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### Challenges and opportunities for judicial protection of human rights against decisions of the United Nations Security Council

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**Publication date**  
2013

[Link to publication](#)

#### **Citation for published version (APA):**

Hollenberg, S. J. (2013). *Challenges and opportunities for judicial protection of human rights against decisions of the United Nations Security Council*. [Thesis, fully internal, Universiteit van Amsterdam].

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## **8. Judicial Review of the Grounds and Evidence Underlying the Imposition of Targeted Sanctions**

### **8.1. Introduction**

A substantial number of the cases examined in the present research concern individuals who are affected by UNSC targeted sanctions. For the imposition of these sanctions a Sanctions Committee, or the UNSC itself, designates the individuals that have to be targeted. In this regard states have no scope of discretion. The individuals are directly targeted by the UNSC. An essential deficit, from the perspective of human rights protection, is that these individuals, as well as the courts before which they seek to challenge the implementation of the sanctions, do not have access to the grounds and evidence on which the designations are based. For three main reasons this unique practice deserves special attention in the context of the present research.

Firstly, the need for the affected individual to be informed of the evidence and grounds underlying the imposition of sanctions is of fundamental importance in order for him to effectively employ his right to a fair trial. Second, even if the UNSC were to agree to remedy other procedural flaws in the system of targeted sanctions, certain limitations on the access to relevant information are almost unavoidable in this system. It can function effectively only with a necessary amount of secrecy. For example, much of the evidence against designated individuals stems from national intelligence agencies. These agencies have a considerable interest in protecting their sources from being identified by individuals allegedly involved in terrorism.

Moreover, an extra obstacle to curb the system's flaws is the reluctance of designating states to share confidential information with other states, even within

the Sanctions Committee.<sup>1</sup> As a consequence, most (or even almost all) of the states that are under an obligation to implement UNSC targeted sanctions in their domestic legal orders do not have any knowledge of the grounds and evidence underlying the imposition of these sanctions. Hence the procedural deficits following from the lack of access to relevant information seem to be extremely difficult to remedy within the present system. This makes this issue even more urgent.

Third, in so far as domestic and regional courts could work as a substitute for an international judicial reviewing mechanism that is lacking, their performance of this task is bound to remain limited by the fact that they do not have access to substantial relevant information. Accordingly, this procedural deficiency more than the others determines the role that domestic and regional courts could play, in practice, to fill the gap in judicial protection in the international legal order. This chapter will focus on how these courts, as judicial institutions taking up the task of guaranteeing targeted individuals an effective legal remedy, assess and deal with the lack of access to relevant information.

Section 8.2 will start with a brief explanation of the relevant requirements under the right to a fair trial, and how this right relates to the obligation to state reasons, which is required in certain domestic administrative proceedings. After that, section 8.3 will analyse procedural guarantees which may compensate for the individual's lack of access to all relevant information underlying his designation. In this regard, the special advocates procedure and the role of the judiciary will be discussed. In addition, this section will examine the minimum level of information that has to be disclosed, both to the individual concerned as well as to the relevant court. It will also explain that this level is hard to meet by most

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<sup>1</sup> See D Cortright 'Human Rights and Targeted Sanctions: An Action Agenda for Strengthening Due Process Procedures' (November 2009) The Fourth Freedom Forum and the Kroc Institute for International Peace Studies, 17, and Special Rapporteur 'Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (26 September 2012) UN Doc A/67/396 [26].

domestic authorities, which do not possess the required information either. To meet some of these problems, section 8.4 will suggest an alternative listing procedure, which enhances the possibility of a judicial review of the grounds and evidence underlying an individual's designation. Finally, section 8.5 will explore what standard and intensity of review courts would have to apply if they were to be supplied with the relevant information. This may also be used as an indication of the level and quality of information with which courts need to be provided.

## **8.2. The Right to a Fair Trial and the Obligation to State**

### **Reasons**

Chapter 7.2.2 considered briefly the lawful limitations that may be imposed on an individual's right to a fair trial.<sup>2</sup> It held that the right contains several elements on which proportional limitations may be placed, under certain circumstances. One of these elements, which is central to the present chapter, is the individual's access to the information on the basis of which he is designated for the imposition of targeted sanctions. The principle of equality of arms and the adversarial nature of the proceedings require that the parties before a court have an (equal) opportunity to present their case;<sup>3</sup> that they have (equal) access to all relevant information brought to the court;<sup>4</sup> and that they are in a position to effectively challenge that information.<sup>5</sup> This chapter will explore what these obligations entail in cases concerning the implementation of targeted sanctions. These sanctions are determinative of the targeted individual's right to property,<sup>6</sup>

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<sup>2</sup> See also chapter 3.6.2.

<sup>3</sup> R White and C Ovey *The European Convention on Human Rights* 5th edn (Oxford University Press Oxford 2010) 261. I Cameron, Council of Europe 'The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions' (6 February 2006) 13.

<sup>4</sup> White and Ovey *ibid.*; B De Smet, J Lathouwers and K Rimanque 'Artikel 6 - Recht op een eerlijk proces (§ 1)' in J Vande Lanotte and Y Haeck (eds.) *Handboek EVRM* vol. 2 (I) (Intersentia Antwerpen 2004) 386-519, 453 and 454.

<sup>5</sup> De Smet et al. *ibid.* 453.

<sup>6</sup> For example, Cameron argues that considering the open-ended nature and the duration of these measures they cannot (or at least can no longer) be qualified as interim measures. I Cameron 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 *Nordic Journal of International Law* 159, 192.

and could also amount to defamation.<sup>7</sup> Therefore, they trigger the application of the right to a fair trial under its civil limb.<sup>8</sup>

The present discussion will rely primarily on the relevant standards developed in case law by the ECtHR. Domestic courts deciding on the same issue have repeatedly referred to this case law. In particular, the CJEU, which has considered the issue most extensively, relied for the determination, or confirmation, of the content of the European general principle of effective judicial protection on the relevant human rights laid down in the ECHR<sup>9</sup> and the case law of the ECtHR.<sup>10</sup>

The requirements under the right to a fair trial must be distinguished from similar and closely related guarantees granted within some domestic legal systems in relation to the administrative procedures by which the impugned decisions came about.<sup>11</sup> Within European law, for example, the imposition of targeted sanctions engages the right to a fair hearing.<sup>12</sup> This right pertains to the state of affairs before the executive has taken a final decision to impose sanctions. It is part of the administrative procedure.<sup>13</sup> It consists of two elements: first, the individual intended to be targeted needs to be informed of the decision the executive

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<sup>7</sup> See chapter 3.5.4.

<sup>8</sup> See chapter 3.5.6. In addition, considering the measures' nature, severity, and duration it might be justified characterizing them as a criminal charge, which would prompt the application of the right to a fair trial under the criminal limb. See a hint thereto in Case T-85/09 *Kadi v European Commission (Kadi II)* [2010] ECR II-05177 [150].

<sup>9</sup> Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)* [2008] ECR I-06351 [335].

<sup>10</sup> *Kadi II* (n 8) [176].

<sup>11</sup> See Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council of the European Union (OMPI)* [2006] ECR II-4665 [94]. See also C Eckes and J Mendes 'The Right to be Heard in Composite Administrative Procedures: Lost in Between Protection?' (2011) 36 *European Law Review* 651, 651.

<sup>12</sup> See, for example, *Kadi I* (appeal) (n 9) [338] et seqq. The right to a fair hearing is, within the European legal order, part of the right of defence. These are judge-made rights, which are now recognized in article 41 of the EU Charter on Fundamental Rights. See T Tridimas *The General Principles of EU Law* 2nd edn (Oxford University Press Oxford 2006) 370.

<sup>13</sup> *OMPI* (n 11) [94].

intends to take and the evidence underlying the reasons for that decision; and second, that individual must be able to make known his view on that evidence.<sup>14</sup>

However, to ensure the effective application, for example, of a decision to freeze an individual's assets, it is inevitable that the targeted individual is not informed of the sanction before its actual application. Obviously, this practice is necessary to avoid the targeted individual being able to transfer his funds from one to another account before they can be frozen. The EU judiciary accepted that for that reason, the targeted individual's enjoyment of this fundamental right could be limited lawfully in relation to the procedure leading to the initial decision to impose sanctions.<sup>15</sup> This limitation must be remedied, however, by communicating to the targeted individual the decision, and the grounds and evidence underlying that decision, immediately after the imposition of the sanctions.<sup>16</sup> This statement must contain sufficient information for the individual concerned to determine whether the decision is well founded, and to enable him to decide whether he should challenge it before the courts.<sup>17</sup>

These procedural requirements pertaining to the administrative proceedings are, as such, not guaranteed under international human rights law.<sup>18</sup> However, there is a close relationship between these guarantees and the right to a fair trial. A statement of reasons is the sole safeguard for a targeted individual to make

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<sup>14</sup> Ibid. [93].

