EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Swiss authorities should have verified that UN sanctions listings were not arbitrary

In today's **Grand Chamber** judgment[1] in the case of Al-Dulimi and Montana Management Inc. v. Switzerland (application no. 5809/08) the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights.

The case concerned the freezing of the assets in Switzerland of Mr Al-Dulimi and the company Montana Management Inc. pursuant to UN Security Council Resolution 1483 (2003), which provided for sanctions against the former Iraqi regime.

The Court found that none of the provisions of Resolution 1483 (2003) expressly prohibited the Swiss courts from verifying, to ensure respect for human rights, the measures taken at national level to implement the Security Council's decisions. The inclusion of individuals and entities on the lists of persons subject to the UN sanctions entailed practical interferences that could be extremely serious for the Convention rights of those concerned.

In the Court's view, before taking those measures the Swiss authorities had a duty to ensure that the listings were not arbitrary. The Federal Court had merely verified that the applicants' names actually appeared on the Sanctions Committee's lists and that the assets concerned belonged to them. The applicants should, on the contrary, have been given at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the lists had been arbitrary. Consequently, the very essence of their right of access to a court had been impaired.

Lastly, noting that the UN sanctions system, and in particular the procedure for the listing of individuals and legal entities and the manner in which delisting requests were handled, had received very serious, reiterated and consistent criticisms, the Court found that access to the delisting procedure could not therefore replace appropriate judicial scrutiny at the level of the respondent State or even partly compensate for its absence.

Principal facts

The applicants are Mr Khalaf M. Al-Dulimi, an Iraqi national who was born in 1941 and lives in Amman (Jordan) and Montana Management Inc., a Panama-based company, of which the first applicant is the managing director. According to the UN Security Council, he was finance manager for the Iraqi secret services under the regime of Saddam Hussein.

After Iraq invaded Kuwait on 2 August 1990 the UN Security Council adopted two Resolutions calling upon States, whether or not UN members, to impose a general embargo on Iraq, which also concerned confiscated Kuwaiti resources and air transport. On 7 August 1990 the Swiss Federal Council accordingly adopted the "Iraq Ordinance" to implement those economic measures against Iraq.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

On 22 May 2003 the UN Security Council adopted Resolution 1483 (2003), imposing on States an obligation to "freeze without delay", among other funds, the financial assets or economic resources acquired by senior officials of the former Iraqi regime and entities belonging to them. On 24 November 2003 the UN Security Council set up a Sanctions Committee responsible for drawing up a list of persons concerned by those measures and on 26 April 2004 the Committee added Mr Al-Dulimi and Montana Management Inc. to its list. On 12 May 2004 the applicants' names were also added to the list of individuals and legal entities annexed to the Swiss Iraq Ordinance, as amended. Their assets in Switzerland were then frozen on that basis and the Federal Department for Economic Affairs subsequently initiated a confiscation procedure.

On 22 May 2006 the Federal Department for Economic Affairs sent the applicants a draft decision on the confiscation and transfer of the funds that were deposited in their names in Geneva. They challenged that decision unsuccessfully. Then in three decisions of 16 November 2006 the Federal Department for Economic Affairs ordered the confiscation of a certain number of assets, observing that the applicants' names appeared on the lists of individuals and entities drawn up by the Sanctions Committee, that Switzerland was bound by the resolutions of the UN Security Council and that it could only delete a name from the Swiss sanctions list where the relevant decision had been taken by the UN Sanctions Committee. It also indicated that an administrative-law appeal could be lodged with the Federal Court against its decisions.

On 19 December 2006 the UN Security Council adopted Resolution 1730 (2006), which created a delisting procedure.

The applicants lodged appeals with the Federal Court against each of the Federal Department's three decisions of 16 November 2006. They argued that the confiscation of their assets breached the property right guaranteed by the Swiss Federal Constitution and that the procedure leading to the addition of their names to the sanctions lists had breached the basic procedural safeguards enshrined in the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, the European Convention on Human Rights and the Federal Constitution.

In three almost identical judgments, the Federal Court dismissed the appeals, confining itself to verifying that the applicants' names actually appeared on the lists drawn up by the Sanctions Committee and that the assets concerned belonged to them.

On 13 June 2008 the applicants lodged a delisting application in accordance with the procedure introduced by Resolution 1730 (2006), but it was rejected. In a favourable opinion issued by the State Secretariat for Economic Affairs they were informed that they would be authorised to make use of the frozen assets to pay the fees charged by a lawyer for work on their defence in connection with the Swiss confiscation procedure and the delisting procedure.

