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KADI II, OR THE HAPPY ENDING OF K'S TRIAL – COURT OF JUSTICE OF THE EUROPEAN UNION, 18 JULY 2013

Posted on 29 Luglio 2013 by ***Filippo Fontanelli***

On July 18, 2013, the Grand Chamber of the Court of Justice of the European Union ("the Court") handed down the judgment in the so-called *Kadi II* dispute. With this decision, the Court dismissed the appeals brought by the Council, the Commission and the UK against the General Court's judgment of September 30, 2010 (find here a comment, in Italian). In so doing, the Court has confirmed that Mr. Kadi's inclusion in the list of subjects whose resources must be frozen on account of their potential relationship with Al Qaida was in breach of his fundamental rights. Therefore, the Court upheld the annulment of the Commission Regulation No 1190/2008, in the part providing for Kadi's renewed enlisting in the blacklist found in Annex 1 to Regulation No 881/2002.

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The two-level *Kadi II* litigation follows at the heels of the famous *Kadi* proceedings (also two-folded: Tribunal of First Instance, 2005; ECJ, 2010). Before turning to the reasoning of the Court in the 2013 judgment, the factual and legal scenario in which the three previous judgments took place will be sketched out briefly to provide some perspective.

In 1999 the Security Council of the United Nations passed Resolution 1267 under Chapter VII of the UN Charter. This act provided for the freezing of the assets of individuals and organisations suspected of having links with terrorist activities run by the Taliban. States can submit to the Sanctions Committee a request for inclusion of a subject in the Consolidated List, together with the relevant supporting evidence. In 2006 (see Resolution 1730) the Security Council established a 'focal point' to deal with delisting requests. Since 2009 (see Resolution 1904) the Office of the Ombudsperson has assisted the Sanctions Committee in dealing with delisting requests. Shortly after the 9/11 attacks, Mr Kadi, upon request of the USA, was included in the Consolidated List by the Sanctions Committee, on grounds of his suspected association with Usama bin Laden. His name was subsequently included in the EC Council Regulation implementing the UN Security Council resolution (No 467/2001, then repealed and substituted by No 881/2002, see Annex I).

Mr Kadi brought proceedings in 2001 before the (then) Tribunal of First Instance seeking annulment of these EC Regulations, in so far as he was directly concerned. He claimed violation of his right to be heard, respect for property, and effective judicial review, as well as breach of the principle of proportionality. In 2005, the TFI dismissed Mr Kadi's claim (see judgment here). It held, in essence, that the Regulations challenged enjoyed immunity from judicial review, since they were designed to give implementation to international obligations which left no margin of discretion to the EC. The Tribunal declined to exercise its judicial review on the determinations made by the Security Council and was content to note that no breach of *jus cogens* had occurred, which could have possibly justified an exception to the immunity principle.

In 2008, on appeal, the Court of Justice reversed the TFI's decision (see judgment here). The Luxembourg judges famously referred to a core of constitutional principles that buttress the rule of law within the EU and cannot be prejudiced by unconditional compliance with international obligations. Since the legality of EU acts depend on their conformity with the minimum standards of fundamental rights protection, EU judicial bodies can review them, using the jurisdictional mechanisms set in the