<sup>15</sup> This does not count for the subsequent decision to maintain an individual on the list. Case C-27/09 P *French Republic v People's Mojahedin Organization of Iran* [2011] ECR I-0000 (*PMOI III*) [61]-[63]. See also *Kadi I* (appeal) (n 9) [338]-[341]; *OMPI* *ibid.* [128]-[131].

<sup>16</sup> See *OMPI* *ibid.* [140]; see also *Kadi I* (appeal) (n 9) [336]-[337] and [348]-[349].

<sup>17</sup> *OMPI* *ibid.* [138], [140]. The obligation to state reasons can be found in article 253 EC Treaty (now article 296 (2) of the Treaty on the Functioning of the European Union, Official Journal C83 of 30.3.2010 (TFEU)), but as a general principle of European law it goes beyond that article. See C Eckes *EU Counter-Terrorist Policies and Fundamental Rights; The Case of Individual Sanctions* (Oxford University Press Oxford 2009) 354. See also Tridimas 2006 (n 12) 408 *et seqq.*

<sup>18</sup> Hence, the General Court in the *OMPI* case found the arguments of the Council and the UK relating to article 6 (European) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221; CETS 5 (ECHR) irrelevant in this context. *OMPI* *ibid.* [94].

effective use of the legal remedies available to him.<sup>19</sup> Such a statement is necessary to enable the adversely affected individual to determine whether the decision is well founded or whether he has reason to challenge it. In the case of the latter option, he must be able to defend himself against the allegations. Without knowing the evidence underlying the decision to impose sanctions, the affected individual cannot make his case before a court. He cannot refute the evidence relied on or challenge its reliability. Therewith, he is not in a position to effectively enjoy legal protection, which may constitute a violation of his right to an effective legal remedy.<sup>20</sup>

Moreover, the court before which the case is eventually brought must have access to the grounds and evidence underlying the individual's listing to be able to engage in an effective judicial review of the lawfulness of that decision. If that court has no access to the information leading to the imposition of sanctions, it will be unable to effectively review the imposition of the measure as to its merits. This may, equally, constitute a violation of the affected individual's right to an effective legal remedy.<sup>21</sup> In particular, when not all information can be disseminated to the individual concerned, courts constitute an important safeguard for ensuring the individual's right to a fair trial.<sup>22</sup>

The CJEU has repeatedly held that the obligation to provide a targeted individual with a statement of reasons after the impugned decision is taken is a prerequisite for guaranteeing his right to effective judicial protection.<sup>23</sup> A failure to provide the affected individual with a statement of reasons cannot be remedied by the fact that he will be made familiar with the reasons for the measure during the

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<sup>19</sup> Ibid. [140].

<sup>20</sup> *Kadi I* (appeal) (n 9) [2008] ECR I-06351 [348]-[349].

<sup>21</sup> Ibid. [351]. See also Case C-550/09 *E and F* [2010] ECR I-06213 [57]. The General Court referred to this in *Kadi II* (n 8) [137].

<sup>22</sup> See *infra* subsection 8.3.2.2.

<sup>23</sup> *Kadi I* (appeal) (n 9) [349]; *Kadi II* (n 8) [181]; *OMPI* (n 11) [165]. See also *supra* section 8.2.

proceedings before the courts.<sup>24</sup> Allowing such a practice might limit the individual's possibility to contest the reasons and, accordingly, adversely affect the principle of equality before the court.<sup>25</sup>

### **8.3. Counterbalancing the Limitation on Access to Information**

Even after the decision to impose sanctions is taken, not all evidence can be communicated to the targeted individual, for fear of disseminating to alleged terrorists security sensitive information.<sup>26</sup> Also, within the Sanctions Committees, member states are reluctant to openly share such information in the presence of the representatives of other member states.<sup>27</sup> States supplying such sensitive information argue that there is a legitimate security interest in not disseminating the evidence on which the decision is based. Therefore, a careful balance will have to be found in order to facilitate the concerns of both the targeted individuals and the states designating them to be sanctioned.

To solve the tension between these two competing interests, which are in themselves both legitimate, the CJEU repeatedly referred to the ECtHR's decision in the *Chahal* case.<sup>28</sup> That court recognized that in matters concerning national security, domestic authorities could be required to rely on confidential information.<sup>29</sup> However, the ECtHR added that invoking national security concerns does not absolve these authorities from judicial review.<sup>30</sup> Hence a balance has to be found between securing the public interests concerned and providing the adversely affected individual with a sufficient degree of judicial protection.<sup>31</sup>

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<sup>24</sup> *OMPI* *ibid.* [139].

<sup>25</sup> See *ibid.*

<sup>26</sup> *Kadi I* (appeal) (n 9) [342]; *OMPI* *ibid.* [148].

<sup>27</sup> See Cortright 2009 (n 1) 17, and Special Rapporteur 2012 (n 1) [26].

<sup>28</sup> *Chahal v The United Kingdom* [1996] (App. No. 22414/93). See *Kadi I* (appeal) (n 9) [344]; *Kadi II* (n 8) [146]; *OMPI* (n 11) [156].

<sup>29</sup> *Chahal* *ibid.* [131]. See also *Öcalan v Turkey* (Application no. 46221/99) [106].

<sup>30</sup> *Chahal* *ibid.*

<sup>31</sup> See *Kadi II* (n 8) [146]-[147]. See also *Kadi I* (appeal) (n 9) [342], and *OMPI* (n 11) [141].

Yet, whatever the circumstances, the ECtHR requires a minimum level of information that should be disclosed in order to guarantee the individual's right to a fair trial. Moreover, it demands that, where full disclosure is not possible, this is counterbalanced in such a way that the individual concerned has a possibility to effectively challenge the allegations made against him. A method that may assist in doing that is the special advocates procedure. This procedure will be explained in subsection 8.3.1. After that, subsection 8.3.2 will consider the situation where no such procedure is available. It will discuss whether that has consequences for the minimum level of information that has to be communicated to the adversely affected individual (8.3.2.1). It will also consider the position of courts, which operate as the primary procedural guarantee (8.3.2.2). However, in order for these courts to be able to do that, they need to have access to the grounds and evidence underlying an individual's designation. A problematic issue in this regard, which will be discussed in subsection 8.3.3, is that most domestic authorities implementing targeted sanctions do not possess such information themselves. Accordingly, they cannot possibly share that with the courts and the individual concerned.

### **8.3.1. The Special Advocates Procedure**

Special advocates procedures are in place in countries such as Canada, New Zealand, and the United Kingdom.<sup>32</sup> These advocates are security-cleared lawyers who operate in certain categories of cases that involve the use of confidential information. They are afforded access to such information and are present at the in-camera hearing by the court that is engaged in reviewing the case. In this way these advocates can test both the secret material's evidentiary value (the representation function) and the executive's claim for confidentiality

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<sup>32</sup> The mechanism originated in Canada, in a different guise, however, than was later understood by the ECtHR and followed by the UK. Eventually, Canada in its turn adopted the UK model. See J Ip 'The Rise and Spread of the Special Advocate' (2008) Public Law WIN 717, 719 and 728.

(the disclosure function).<sup>33</sup> They can cross-examine the witnesses and assist the court in testing the strength of the state's case. However, in practice, special advocates primarily submit arguments for the release of allegedly confidential information. Their representative function remains limited, since they are, in principle, allowed to receive instructions from the adversely affected individuals only before they have had access to the confidential material.<sup>34</sup> Therefore the affected individuals can only instruct the special advocate in advance, on the basis of the executive's statement summarizing the case.<sup>35</sup>

The Court of Justice in the *Kadi I* case suggested, in covered terminology, that such a special advocates procedure might constitute a useful technique accommodating a fair balance between security concerns and affording the individual a sufficient measure of procedural justice.<sup>36</sup> It confined itself to referring to the paragraphs in the ECtHR's judgment in the *Chahal* case dealing with the option of employing special advocates in order to arrive at a fair balance between both concerns. The intervenors in that case had brought the ECtHR's attention to the use of special advocates in Canada.<sup>37</sup> There, these advocates were used in the context of special immigration cases involving national security, but in a somewhat different fashion, however, than was reflected in the Court's judgment.<sup>38</sup> Be that as it may, the ECtHR referred to this procedure as an example of a technique which could accommodate legitimate security concerns and, at the same time, accord the affected individual a substantial measure of procedural justice.<sup>39</sup>

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<sup>33</sup> See House of Commons Constitutional Affairs Committee 'The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates' Seventh Report of Session 2004–05 Vol I, 23.

