules of law intended to confer rights on individuals. That breach, should it be proved, would therefore be such, if it were sufficiently serious, as to incur the non-contractual liability of the

Community.

76 The applicant does not raise an objection of the illegality as such, having regard to fundamental rights, of the general fund-freezing regime given effect by Regulation No 2580/2001, but only of the incorrect application of that regulation in the particular circumstances of the case, which gave rise to that breach.

77 Moreover, the fact that such a regime, or similar regimes flowing from the implementation of other resolutions of the United Nations Security Council, is in principle compatible with the fundamental rights of the persons affected is clearly established in the case-law of the Court of Justice and the General Court (see, with regard to the right to property, *Kadi* on appeal, paragraph 60 above, paragraphs 361 to 366, and Joined Cases T–246/08 and T–332/08 *Melli Bank* v *Council* [2009] ECR II–2629, paragraphs 111 and 112; with regard to respect for private and family life, Case T–253/02 *Ayadi* v *Council* [2006] ECR II–2139, paragraph 126, not reversed by the Court on appeal; with regard to the presumption of innocence, *El Morabit* v *Council*, paragraph 65 above, paragraph 40, and *Fahas* v *Council*, paragraph 65 above, paragraphs 64 to 68).

78 It is not, therefore, the imposition of the restrictive measures provided for by Regulation No 2580/2001, per se, that is claimed to constitute breach of the applicant's fundamental rights, but only the fact that those measures were imposed on him, by the contested acts, in conditions not consistent with those laid down, specifically in order to limit the opportunities of interference by public authorities in the exercise of those rights (see paragraphs 50 and 51 above), by Article 2(3) of Regulation No 2580/2001, read in conjunction with Article 1(4) of Common Position 2001/931.

79 It has been held above that while the incompatibility of the contested acts with the conditions laid down in Article 2(3) of Regulation No 2580/2001 does amount to illegality, it may not, however, be considered to be a breach of Community law sufficiently serious to incur the non-contractual liability of the Community vis-à-vis the applicant.

80 The alleged breach of the applicant's fundamental rights being inseparable from that illegality and arising from it alone, it must therefore be concluded that that breach is also not sufficiently serious, in the particular circumstances of the case, to incur the non-contractual liability of the Community (see, by analogy, *Artegodan* v *Commission*, paragraph 32 above, paragraphs 131, 132 and 136).

81 It may be added here that neither the Charter of Fundamental Rights of the European Union nor the ECHR, which both guarantee the right to effective judicial protection, preclude that the Community's non-contractual liability be made subject, in circumstances such as those of this case, to the finding of a sufficiently serious breach of the fundamental rights invoked by the applicant. With more particular regard to the rights guaranteed by Protocol No 1 to the ECHR, the European Court of Human Rights has, furthermore, taken account of 'the various inherent limitations imposed by the elements of the action to be established' (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi* v. *Ireland*, ECHR judgment of 30 June 2005, *Reports of Judgments and Decisions,* 2005-VI, §§ 88, 163 and 165).

82 It follows from all the foregoing considerations that, in the present case, the condition relating to the Council's allegedly unlawful conduct for the incurring of the Community's non-contractual liability has not been satisfied.

83 The action must, therefore, be dismissed, and there is no need to examine the other conditions for the incurring of the Community's non-contractual liability.

Costs

84 Under Article 87(1) of the Rules of Procedure, a decision as to costs is to be given in the final judgment or in the order closing the proceedings. In accordance with that provision, costs were reserved in *Sison II*, paragraph 1 above.

85 Article 87(3) of the Rules of Procedure provides that, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the General Court may order costs to be shared or decide that each party is to bear its own costs. In addition, Article 87(4) of those Rules provides that those Member States and institutions that intervened in the proceedings are to bear their own costs.

86 In the instant case, the Council has failed on the heads of claim for annulment, but the applicant has failed on the heads of claim for compensation. The applications for annulment and for compensation having been dealt with separately throughout the proceedings, those provisions will find equitable application in a decision that the Council is to pay all the costs of the parties to the main proceedings relating to the action for annulment, while the applicant is to pay all the costs of the parties to the main proceedings relating to the action for compensation. In addition, it must be decided that the Kingdom of the Netherlands, the United Kingdom and the Commission are to bear their own costs.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. Dismisses the action for compensation;

2. Orders the Council of the European Union to pay, so far as the costs relating to the action for annulment are concerned, the costs incurred by Jose Maria Sison in addition to its own costs;

3. Orders Mr Sison to pay, so far as the costs relating to the action for compensation are concerned, the costs incurred by the Council in addition to his own costs;

4. Orders the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the Commission to bear their own costs.

Forwood Dehousse Prek

Schwarcz Popescu

Delivered in open court in Luxembourg, on 23 November 2011.

[Signatures]

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*Language of the case: English.