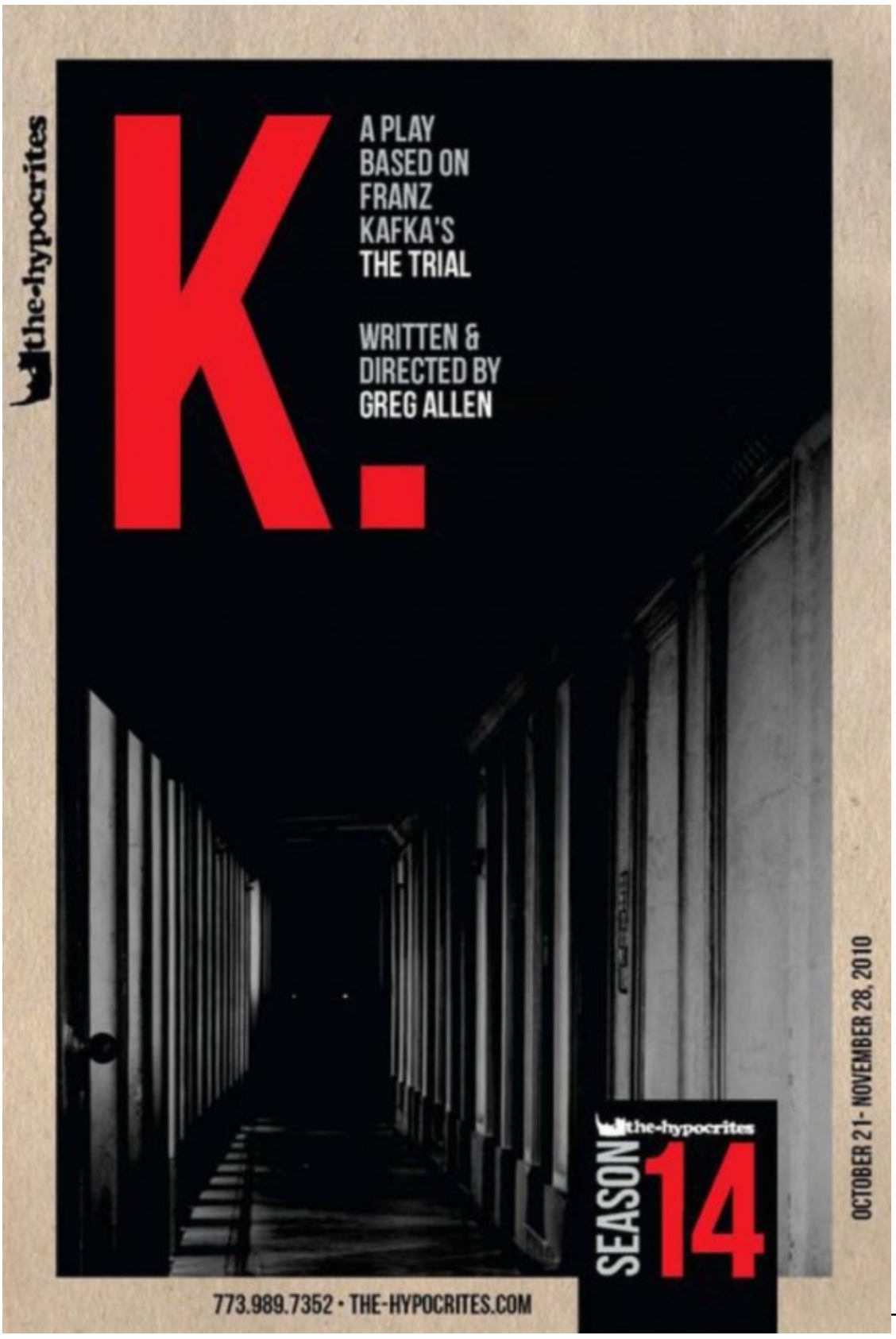
Treaties. As to the nature of such review, the ECJ held that it must ensure 'in principle the full review' of EU legal acts, including those designed to implement UN Security Council's resolutions (para. 326). In performing such review, the ECJ concluded that Mr Kadi's rights to property and judicial protection had been breached, mainly due to the EU's absolute failure to communicate to him any of the information upon which the listing had been decided. As a consequence, he was unable to submit his views effectively with the purpose of challenging the listing measure: he was in other words deprived of the right to defence and of effective judicial review. The ECJ thus annulled the challenged Regulation, allowing for the maintenance of its effects for three months, so as to give some time to the EU institutions to remedy the procedural wrongdoing.

Shortly after this judgment, the Sanctions Committee authorised the transmission to Mr Kadi of the narrative summary of the reasons for his listing. They are reported in full at par. 28 of the Court's 2013 decision. In a nutshell, Mr Kadi was listed because he had founded and directed the Muwafaq Foundation, which was alleged to belong to the Al Qaida network and to support to mujahidin in Bosnia during the war in Yugoslavia. Moreover, a director of the Foundation was alleged to have regular contacts with Usama bin Laden for the purpose of providing military training to Tunisian mujahidin. Mr Kadi was also shareholder of a Bosnian bank where a terroristic plot might have been planned, as well as of other Albanian firms which allegedly funnelled money from and to extremists.