<sup>34</sup> Special advocates can ask for permission to seek further instructions from the individual concerned. The views differ on whether such permission will be given in practice, and whether such feedback is actually very useful. See *Secretary of State for the Home Department v AF and Others (Control Orders II)* [2008] EWCA Civ 1148 [72]-[74].

<sup>35</sup> See as to this procedure *Chahal* (n 28) [144] and House of Commons 2004 (n 33) 23.

<sup>36</sup> *Kadi I* (appeal) (n 9) [344]. See also *Kadi II* (n 8) [134], and also *OMPI* (n 11) [158].

<sup>37</sup> The intervenors were Amnesty International, Liberty, the AIRE Centre and JCWI. See *Chahal* (n 28) [131] and [144].

<sup>38</sup> See Ip 2008 (n 32) 719 and 728.

<sup>39</sup> *Chahal* (n 28) [131].

In response to this decision, the United Kingdom adopted the special advocates procedure in special immigration cases.<sup>40</sup> Subsequently it extended this model to other categories of cases, including those concerning anti-terrorism measures, such as preventive detentions and control orders.<sup>41</sup> In contrast to those measures, the UK government did not create a statutory power for the use of special advocates in the procedure concerning the implementation of UNSC targeted sanctions.<sup>42</sup> The Court of Appeal in the *A, K, M, Q and G* case considered that in respect of the orders implementing these sanctions, there must be procedures that afford affected individuals the possibility to discover, as far as possible, the cases against them, so that they may have an opportunity to raise effective challenges.<sup>43</sup> Such procedures could involve the use of special advocates, the Court held.<sup>44</sup> Regarding the lack of a statutory provision, it considered that ‘the authorities show’ that in ‘an appropriate case’ courts themselves would have the power to order the assistance of a special advocate.<sup>45</sup> They should only do so, however, in very exceptional circumstances and as a last resort.<sup>46</sup> No court has yet done so.

Moreover, as the Court of Appeal recognized, with regard to the implementation of UNSC resolution 1267 the difficulty may arise that the executive itself may not be aware of all the grounds and evidence for listing.<sup>47</sup> In such a situation a special advocates procedure would not be able to alleviate the difficulties the affected individual meets in effectively challenging the imposition of sanctions.

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<sup>40</sup> See House of Commons 2004 (n 33) [48].

<sup>41</sup> Ibid. [50]. See also Ip 2008 (n 32) 721.

<sup>42</sup> It appeared to have been the government’s intention to make statutory provision for special advocates from the outset. Still, two years after the adoption of the domestic implementation, no such procedure was yet in force. This delay remained unexplained. *A, K, M, Q, & G v HM Treasury* [2008] EWCA Civ 1187 [57]-[58], [153].

<sup>43</sup> Ibid. [120].

<sup>44</sup> Ibid.

<sup>45</sup> The Court found authority in particular in the decision of the House of Lords in *R (Roberts) v Parole Board* [2005] UKHL 45 [2005] 2 AC 738. There ‘it was held that the court had power to do so even where it was not sanctioned by Parliament’. *A, K, M, Q, & G* (appeal) (n 42) [58].

<sup>46</sup> *A, K, M, Q, & G* ibid.

<sup>47</sup> Ibid. [120].

Subsection 8.3.3 will consider the topic of implementation of UNSC sanctions by domestic authorities which themselves do not possess the relevant information underlying the imposition of these sanctions.

### **8.3.1.1. The Minimum Level of Disclosure of Information**

As was mentioned, in the United Kingdom statutory provisions provide for the use of special advocates in domestic anti-terrorism proceedings concerning the implementation of measures such as preventive detentions and control orders. In this context, the fairness of the procedure was subject to judicial review in several cases brought by individuals who were suspected of being involved in terrorism-related activities.

The ECtHR, in the *A and Others v United Kingdom* case, which concerned the issue of preventive detention, imposed as a rigid principle that no matter what,<sup>48</sup> whatever compelling security interest was involved,<sup>49</sup> the affected individual must always ‘be given sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.’<sup>50</sup> Lord Hope, in the subsequent *Control Orders II* case, found that this threshold was a core irreducible minimum that could not be shifted.<sup>51</sup> Similarly, Lord Phillips understood the ECtHR’s decision to mean that the individual concerned must be made familiar, at least, with the essence of the case against him.<sup>52</sup> What this essence entails in practice will be elaborated on in subsection 8.3.2.1.

The ECtHR required dissemination of sufficiently specific allegations or grounds underlying the decision, but not necessarily also the evidence relied on. The Court went so far to say that even if all of the underlying evidence remains undisclosed, the procedure would still be in accordance with the ECHR, as long

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<sup>48</sup> See *Secretary of State for the Home Department v AF (FC) and another (Control Orders II)* [2009] UKHL 28 [71], [119].

<sup>49</sup> See *ibid.* [116].

<sup>50</sup> *A and Others v The United Kingdom* [2009] (App No. 3455/05) [220]. See also *Control Orders II* (UKHL) (n 48) [59] and [116].

<sup>51</sup> *Control Orders II* *ibid.* [80]-[81].

<sup>52</sup> *Ibid.* [65].

as the adversely affected individual is made aware of sufficiently specific allegations on the basis of which he can effectively instruct a special advocate.<sup>53</sup> Lord Hope, in the *Control Orders II* case, acknowledged that the ECtHR did not insist on disclosure of the evidence underlying the allegations against the individual concerned.<sup>54</sup> The individual is entitled only to the substance of the allegations.<sup>55</sup>

This standard deviates from the standard required under the criminal limb of the right to a fair trial.<sup>56</sup> In cases classified under the criminal limb, anonymous or confidential information cannot be the sole or decisive basis for a criminal conviction.<sup>57</sup> The same is true for situations where there are mechanisms in place, such as a special advocates procedure, which counterbalance sufficiently the limitations under which the defence labours.<sup>58</sup> Hence, in relation to the measures presently discussed, the requirements under the right to a fair trial seem to be lower. Still, the ECtHR in the *A and Others v United Kingdom* case considered, with regard to the measure of preventive detention, that the hugely invasive nature of that measure justified the application of substantially the same fair trial guarantees as the right to a fair trial in its criminal aspect.<sup>59</sup>

However, despite using the language of article 6 of the ECHR in its criminal aspect, the ECtHR arrived at a different result.<sup>60</sup> According to Lord Brown, this

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<sup>53</sup> *A v United Kingdom* (n 50) [220].

<sup>54</sup> *Control Orders II* (UKHL) (n 48) [86]. See to the same effect Lord Phillips at [59].

<sup>55</sup> *Ibid.* [86] and [120].

<sup>56</sup> On the different limbs of the right to a fair trial see chapter 3.5.6.

<sup>57</sup> *Kostovski v The Netherlands* [1989] (App. No. 11454/85) [37]-[45]. See also *Control Orders II* (UKHL) (n 48) [120].

<sup>58</sup> *Doorson v The Netherlands* [1996] (App. No. 20524/92) [76].

<sup>59</sup> The ECtHR was concerned with infringements of the right under article 5 (4) ECHR (n 18). Yet, in the circumstances of the present case, the Court found that that provision ‘must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect.’ See *A v United Kingdom* (n 50) [203], [217] and [233]. See in a similar vein, Lord Phillips in *Control Orders II* (UKHL) (n 48) [57].

<sup>60</sup> *A v United Kingdom* *ibid.* [120]-[121]. Lord Hoffmann appears not to have understood the ECtHR’s decision in that way. He held that ‘the Strasbourg court has imposed a rigid rule that the requirements of a fair hearing are never satisfied if the decision is “based solely or to a decisive degree” on closed material’. *Control Orders II* *ibid.* [71].

followed from the Court's searching for something of a compromise between the interests concerned, taking into account the demands of national security.<sup>61</sup> However, he found that in cases where it would be impossible to separate the allegations from the evidence and underlying sources, the interests of a fair hearing may have to prevail over that of national security.<sup>62</sup> That is where he thought the ECtHR struck the balance between the competing interests at issue.<sup>63</sup>

Accordingly, the ECtHR in the *A and Others v United Kingdom* case refined the requirements that need to be taken into account when drawing a fair balance between the targeted individual's human rights and the need to protect the confidential nature of security sensitive information, as indicated in the *Chahal* case.<sup>64</sup> It acknowledged both interests, but the Court also recognized a core requirement of the right to a fair trial that cannot be derogated from, even in view of legitimate security concerns.<sup>65</sup> This could be secured only by providing the individual concerned with sufficient information which enables him to effectively instruct a special advocate.<sup>66</sup> This confirms the idea of the right to a fair trial – which in principle can be subject to lawful limitations – containing an essential core.<sup>67</sup>

### **8.3.1.2. Fairness of the Special Advocates Procedure**

The fact that the ECtHR considered what should be the minimum level of disclosure of confidential information in cases in which a special advocates procedure is in place does not mean that the Court has given 'a ringing endorsement' of this procedure as such.<sup>68</sup> It has merely confirmed that a special

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<sup>61</sup> *Control Orders II* *ibid.* [120].