Complaints, procedure and composition of the Court

The applicants complained that the confiscation of their assets had been ordered in the absence of any procedure compatible with Article 6 § 1 (right to a fair hearing) of the Convention.

The application was lodged with the European Court of Human Rights on 1 February 2008.

In its Chamber judgment of 26 November 2013 the Court found, by four votes to three, that there had been a violation of Article 6 § 1.

On 25 February 2014 the Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 14 April 2014 the panel of the Grand Chamber accepted that request. The applicants and the Government filed further written observations. Comments were also received from the French and United Kingdom Governments, which had been given leave by the President to intervene in the proceedings. A hearing was held on 10 December 2014.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Mirjana **Lazarova Trajkovska** ("The Former Yugoslav Republic of Macedonia"), *President*,
Dean **Spielmann** (Luxembourg),
Josep **Casadevall** (Andorra),
Angelika **Nußberger** (Germany),
Mark **Villiger** (Liechtenstein),
Ineta **Ziemele** (Latvia),
Khanlar **Hajiyev** (Azerbaijan),
Vincent A. **de Gaetano** (Malta),
Julia **Laffranque** (Estonia),
Paulo **Pinto de Albuquerque** (Portugal),
Linos-Alexandre **Sicilianos** (Greece),
Helen **Keller** (Switzerland),
André **Potocki** (France),
Aleš **Pejchal** (the Czech Republic),
Dmitry **Dedov** (Russia),
Egidijus **Kūris** (Lithuania),
Robert **Spano** (Iceland),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

Decision of the Court

Article 6 § 1

The Court began by reiterating that the right to a fair hearing had to be construed in the light of the rule of law, requiring that all litigants should have an effective judicial remedy enabling them to assert their civil rights. Everyone had the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. However, as the Court had constantly found, the right of access to a court was not absolute, but might be subject to limitations, these being permitted by implication since the right of access by its very nature called for regulation by the State. The Contracting States enjoyed a certain room for manoeuvre ("margin of appreciation") in such matters, although the final decision as to the observance of the Convention's requirements rested with the Court, which had to be satisfied that the limitations applied had not restricted the individual's access in such a way or to such an extent that the very essence of the right was impaired.

The Court found that, in its judgments of 23 January 2008, the Swiss Federal Court had set out very detailed reasons why it considered itself to be bound only to verify that the applicants' names actually appeared on the Sanctions Committee's lists and that the assets concerned belonged to them. On the other hand, it had refused to examine the applicants' allegations concerning the compatibility of the confiscation procedure with the fundamental procedural safeguards of a fair hearing enshrined in the Convention. The Federal Court had invoked the absolute primacy of obligations stemming from the UN Charter and UN Security Council decisions in accordance therewith over other norms of international law; the very precise and detailed nature of the obligations imposed by Resolution 1483 (2003) did not leave the States any discretion. In those circumstances, the Court was of the view that the applicants' right of access to a court had clearly been restricted and that it remained to be examined whether that restriction was justified.

The Court observed that the confiscation of the applicants' assets had been ordered pursuant to Resolution 1483 (2003), adopted by the UN Security Council with the aim of imposing on member States a series of measures designed to further the stabilisation and development of Iraq. One of

those measures was to ensure that the assets and property of senior officials of the former Iraqi regime – including Mr Al-Dulimi, considered by the Sanctions Committee to be a former head of finance of the Iraqi secret services – would be transferred to the Development Fund for Iraq. The Court acknowledged that the impugned decision was taken to implement an objective that was compatible with the Convention. It accepted the respondent Government's argument that the domestic courts' refusal to examine the applicants' complaints on the merits could be explained by their concern to ensure the efficient implementation, at domestic level, of the obligations under the Resolution. The refusal had thus pursued a legitimate aim, namely to maintain international peace and security.

The Court reiterated that, in spite of its specific nature as an instrument for the protection of human rights, the Convention was an international treaty to be interpreted in accordance with the relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969, which, in Article 31 § 3 (c), provided that the interpretation of a treaty must take account of "any relevant rules of international law applicable in the relations between the parties".

The Court emphasised that one of the basic elements of the current system of international law was constituted by Article 103 of the UN Charter, which asserted the primacy, in the event of conflict, of the obligations deriving from the Charter over any other obligation arising from an international agreement. One of the Charter obligations, under Article 25, was "to accept and carry out the decisions of the Security Council in accordance with ... the Charter".