The Commission referred to these reasons to motivate the decision not to remove Mr Kadi from the list annexed to Regulation No 881/2002, and gave him the possibility to submit comments. This procedure, in the Commission's intentions, was clearly designed to meet the procedural requirements indicated by the ECJ and therefore to obliterate the human rights deficiencies tainting Mr Kadi's listing. In Regulation No 1190/2008, the Commission acknowledged Mr Kadi's submissions but concluded that they could not warrant delisting.

Mr Kadi then brought new proceedings before the General Court, seeking

annulment of Commission's Regulation 1190/08. In its 2010 decision (found here), the General Court referred – not without some perplexity – to the *dictum* of the ECJ, which had called in 2008 for 'in principle full review' of all EU acts. It therefore held that the delisting procedure available before the Sanctions Committee failed to offer the minimum guarantees of judicial protection, nor had the system set up at the EU level offered any additional protection of Mr Kadi's rights. The General Court also noted that the judicial review could not be limited to the merits of the contested measure but should necessarily extend to the evidence on which it was adopted. The kind of review advocated by the Commission, the General Court noted, would be tantamount to 'a simulacrum' of effective judicial review (par. 123). In the instant case, this required an examination of the information available to justify the listing, which could not be barred by reasons of secrecy or confidentiality. Ultimately, the General Court considered that the process put in place by the Commission to allow Mr Kadi to submit his views was superficial and formalistic. The main flaw of that procedure was that Mr Kadi had not been given access to the any of the information used against him, other than what was contained in the summary of reasons. As a consequence, the fundamental rights violations highlighted by the ECJ had not been healed and the General Court annulled the 2008 Regulation.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Council, the Commission and the UK appealed the judgment of the GC. Thirteen member states intervened in support of the appellants, asking the CJEU to set aside the 2010 judgment of the General Court. The grounds of appeal can be summarised as follows: 1) the GC erred because it failed to recognise that the challenged Regulation is immune from judicial review; 2) the GC's review of the contested Regulation was too intrusive, and should have rather been deferential; 3) the GC erred in assessing the merits of the annulment claim, failing to appreciate the counterbalancing measures that prevent a violation of Mr Kadi's fundamental rights (such as the need for confidentiality and the procedures available to allow Mr Kadi to submit his views).

In October 2012, Mr Kadi was delisted by the Sanctions Committee, following a request for delisting channelled through the Ombudsperson. As noted in this great post, Mr Kadi did not give up on the proceedings before the Court, seeking to obtain a pilot-judgment.

The Court dismissed the first claim very swiftly, borrowing the reasoning from its own precedent in *Kadi I*: the EU is a legal order based on the rule of law, and protection of fundamental rights is an essential component thereof (par. 66). It follows that all EU acts must be amenable to judicial review for compliance with fundamental rights, without prejudice to the primacy of UN Security Council's resolutions (par. 67). This brief remark represents the consecration of the dualist approach inaugurated in *Kadi I*: maintenance of the constitutional values of the EU prevails over the risk of incurring international responsibility for failure to comply with international obligations. When push comes to shove, the Court will strike down abhorrent EU acts, regardless of their UN *imprimatur*. Likewise, the Court was not particularly impressed by the argument regarding the intensity of the review: review must be full, in principle, and Art. 275(2) TFEU squarely empowers the Court to carry it out (par. 97).

The thrust of the decision concerned the merits of the claims, ie, whether Mr Kadi's rights to judicial protection and property had been unjustifiably restricted. The Charter of Fundamental Rights lists the right to be heard, the right to have access to the file and the right to ascertain the reasons

upon which a decision is taken (see Articles 41(2) and 47). Art. 52(1), on the other hands, allows for the necessary restrictions of Charter's rights, subject to a requirement of necessity, proportionality and contribution to objectives of general interest.