<sup>62</sup> *Ibid.* [121].

<sup>63</sup> *Ibid.*

<sup>64</sup> E de Wet 'Distilling Principles of Judicial Protection from Judicial and Quasi Judicial Decisions' (expert workshop on Due Process Aspects in the Implementation of Targeted United Nations Security Council Sanctions, organised by the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame New York 30 October 2009) 18.

<sup>65</sup> *A v United Kingdom* (n 50) [205], [220].

<sup>66</sup> *Ibid.* [205], [220].

<sup>67</sup> See chapter 3.6.2.

<sup>68</sup> See House of Commons 2004 (n 33) [49].

advocates procedure could be a means to ensure a fair balance between the conflicting concerns, in the sense that it could provide an important safeguard in addition to an independent court.<sup>69</sup> The Court required that there was, at least, some procedure followed by the judicial authorities to counterbalance the difficulties caused to the targeted individual by a limitation on his human rights, in order to guarantee a fair trial.<sup>70</sup> What is important is that the overall process is fair.<sup>71</sup> The Court has never been required to give a definitive ruling on whether the special advocates procedure, as such, complies with the ECHR.<sup>72</sup>

The special advocates procedure has not been free from critique. Lord Steyn, dissenting in the *Roberts* case, for example, was very critical of the representative aspect of the special advocate. He found the procedure to lack completely the essential characteristics of a fair hearing.<sup>73</sup> Indeed, the representative function remains underdeveloped if the special advocate is not allowed to take any further instructions after he has seen the confidential material.<sup>74</sup> Note that the original Canadian procedure, which had been misconstrued by the ECtHR in the *Chahal* case,<sup>75</sup> did allow him to maintain contact with the individual concerned.<sup>76</sup> The UK system provides for this possibility only when the special advocate has received permission to do so.

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<sup>69</sup> *A v United Kingdom* (n 50) [219].

<sup>70</sup> *Ibid.* [205]. In the following paragraphs [206]-[209] it considered the role a trial judge may play in situations concerning the use of confidential information in criminal proceedings. See also Baroness Hale in *Secretary of State for the Home Department v MB and AF (Control Orders I)* [2007] UKHL 46 [62]-[63], also [65] and Eckes 2009 (n 17) 198. See, similarly, D Barak-Erez and M Waxman 'Secret Evidence and the Due Process of Terrorist Detentions' (2009) 48 *Columbia Journal of Transnational Law* 3.

<sup>71</sup> See *A v United Kingdom* *ibid.* [208]. See also *Control Orders II* (UKHL) (n 48) [78], and see Ip 2008 (n 32) 734

<sup>72</sup> *A v United Kingdom* *ibid.* [209], [211]. According to Ip, writing before the said case: 'At best, the court has "tacitly endorsed" their use.' Ip *ibid.* 733.

<sup>73</sup> See Ip *ibid.* 731.

<sup>74</sup> See also *ibid.* Recommendations on improvements in this regard were also voiced in the Report on SIAC of the Constitutional Affairs Committee. House of Commons 2004 (n 33) [86].

<sup>75</sup> See footnote 32.

<sup>76</sup> Ip 2008 (n 32) 720.

Views differ on whether such permission will be given in practice, and whether such feedback will actually be very useful.<sup>77</sup>

The other element in the special advocate's function – that of testing the executive's claim regarding the need for confidentiality – remains undoubtedly an important task. As Baroness Hale held, in this regard, in cases concerning terrorism there is a tendency to overstate the need for secrecy.<sup>78</sup> However, she recognized that in practice, when the executive objects to disclosure of confidential information, there is very little scope for contesting that objection.<sup>79</sup> She found the vast majority of those objections to be upheld.<sup>80</sup>

In conclusion, a special advocates procedure could constitute part of safeguarding a fair balance between the security concerns of the executive and effective judicial protection of the targeted individual. These advocates may assist courts in counterbalancing the limitations on individuals' lack of access to relevant information, and ensure them an effective legal remedy.<sup>81</sup> However, the fairness of a procedure depends on the process as a whole. In the end, it should be an independent court that determines how a fair balance should be struck. It is in the best position to assess the extent to which the targeted individual is disadvantaged by the lack of disclosure.<sup>82</sup>

The special advocate can, at most, provide an additional safeguard, however important. He can question the executive's argument for the need for secrecy, by making to the judge submissions regarding the case for additional disclosure, and he can test the evidence and present arguments on behalf of the affected individual during the closed hearings.<sup>83</sup> However, the latter function in particular

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<sup>77</sup> *Control Orders II* (appeal) (n 34) [72]-[74].

<sup>78</sup> *Control Orders I* (UKHL) (n 70) [66].

<sup>79</sup> See *Control Orders II* (UKHL) (n 48) [104]-[105].

<sup>80</sup> See *ibid.*

<sup>81</sup> See *A v United Kingdom* (n 50) [219].

<sup>82</sup> *Ibid.* [219], see also *Control Orders II* (UKHL) (n 48) [79].

<sup>83</sup> See *A v United Kingdom* (n 50) [220], see also *Control Orders II* (UKHL) (n 48) [79].

is bound to remain limited if the individual concerned cannot effectively instruct the special advocate. This may be due either to the fact that he does not have sufficiently precise allegations to which to respond, or to the prohibition on contact after the special advocate has had access to the confidential information.

### **8.3.2. The Lack of a Special Advocates Procedure in Relation to Targeted Sanctions**

As was already mentioned, in the United Kingdom there is no statutory provision on the application of special advocates in relation to the implementation of targeted sanctions. Similarly, in the European legal order, and many other domestic legal systems, no such procedure is in place. What should a fair balance entail in this situation? What information should be disseminated to the individual concerned, and are other procedural guarantees available securing his right to a fair trial?

#### **8.3.2.1. Disclosure of Information to the Individual Concerned**

The ECtHR did not consider whether the required level and kind of information that has to be disseminated to the individual concerned is dependent on the question of whether, in a particular situation, a special advocates procedure is in place. It could be argued that it should, because the Court based the criteria for the dissemination of information on the question of whether the affected individual could, with that information, effectively instruct a special advocate in order to be able to enjoy a fair trial. In the absence of a special advocates procedure, it is to be expected that the individual, who must then defend himself before the court, would need more information to be able to challenge the allegations made against him as effectively.

In relation to the targeted sanctions implemented in the EU legal order, there is no special advocates procedure: still, the General Court in the *Kadi II* case relied on the standard for dissemination of information as applied by the ECtHR in a case in which such a procedure was available. The General Court mentioned the

existence of these special procedures,<sup>84</sup> but did not consider the relevance thereof in the context of assessing the level of information that had to be disseminated. It merely found that Mr Kadi had to be put in a position in which he could mount an effective challenge to any of the allegations made against him.<sup>85</sup> Relying on the *A and Others v United Kingdom* case before the ECtHR, it specified in further detail what a statement of reasons must contain.<sup>86</sup> It deduced from that court's case-by-case assessment that the disclosed material cannot solely be of a general nature and must contain specific information, in order to allow the individual concerned to effectively challenge the allegations against him.<sup>87</sup>

The General Court quoted from the ECtHR's assessment a particular instance in which the disseminated information was deemed sufficient.<sup>88</sup> In that instance there were detailed allegations about meetings with terrorist suspects at specific places and times; about purchasing specific equipment; and possessing specific documents linked to named terrorist suspects.<sup>89</sup> Another instance in which the ECtHR considered the information to have sufficient detail was when the individuals concerned were alleged to have attended a terrorist training camp at a stated location between stated dates.<sup>90</sup>

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<sup>84</sup> The General Court referred to the suggestion of employing such procedures made by the Court of Justice in the *Kadi I* case, but went on to ignore it in the application to the present case. *Kadi II* (n 8) [134]. See also *infra* footnote 88.

<sup>85</sup> See *ibid.* [177].

<sup>86</sup> Remarkably, the Court of Justice rejected reference to this case law in quite a similar case, because it considered the right to property not to enjoy the same protection as the absolute prohibition of torture, which was in addition to the right to liberty also invoked in the *A and others v The United Kingdom* case. Case C-548/09 P *Bank Melli Iran v Council of the European Union* [2011] [89].