The respondent Government had argued that Switzerland had been confronted with a conflict between its UN Charter obligations and its Convention obligations and that it could not be resolved because Switzerland had no room for manoeuvre in the implementation of the UN Resolution. The Court referred to the purposes for which the United Nations was created: as well as to maintain international peace and security, Article 1 of the Charter provided that the United Nations was created "[t]o achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms ...". Consequently, there had to be a presumption that the Security Council did not intend to impose any obligation on member States that would breach fundamental principles of human rights. Where a Security Council resolution did not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions at national level, the Court would always presume those measures to be compatible with the Convention and would in principle conclude that there was no conflict of obligations to be resolved by the State.

The Court found that none of the provisions of Resolution 1483 (2003) expressly prohibited the Swiss courts from verifying, to ensure respect for human rights, the measures taken at national level to implement the Security Council decisions. The inclusion of individuals and entities on the lists of persons subject to the UN sanctions entailed practical interferences that could be extremely serious for the Convention rights of those concerned. Being drawn up by bodies whose role was limited to the individual application of political decisions taken by the Security Council, those lists nevertheless reflected choices of which the consequences for the persons concerned might be so weighty that they were entitled to appropriate review.

The Court reiterated that the Convention was a constitutional instrument of European public order and that the States Parties were required to ensure a level of scrutiny of Convention compliance which preserved the foundations of that public order. One of the fundamental components of European public order was the principle of the rule of law, and arbitrariness constituted the negation of that principle. In the context of interpreting and applying domestic law, the Court left the national authorities very wide discretion, subject to a prohibition of arbitrariness. This would necessarily be true for the implementation of a Security Council resolution. Where a resolution did not contain any clear or explicit wording excluding the possibility of judicial supervision of the

measures taken for its implementation, it would always have to be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness could be avoided. By limiting that scrutiny to arbitrariness, the Court struck a fair balance between the need to ensure respect for human rights and the imperatives of the protection of international peace and security.

In the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts had to be able to obtain sufficiently precise information in order to exercise the requisite scrutiny. Any inability to access such information was therefore capable of constituting a strong indication that the measure was arbitrary. Accordingly, any State Party whose authorities gave effect to the addition of an individual or a legal entity to a sanctions list, without first ensuring that the listing was not arbitrary, would engage its responsibility under Article 6 of the Convention.

The Court found that Switzerland had not been faced in the present case with a real conflict of obligations such as to engage the primacy rule of the UN Charter. This finding made it unnecessary for the Court to determine the question of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the UN Charter, on the other.

As regards the substance of the sanctions – the freezing of the assets and property of senior officials of the former Iraqi regime – the Court took the view that the choice fell within the eminent role of the UN Security Council as the ultimate political decision-maker in this field. However, before taking the above-mentioned measures, the Swiss authorities had a duty to ensure that the listing was not arbitrary. In its judgments of 23 January 2008 the Federal Court had merely confined itself to verifying that the applicants' names actually appeared on the Sanctions Committee's list and that the assets concerned belonged to them, but that was insufficient to ensure that the applicants had not been listed arbitrarily. The applicants should have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary. The very essence of their right of access to a court had thus been impaired.

The Court further noted that the applicants had been, and continued to be, subjected to major restrictions. The confiscation of their assets had been ordered on 16 November 2006. The fact that it had remained totally impossible for them to challenge the confiscation measure for many years was hardly conceivable in a democratic society.

Lastly, the Court observed that the UN sanctions system, and in particular the procedure for the listing of individuals and legal entities and the manner in which delisting requests were handled, had received very serious, reiterated and consistent criticisms from UN Special Rapporteurs, the Council of Europe's Parliamentary Assembly, and a number of courts, such as the European Court of Justice, the United Kingdom Supreme Court and the Federal Court of Canada. The respondent Government themselves had admitted that the system applicable in the present case to the delisting procedure did not afford satisfactory protection. Access to that procedure could not therefore replace appropriate judicial scrutiny at the level of the respondent State or even partly compensate for its absence.

The Court held that there had been a violation of Article 6 § 1.

Article 41 (just satisfaction)

The Court found that there was no causal link between the violation of Article 6 § 1 and the allegation of pecuniary damage, the existence of such damage remaining for the time purely hypothetical. It further observed that the applicants had requested neither compensation for non-pecuniary damage nor the reimbursement of their costs and expenses. It was not therefore appropriate to reserve the question of just satisfaction and no award was due by way of just satisfaction.

Separate opinions

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to the judgment: the concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov; the concurring opinion of Judge Sicilianos; the concurring opinion of Judge Keller; the concurring opinion of Judge Kūris; the partly dissenting opinion of Judge Ziemele; and the dissenting opinion of Judge Nußberger.

The judgment is available in English and French.

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