Within this legal framework, the Court turned to the listing procedure, and identified the major cause for problems: whereas the EU is bound to respect fundamental rights (in all circumstances, and therefore also) when it implements Security Council's resolutions, the Sanctions Committee is under no obligation to disclose the information used to adopt its decisions to the subjects listed or to the EU, the only exception being the summary of reasons (par. 107). All issues arise from this gulf between the duties of the EU and the lack of duties of UN bodies. In particular, the Court noted that the right to effective judicial protection under Art. 47 of the Charter requires an ascertainment that decisions affecting individuals are taken on sufficiently solid factual bases (par. 119). Hence, the review cannot stop at the logical cogency of the reasons stated in the decision, but must ascertain whether they are substantiated on the basis of reliable evidence. In the instant case, all that the Commission could rely on was the summary of reasons. The task of the Court, therefore, was to ascertain whether any one of those reasons, in the absence of further supporting information, could be sufficient to justify the listing of Mr Kadi.

Significantly, the Court did not equate the failure to disclose the evidence supporting the summary of reasons with an automatic violation of the right to defence (par. 137): the EU institutions are under no general obligations to submit this information to the Court. However, if they chose not to do so (or, like in the instant case, are simply unable to do so because the Sanctions Committee will refuse to share it), the risk of violation increases together with the summary's vagueness. The Court did not disregard the possibility that the confidentiality of the information require its non-disclosure for security reasons, but reserved for itself the power to ascertain whether a claim of non-disclosure is founded. If secrecy is not justified, the Court will examine the lawfulness of the contested measures solely on the basis of the disclosed information (par. 127). Otherwise, a balance must be struck between the need for

confidentiality and the principle of equality of arms – the Court will again be the subject entrusted with the determination of whether the balance was reached or, to the contrary, the rights of the person concerned are unduly restricted (par. 129).

The Court then criticised the General Court for dismissing wholesale the probative value of the summary of reasons for lack of detail (par. 140) and for inferring the breach of Mr Kadi's rights from the sole fact that the information held by the Sanctions Committee were not disclosed to anyone, let alone to Mr Kadi. In fact, it is possible, in the abstract, that the summary of reasons be sufficient evidence to justify the listing, and the simple fact that more detailed information are not disclosed is not *per se* decisive. The Court agreed with the General Court that one of the reasons of the summary was irredeemably vague (the one regarding the unspecified Albanian firms) but found on the contrary that the other reasons were sufficiently detailed, as they referred to the identity of the persons involved and the nature of the wrongdoing alleged.

The Court then examined the other allegations contained in the summary of reasons, together with Mr Kadi's comments and the Commission's replies (paras. 151 to 163). It noted that, invariably, the Commission had not been able to answer Mr Kadi's comments satisfactorily. In the face of detailed exculpatory submissions by Mr Kadi, the Commission's failure to substantiate further the reasons for listing was tantamount to a failure to discharge the necessary burden of proof. Therefore, the contested Regulation, as previously held by the General Court, is unlawful, and the errors committed in first instance did not affect the correctness of the order of annulment (paras. 164-165).

The Court appeared to stand by its 2008 precedent, in spite of the mounting pressure by all Member States and of the obvious risk that its reasoning be used in countless similar delisting cases in the future. Far from being a decision of principle, it is nevertheless a decision based on principles: its value lies squarely in its systemic impact (beyond the instant case), as it incarnates the idea that certain fundamental rights cannot be silenced under the cover of generic security concerns.

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The simple recapitulation of the court vicissitudes endured by Mr Kadi and his legal team is so dense that no further comments should be added here. Commentaries, of course, will flourish and some of them are already in the making (here an example). Readers are warmly encouraged to share their views in the comment section, below.

As a final thought, suffice it here to justify the title of the post, hinting at the striking parallel between Kadi's saga and Mr K's trial. Both Messrs K. faced everlasting and frustrating judicial proceedings based on allegations that were never fully communicated to them. Regardless of whether the Court's decision is correct (let alone just in a wider sense), it is somewhat comforting to note that the rule of law in the EU is alive and kicking. An individual, suspected of connections with Al Qaida, can succeed against the aggregate hostility of the Council, the Commission and a plethora of member states, with no other weapon than the set of guarantees listed in the Charter of Fundamental Rights (an apparently unfrozen wealth also helped, at least if one reads the names featuring in his all-star legal team).