<sup>87</sup> See *Kadi II* (n 8) [176].

<sup>88</sup> What the General Court did not mention was that the ECtHR considered these criteria on accessibility of information in the light of the targeted individual being able to effectively instruct the special advocate, which was discussed in subsection 8.3.1. This was also how the House of Lords understood the ECtHR's assessment. Lord Phillips held that the essence of the ECtHR's decision is that the affected individual 'must be given sufficient information about the allegations against him to enable him to give effective instructions [to the special advocate] in relation to those allegations.' *Control Orders II* (UKHL) (n 48) [59] and [81], see also [116].

<sup>89</sup> *Kadi II* (n 8) [176]. See *A v United Kingdom* (n 50) [222].

<sup>90</sup> According to the ECtHR 'given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for

From these examples it appears that the allegations need to be sufficiently detailed to enable the targeted individual to challenge them effectively, other than merely denying them. When the General Court applied this requirement to the facts of the *Kadi II* case, it concluded that it was clear that Mr Kadi was not provided with sufficient information to effectively challenge any of the allegations against him.<sup>91</sup> The summary of reasons provided, for example, that Mr Kadi ‘was a major shareholder in a bank in which “planning sessions for an attack against a United States facility in Saudi Arabia may have taken place”.’<sup>92</sup> This statement, according to Mr Kadi, contained ‘no indication as to the attack in question, the facility, the date, whether the meetings did in fact take place, the alleged connection with Al-Qaeda or the alleged involvement of the applicant’.<sup>93</sup> The Court agreed.<sup>94</sup> It found that the statement of reasons did not need to be exhaustive, but at least had to contain sufficiently specific allegations.<sup>95</sup> It considered the scarce information and general allegations clearly insufficient to enable Mr Kadi to bring an effective challenge to the allegations against him.<sup>96</sup> Therefore the Court concluded that Mr Kadi’s right of defence and his right to an effective judicial review were violated.<sup>97</sup>

In contrast to the ECtHR and the House of Lords, the General Court did not make a distinction between the allegations and the evidence upon which these allegations were founded.<sup>98</sup> Accordingly, the question arises whether the General Court has intentionally struck a different balance in the absence of a special

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example of an alibi or of an alternative explanation for his presence there.’ *A v United Kingdom* *ibid.* [220].

<sup>91</sup> *Kadi II* (n 8) [177].

<sup>92</sup> This was one of the examples submitted by Mr Kadi himself, see *ibid.* [157].

<sup>93</sup> *Ibid.*

<sup>94</sup> The Court held that ‘all the applicant’s observations and arguments summarised at paragraph 157 above are well founded.’ *Ibid.* [177].

<sup>95</sup> *Ibid.* [176]. See also *Kadi I* (appeal) (n 9) [342], and *A v United Kingdom* (n 50) [220].

<sup>96</sup> *Kadi II* (n 8) [174].

<sup>97</sup> The breach of the right to effective judicial review followed from its relationship with the right of defence. *Ibid.* [179], [181]. See *supra* section 8.2.

<sup>98</sup> *Ibid.* [181], see similarly [173]. The Court of Justice did make such a distinction in a rather similar case. See *Bank Mellî Iran* (n 86) [88].

advocates procedure, or whether it was following the ECtHR's judgment rather inaccurately. Alternatively, the Court might have regarded itself, as an independent judicial institution, as able to sufficiently guarantee the individual's right to a legal remedy. Support for this contention can be found in the Court's consideration that the infringement with the individual's right to effective judicial review had not been remedied by the present procedures, since the Court itself was not informed of the grounds and evidence for listing either.<sup>99</sup> Accordingly, it was not able to undertake any review of the lawfulness of the implementation of the targeted sanctions.<sup>100</sup> This could be read to imply that the infringement with Mr Kadi's right to effective judicial review could have been remedied if the Court itself was supplied with that information.<sup>101</sup> In other words, as long as the Court is provided with the grounds and evidence underlying the imposition of the sanctions, the targeted individual only needs to be informed of sufficiently specific allegations.

In principle, this result seems to fit with the ECtHR's decision, which held that a fair trial would be possible if the limitations on the individual's rights are adequately counterbalanced by judicial safeguards.<sup>102</sup> It is primarily for independent courts, according to the ECtHR, to ensure that the individual concerned is afforded an effective legal remedy.<sup>103</sup> The procedure of special advocates could constitute an important additional safeguard.<sup>104</sup> Such a procedure may enhance the possibilities for targeted individuals to challenge effectively the imposition of sanctions before courts, in situations in which there is only limited access to confidential grounds and evidence,<sup>105</sup> but it is not the sole possibility.

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<sup>99</sup> Ibid. [182].

<sup>100</sup> Ibid. [183].

<sup>101</sup> Ibid. [181], see to the same effect *Kadi I* (appeal) (n 9) [348]-[349].

<sup>102</sup> *A v United Kingdom* (n 50) [205].

<sup>103</sup> Ibid. [218]-[219].

<sup>104</sup> Ibid. [219].

<sup>105</sup> *Control Orders I* (UKHL) (n 70) [35].

### 8.3.2.2. Disclosure of Information to the Judiciary

Accordingly, the prime responsibility for ensuring a fair procedure lies with the courts.<sup>106</sup> They are in the best position to review whether no material was unnecessarily withheld from the individual concerned.<sup>107</sup> However, in order for them to carry out that function, they themselves need to have access to the relevant information. In addition, they need such information also to review effectively the lawfulness of an impugned measure.

The General Court in the *Kadi II* case considered that, in order for it to be able to review the lawfulness and merits of the sanction measures, it must have access to the evidence and information relied on by the competent European institution.<sup>108</sup> This was necessary, according to the Court, to counterbalance the restrictions imposed on the affected individual's right to a fair hearing and right to defence,<sup>109</sup> following from the implementation of targeted sanctions.<sup>110</sup> In these circumstances, the Court held, judicial review is the only safeguard for ensuring that 'a fair balance is struck between the need to combat terrorism and the protection of fundamental rights.'<sup>111</sup>

Similarly, the Court of Justice in the *Kadi I* case suggested that the infringement of Mr Kadi's right to an effective legal remedy, resulting from the non-communication of evidence to him, could have been remedied if the Court was given enough information in order to guarantee sufficiently his judicial protection.<sup>112</sup> However, since the Council of the European Union took the fundamental position not to adduce 'evidence of that kind' to the European judiciary, the Court was not in a position to exercise any judicial review.

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<sup>106</sup> See *A v United Kingdom* (n 50) [219], and to the same effect *Control Orders II* (UKHL) (n 48) [86] and [121].

<sup>107</sup> *Control Orders II* *ibid.* [121].

<sup>108</sup> *Kadi II* (n 8), see also *OMPI* (n 11) [155].

<sup>109</sup> See *supra* subsection 8.2.

<sup>110</sup> In *Kadi II* (n 8) [144] the Court referred to the right of defence, and in *OMPI* (n 11) [155] the Court referred to the right to a fair hearing.

<sup>111</sup> *Kadi II* *ibid.* [144].

<sup>112</sup> See *Kadi I* (appeal) (n 9) [350].

Therefore the Court found that the right to an effective legal remedy had not been observed.<sup>113</sup>

From the *Kadi* judgments it follows that the executive must provide the courts with sufficient information to enable them to engage in a ‘full’ or ‘strict’ judicial review of the lawfulness of that decision.<sup>114</sup> Accordingly, the courts must be furnished with all the relevant information that they will need in order to carry out such a review.<sup>115</sup> This includes the evidence underlying the imposition of the sanctions.<sup>116</sup> This leaves the relevant institution very little possibility for not sharing any of the essential information with the judiciary.

In a similar vein, the UK High Court in the *HAY* case held that as long as not all information is shared with the Court, it is not able to determine whether a different outcome would have been possible.<sup>117</sup> The UK Supreme Court, in a joined appeal of that case with the *A, K, M, Q and G* case, confirmed that the right to an effective remedy requires that the targeted individuals must have a means of subjecting the actual designation by the 1267 Committee, underlying the domestic implementation of the sanctions, to judicial review.<sup>118</sup> The General Court in the *Kadi II* case confirmed that an effective review must concern, indirectly, the substantive assessments made by the UNSC Sanctions Committee, and the evidence underlying its decisions.<sup>119</sup> This, of course, is only possible when the domestic organs implementing the measures are themselves aware of the grounds and evidence underlying an individual’s designation.

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<sup>113</sup> Ibid. [351].

<sup>114</sup> See, respectively, Ibid. [326] and *Kadi II* (n 8) [144].

<sup>115</sup> See P De Sena and M Vitucci 'The European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values' (2009) 20 European Journal of International Law 193, 225.

<sup>116</sup> *Kadi II* (n 8) [135].

<sup>117</sup> *HAY v HM Treasury and Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1677 (Admin) [30].

<sup>118</sup> *HM Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2 & UKSC 5; ILDC 1533 (UK 2010) (*Ahmed*).

<sup>119</sup> *Kadi II* (n 8) [129].

### **8.3.3. Domestic Authorities not Possessing all Relevant Information**

A meaningful judicial review of the grounds and evidence for blacklisting, even with the imposition of procedural guarantees, such as the use of special advocates, is bound to remain illusory if domestic authorities implementing the targeted sanctions do not have access themselves to all confidential information underlying an individual's designation. This problem did not occur in the control orders and preventive detention cases discussed earlier, because they concerned purely domestic measures in respect of which the United Kingdom must have been aware of all the information leading to the imposition of those sanctions. The problem of domestic authorities themselves not possessing sufficient information to ensure an effective legal remedy surfaces only in regard to the imposition of targeted sanctions based on designations by the UNSC or a Sanctions Committee, such as with the 1267 regime. In that situation, confidential grounds and evidence for listing are usually not communicated to the domestic authorities that have to implement these measures. As was mentioned earlier, even within the UNSC Sanctions Committees, member states are reluctant to share with other member states security sensitive information that underlies individuals' designations.<sup>120</sup> As a consequence, only authorities of the state that initiated a specific individual's designation at a Sanctions Committee might be aware of all the grounds and evidence for listing.

A recently adopted UNSC resolution seeks to increase the transparency of the Sanctions Committee's decision-making in this regard. It directs the Committee members to provide reasons for objecting to delisting requests, and calls upon the Committee to share its reasons with relevant states and national and regional courts.<sup>121</sup> These reasons for objecting to an individual's delisting may concur with the reasons for listing him in the first place. It remains to be seen what effect this provision will have on the highly reluctant attitude of states towards sharing confidential information.

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<sup>120</sup> See *supra* footnote 1.

<sup>121</sup> UNSC Res 1989 (17 June 2011) UN Doc S/Res/1989 [33].

The problematic matter at issue can be illustrated by two consecutive cases before UK courts, which both concerned the lawfulness of the domestic implementation of targeted sanctions pursuant to UNSC resolution 1267.<sup>122</sup> First, in the *A, K, M, Q and G* case, the Court of Appeal found that the targeted individuals had a right to a merits-based review of the lawfulness of the imposition of the sanctions.<sup>123</sup> It held that these individuals should be able to ask the court to consider, as far as possible, what the basis for listing was.<sup>124</sup> It considered that in the case at hand, the United Kingdom must have known all or most of the facts that led to the listing of the applicant, since it was in that particular instance the UK itself that had transmitted the name of the individual concerned to the Sanctions Committee. Therefore, it must be possible for the executive to inform the Court, and to a certain extent the targeted individual, of the relevant grounds and evidence. The Court must then be able to carry out a review of the merits, and the applicant must be able to challenge the allegations, possibly through the means of a special advocate.<sup>125</sup> The Court acknowledged, however, that there may be greater difficulties in carrying out such a review where a domestic authority is not aware of the facts upon which an individual was designated by the Sanctions Committee.<sup>126</sup> The Court did not provide a general solution for these instances, and held that it ‘would leave the possible problems in such a case to be solved when they arise.’<sup>127</sup>

As was to be expected, these problems did arise not much later. In the subsequent *HAY* case, before the UK High Court, the individual concerned was not designated by the United Kingdom, but by another state of which the identity

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<sup>122</sup> These sanctions were implemented in the UK by the Al Qaida and Taliban Order 2006 (AQO). See on the review of lawfulness of this implementation also chapters 6.3.3 and 6.4.1.

<sup>123</sup> *A, K, M, Q, & G* (appeal) (n 42) [119].

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.* [120].

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

could not be released.<sup>128</sup> The UK executive authority assigned with the task of implementing the sanctions did not possess in respect of that individual all information put before the Committee by the designating state.<sup>129</sup> It also did not succeed in obtaining further disclosure of such information.<sup>130</sup> As a consequence, it was aware of only some, but not all, of the facts upon which the designation was made.

The executive considered that it was able to conduct a proper review itself on the basis of the material available to it. However, the Court held that an effective review could not be conducted, since the outcome might have been different if it had had access to all the relevant information.<sup>131</sup> The Court saw no solution for this problem other than full disclosure of the facts upon which the individual was designated.<sup>132</sup> Since this was not possible, the Court concluded that it could not carry out an effective review of the merits of the individual's designation.<sup>133</sup> From this conclusion it followed that the Court considered the domestic implementation of the sanctions, as far as it applied to the present individual, to be unlawful.<sup>134</sup>

#### **8.4. A Solution: Decentralization of Designations**

Judicial review by domestic courts of the merits of an individual's designation is impossible if these courts are not supplied with sufficient information, but often

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<sup>128</sup> *HAY v HM Treasury* (n 117) [7].

<sup>129</sup> *Ibid.* [30]. This seems a rather strange situation, since the UK itself, as a permanent member of the UNSC, is automatically also a member of the Sanctions Committees, and thus most likely to be aware of the information put before that Committee.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.* Note that the outcome of the review by the executive itself of the material available to it was that the listing was no longer appropriate. The UK, therefore, submitted and supported a delisting request. *Ibid.* [10] This was, according to the Court, however, not sufficient to constitute an effective remedy. It argued that the assessment by the UK, which was not the designating state, might not convince the other members of the Sanctions Committee, since the designating state might possess additional information challenging the accuracy of UK's finding. *Ibid.* [31].

<sup>132</sup> *Ibid.* [33].

<sup>133</sup> *Ibid.* [45].

<sup>134</sup> *Ibid.* [46]. The Court determined that the implementation was *ultra vires* the United Nations Act 1946, c 45 9 and 10 Geo 6 (enacted 15 April 1946). On this issue see further chapter 6.4.1.

the executive implementing the sanctions in the domestic legal order is itself not aware of the grounds and evidence underlying the imposition of these sanctions. A solution might be found by making an analogy with the listing procedure as is applied in the EU in regard to the implementation of UNSC resolution 1373.<sup>135</sup> Designation of individuals under this sanctions regime is done through a composite administrative procedure.<sup>136</sup> In short, this procedure involves two consecutive steps: first, there needs to be a decision by a competent national authority, which is communicated to the Council of the EU by a member state together with a request for listing; and second, on the basis of that request, the Council may take the (initial) decision to designate a particular individual. In substantiating that decision the Council cannot rely on information disseminated to it by the state that made the request for the listing, if that state is unwilling to authorise the disclosure of that information to the European courts.<sup>137</sup>

The two-tier bottom-up procedure as applied in the EU's implementation of UNSC resolution 1373 has the benefit, at least in theory, that the targeted individual has the opportunity of some form of judicial review at the national level.<sup>138</sup> There needs to be a decision by a competent national authority, which should in principle be a judicial authority.<sup>139</sup> This decision has to confirm that there are 'serious and credible evidence or clues' substantiating the allegations made against the individual intended to be targeted, before he can be designated by the Council of the EU. What is important to note is that this procedure

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<sup>135</sup> Cases concerning individuals and entities targeted by this regime do not form part of the research's analysis: see chapter 2.2.2. In the present chapter cases concerning this sanctions regime are referred to by way of analogy. Essentially, the CJEU relies on the same standard of review in cases concerning individuals who are targeted by the 1267 regime.

<sup>136</sup> See Eckes and Mendes 2011 (n 11). See also *OMPI* (n 11) [117].

<sup>137</sup> Case T-284/08 *People's Mojahedin Organization of Iran v Council of the European Union (PMOI II)* [2008] ECR II-3487 [73]. Referred to by the General Court in *Kadi II* (n 8) [145]. See also *PMOI II* *ibid.* [72].

<sup>138</sup> Also the right to a fair hearing should in the first instance be guaranteed at the national level.

<sup>139</sup> See Common Position 931/2001/CFSP, 27 December 2001, article 1(4). But see Eckes and Mendes 2011 (n 11) 659.

provides for some form of judicial review of the merits, notwithstanding the very low evidentiary threshold.<sup>140</sup>

The General Court explicitly distinguished this procedure from the implementations under the 1267 regime.<sup>141</sup> Essentially, that regime also follows a two-tier procedure. However, this procedure is of a top-down character. The designations are made at the UN level and implemented at the domestic level and at the EU level. The fact that at the UN level no safeguards of the rights of defence are in place requires, according to the Court, that the European institutions have to ensure such procedural safeguards when implementing the sanction measures in the EU legal order.<sup>142</sup>

In response to the Court of Justice's decision in *Kadi I*, the EU changed the method of implementation of the 1267 regime from 'automatic compliance' to 'controlled compliance'.<sup>143</sup> Instead of merely copying the names designated by the Sanctions Committee, the new procedure gives the Commission a more autonomous position. Herewith, according to the Council, the procedural guarantees now correspond to those applied in relation to the implementation of the 1373 regime.<sup>144</sup> However, in practice, the only difference from the old procedure is that the Commission will, upon listing, forward to the individual concerned the statement of reasons given by the Sanctions Committee, providing him an opportunity to express his views on the matter.<sup>145</sup> The Commission shall

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<sup>140</sup> The Council merely has to inform the targeted individual of the existence of that specific national decision. It does not have to provide reasons itself for the substance of that decision, and it cannot examine whether the decision of the national authority is well founded. Hence, there is no need for the competent national authority to communicate all grounds and evidence to the Council. However, the Council needs to be able 'to submit the relevant information to the Court in the event of a legal challenge.' This concerns, however, only the information in the file communicated by the member state. Eeckes and Mendes *ibid.* 662-663.

<sup>141</sup> *Kadi II* (n 8) [187].

<sup>142</sup> *Ibid.* See also Eeckes 2009 (n 17) 315.

<sup>143</sup> Council Regulation (EU) No 1286/2009 of 22 December 2009. *Kadi II* *ibid.* [29], and [170].

<sup>144</sup> *Kadi II* *ibid.* [170].

<sup>145</sup> Council Regulation (EC) No 881/2002 of 27 May 2002 (amended by Council Regulation (EU) No 1286/2009 of 22 December 2009) article 7a (2).

review its decision in light of these observations, and shall forward them to the Sanctions Committee.<sup>146</sup>

Nowhere is it mentioned that the Commission, upon such review, can decide to delist an individual, independently from a decision thereto by the Sanctions Committee.<sup>147</sup> Moreover, according to the General Court in the *Kadi II* case, the Commission would not genuinely scrutinize its decision in light of the individual's observations, since it considered itself strictly bound by the findings of the Sanctions Committee.<sup>148</sup> Therefore, the General Court found the new rules to observe the individuals' rights of defence only 'in the most formal and superficial sense.'<sup>149</sup>

The Commission's approach is induced by the fact that the 1267 regime leaves no scope of discretion for the sanctions' implementation. It is very difficult to implement these targeted sanctions in accordance with procedural guarantees not provided for in the sanctions regime itself. Therefore, the UNSC should replace the top-down procedure, as presently applied in relation to the 1267 regime, by a two-tier bottom-up designation procedure, as is applied in the EU with regard to the implementation of the 1373 regime.

The need thereto is confirmed also by the *Sayadi and Vinck* decision by the HRC.<sup>150</sup> In this case, concerning the implementation of UNSC targeted sanctions by Belgium against the said individuals, the HRC focused specifically on the prior act of Belgium's request for listing with the Sanctions Committee. It did this with the argument that, since it was Belgium itself that transmitted the names of Sayadi and Vinck to the Sanctions Committee, it was thus responsible for their

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<sup>146</sup> Ibid. article 7a (3).

<sup>147</sup> See *ibid.* article 7a (5).

<sup>148</sup> *Kadi II* (n 8) [171].

<sup>149</sup> *Ibid.*

<sup>150</sup> UN Human Rights Committee 'Views of the Committee Concerning the Communication Submitted by Sayadi and Vinck' (29 December 2008) CCPR/C/94/D/1472/2006 (*Sayadi and Vinck*).

presence on the list.<sup>151</sup> The HRC, therewith, shifted the attention (and the commencement of responsibility for the state) from the moment of implementation of the UNSC measure to the moment of reporting the individuals to the Sanctions Committee. It then found that Belgium had transmitted the individuals' names to the UN Sanctions Committee prematurely.<sup>152</sup>

From this ruling it appears that from a human rights perspective, states cannot submit names to the Sanctions Committee for designation without due care. Possibly, a state may even have to grant the individual intended to be targeted a right to be heard and an effective legal remedy within the domestic legal order before it decides to transmit his name to the Sanctions Committee. Such procedure may have similarities with the composite administrative procedure applied in the EU in respect of the implementation of UNSC resolution 1373.

In order to avoid undermining the effectiveness of the sanctions, by informing in a too early phase of the process the individual concerned of the state's intention of submitting his name to the Sanctions Committee, the Committee could institute a procedure by which individuals are first placed on a tentative (entrance) list. The sanctions would then have to be implemented by states immediately, but only for a fixed period of time. Eventually, after completion of the domestic procedures, the outcome thereof should be forwarded to the Sanctions Committee. If the allegations against the individual concerned were rejected in the domestic proceedings, his name would be deleted from the temporary list. If the allegations were confirmed, the members of the Sanctions Committee should consider the judgment, its reasoning, and other relevant circumstances surrounding the trial. In this assessment the Committee should pay appropriate deference to the court concerned, but should also be able to discern whether the proceedings against the targeted individual were fair. If the Sanctions Committee were satisfied that the domestic judgment evidenced

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<sup>151</sup> Ibid. [10.7].

<sup>152</sup> Ibid.

sufficient merit for an individual's designation, his name could be transposed to a definitive list. Review of this final list should then take place on a regular basis, by a domestic judicial authority in the state that originally submitted the name to the Committee. If that state, upon such judicial review, were to request delisting, then that is what should be done.<sup>153</sup> During a certain period of transition towards delisting, other members of the Sanctions Committee, provided that they revealed their identity, could in response to the request for delisting decide to institute their own domestic proceedings against the individual concerned.

A decentralized procedure, such as the one briefly described here, may solve some of the problems discussed in the present chapter. A major advantage of applying a bottom-up approach to UNSC listing is that most of the confidential material can stay close to home. It needs to be shared only with the country's own domestic judges, and possibly with security-cleared special advocates. The burden of sharing confidential information with the judiciary may be lower if it concerns courts within their own state.<sup>154</sup> This approach enhances the possibility of guaranteeing the targeted individuals a proper judicial review of their designations.

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<sup>153</sup> Note that in the *Sayadi and Vinck* case it turned out not to be that self-evident that the state that requested listing would upon a request for delisting actually obtain such delisting. See *ibid.* This situation may have changed with UNSC Res 1989 (2011) (n 121) [27].

<sup>154</sup> This could be evidenced, for example, by the review conducted by a US District Court in a case brought by Mr Kadi against his designation by the American Office of Foreign Assets Control (OFAC). The District Court was in a position to evaluate confidential material relied on by OFAC. Eventually, it found the material available to amply support OFAC's findings and its determination to continue Mr Kadi's listing. *Kadi v Geithner*, No. 09-0108 memorandum opinion (US District Court for the District of Columbia). Remarkably, some seven months after this decision, the Sanctions Committee delisted Mr Kadi from the UNSC list, after having considered the Ombudsperson's comprehensive report. <http://www.un.org/News/Press/docs//2012/sc10785.doc.htm> (last visited 5 february 2013). Mr Kadi remains, however, on the American list. <http://www.un.org/News/Press/docs//2012/sc10785.doc.htm> (last visited 5 february 2013).

## 8.5. The Standard and Intensity of Review of the Grounds and Evidence

If, one way or the other, courts were provided with sufficient information, how closely would they then engage in a review of that information when making an assessment of the impugned decision's lawfulness? In other words, what would be the standard and intensity of review of the grounds and evidence? Does the executive maintain certain discretion in arriving at a particular finding?

### 8.5.1. The Criteria of Review under the 1373 Regime Applied to the 1267 Regime

The General Court in the *Kadi II* case paid considerable attention to the standard and intensity with which it considered it should review the Council of the EU's appraisal of the information leading to Mr Kadi's blacklisting. It considered the Court of Justice in its decision in the *Kadi I* case to have approved and endorsed the standard and intensity of review as carried out by the General Court in the *OMPI* case.<sup>155</sup> As was mentioned earlier, that case concerned the EU's implementation of UNSC resolution 1373. The General Court had in that case explicitly made a distinction between sanctions based on UNSC resolution 1267 (such as those against Mr Kadi) and sanctions based on UNSC resolution 1373 (which was the foundation of the sanctions against OMPI).<sup>156</sup> In line with this distinction, the General Court in the *Kadi I* case proceeded from the perspective that the EU had no autonomous discretion.<sup>157</sup> Conversely, in the *Kadi II* case, following the Court of Justice's ruling, it applied the same principles of review as it had set out in relation to the case of *OMPI*. Herewith, the General Court deviated substantially from its earlier approach. It did not, however, swing around with great enthusiasm or loyalty to the Court of Justice.<sup>158</sup>

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<sup>155</sup> *Kadi II* (n 8) [138]. As far as this decision concerns the right of defence it was confirmed by the Court of Justice in *PMOI III* (n 15) [60].

<sup>156</sup> *OMPI* (n 11) [99].

<sup>157</sup> Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities (Kadi I)* [2005] ECR II-3649 [214].

<sup>158</sup> It only very grudgingly followed the Court of Justice's approach. Especially, in *Kadi II* (n 8), paragraphs 112-121, 123 and 151, clearly indicate the General Court's reluctance.

Accordingly, the CJEU is of the opinion that the standard and intensity of review as prescribed by EU regulations in regard to the implementation of sanctions under the 1373 regime should apply also to sanctions implementation under the 1267 regime. What are the implications of this finding? As was considered in the previous section, designation of individuals and organizations under the 1373 implementation regime is done through a composite administrative procedure.<sup>159</sup> This means that EU member states convey to the Council of the EU a file containing a request for listing and a decision of a competent national authority which meets the definition mentioned in the Council's Common Position.<sup>160</sup> Upon the member state's request, the Council may decide to designate the individual concerned.<sup>161</sup> For a lawful designation the Council only has to confirm that there is indeed a decision of a competent national authority. It is not allowed, under the principle of sincere cooperation, to examine the national authority's assessment (at least where it concerns a judicial authority).<sup>162</sup> This is particularly true in regard to the 'serious and credible evidence or clues' on which the national authority based its decision.<sup>163</sup>

Hence, when the CJEU is asked to review the lawfulness of the Council's decision, that review will concern only whether the Council could have lawfully concluded that a decision by a competent national authority based on serious and credible evidence and clues existed, and possibly some additional material the

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<sup>159</sup> See *supra* section 8.4.

<sup>160</sup> The Common Position holds that the decision by the competent authority must indicate that the persons, groups, and entities concerned were prosecuted, or that an investigation was instigated in respect of the perpetration of a terrorist act, or an attempt to perpetrate, participate in, or facilitate such an act. The decision must be taken by a judicial authority, on the basis of serious and credible evidence or clues. Where there is no competent judicial authority in the area concerned the decision may be taken by an equivalent competent authority in that area. Common Position 931/2001/CFSP, 27 December 2001, article 1 (4).

<sup>161</sup> The Council has discretionary power in this respect; it is not obliged to list the person. Eckes 2009 (n 17) 311.

<sup>162</sup> In many cases the decision did not stem from a judicial authority. However, the Council still needs to defer to the competent authority's assessment if there is a possibility for the affected individual to have that authority's decision judicially reviewed. Case T-256/07 *People's Mojahedin Organization of Iran v Council of the European Union (PMOI I)* [2008] ECR II-3019 [145].

<sup>163</sup> *Ibid.* [133].

Council chose to rely on.<sup>164</sup> With regard to the content of the decision of the competent national authority, the Court will ascertain only whether that authority based its decision, in its own assessment, on serious and credible evidence or clues.<sup>165</sup> It will not itself engage in a review of the existence of the ‘evidence or clues’ on which the national authority’s decision was based, or whether these were indeed ‘serious and credible’. Accordingly, the review by the European judiciary in cases concerning the EU’s implementation of sanctions under the 1373 regime considers merely formal elements. The possibility for judicial review of the substantive grounds and evidence must be guaranteed, in principle, at the national level, before the competent national authority or on an appeal of that authority’s decision.<sup>166</sup>

In contrast, in respect of the 1267 listing there is no possibility at all for an assessment of the evidence by any judicial authority on any other level.<sup>167</sup> The European courts, therefore, require that they themselves are put in the position that they are able to review (indirectly) the substantive grounds and evidence underlying the individual’s designation by the Sanctions Committee. Review by these courts of such evidence and grounds constitutes the only possibility for the individuals concerned to obtain an effective judicial review when the sanctions are implemented in the EU legal order.<sup>168</sup>

The mere fact that an individual is designated by the Sanctions Committee is no longer regarded as sufficient by the European judiciary for a lawful implementation of the sanctions. The Council of the EU needs to take into account information of a more substantive nature, which is for the European courts to review. They will conduct such a review on the basis of the same standard and intensity as they would with regard to the review of the mere formal

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<sup>164</sup> See *ibid.* [57]; [58]; [144]; [145]; and [147].

<sup>165</sup> *PMOI II* (n 137) [68].

<sup>166</sup> See also Eckes and Mendes 2011 (n 11) 660; and Eckes 2009 (n 17) 311 et seqq.

<sup>167</sup> *Kadi II* (n 8) [187].

<sup>168</sup> See *supra* footnote 142.

elements in respect of the implementations under the 1373 regime. However, because in cases concerning the 1267 regime this standard is thus directly applied in respect of substantive evidence, this means that the Sanctions Committee or individual states (through the Council of the EU) need to submit to the European courts even more confidential information, and probably of a higher level of secrecy, than mere decisions of competent national authorities. This may make the application of the same standard and intensity of review to 1267 listings even more controversial among EU member states than it is in regard to the 1373 listings.<sup>169</sup>

### **8.5.2. Progressive Intensity of Review**

Notwithstanding the difference in effect, the General Court proceeded by applying the *OMPI* criteria to the *Kadi II* case.<sup>170</sup> Therefore, it is useful to examine what these criteria entail. Over the course of time the Court appears to have been applying an increasing intensity of review.

In the *OMPI* case, the General Court held that it must review the assessment of the facts and circumstances relied on as justifying the measure, and the evidence and information on which that assessment is based.<sup>171</sup> However, the Court also recognized a broad discretion for the Council of the EU.<sup>172</sup> It found that it could not replace its assessment of the evidence, facts, and circumstances for that of the Council.<sup>173</sup> It concluded that its review ‘must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power.’<sup>174</sup> This limited review, the

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<sup>169</sup> Eckes and Mendes hold with regard to the implementation of the 1373 regime in the EU that ‘the protection of the procedural rights of terrorist suspects is still controversial.’ Eckes and Mendes 2011 (n 11) 653.

<sup>170</sup> *Kadi II* (n 8) [139] et seqq.

<sup>171</sup> *OMPI* (n 11) [154].

<sup>172</sup> *Ibid.* [159].

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.* See also Case T-47/03 *Sison v Council of the European Union* [2007] ECR II-73 [206]. In addition, from the Court of Justice’s case law it appears that in these situations

Court continued, applied especially with regard to the Council's assessment of the appropriateness of its decision.<sup>175</sup>

In the subsequent *PMOI I* case, which concerned the designation of the same organization, the General Court was somewhat less deferential to the Council's findings. While still recognizing the limited review in respect of the Council's considerations on the appropriateness of the measures, it intensified the review of the Council's assessment of the relevant facts.<sup>176</sup> It found that the EU courts had to establish whether the evidence relied on is factually accurate, reliable, and consistent. Moreover, it considered it also for the courts to determine whether the evidence contains all the relevant information, and whether it could support the conclusions drawn from it.<sup>177</sup>

Accordingly, the General Court went from reviewing whether there was a 'manifest error of assessment of the facts' in *OMPI*,<sup>178</sup> to reviewing whether the Council of the EU in its interpretation of the facts took into account all relevant information, and whether that information was 'capable of substantiating the conclusions'.<sup>179</sup> It reiterated this reasoning in subsequent decisions concerning the implementation of 1373 sanctions,<sup>180</sup> and notably also in the *Kadi II* case. Hence, while the General Court in the *Kadi II* case found the standard of review,

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involving discretionary decisions, which are not fully reviewable, particular importance should be attached to compliance with procedural rules. Eckes 2009 (n 17) 315.

<sup>175</sup> See previous footnote.

<sup>176</sup> *PMOI I* (n 162) [137]-[138]. See also *Kadi II* (n 8) [142].

<sup>177</sup> *PMOI I* *ibid.* [138]. See also *Kadi II* *ibid.*

<sup>178</sup> *OMPI* (n 11) [159].

<sup>179</sup> *PMOI I* (n 162) [138]. The Court of Justice applied the same standard in Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947 [57]. There it referred to its earlier case law, but without noting that it actually deviated from that. See Case 98/78 *Racke* [1979] ECR 69 [5]; Case C-16/90 *Nölle* [1991] ECR I-5163 [12]; *Commission v Tetra Laval* [39]; and Case C-326/05 P *Industrias Químicas del Vallès v Commission* [2007] ECR I-0000 [76], in which it applied the same standard as the General Court did in *OMPI*.

<sup>180</sup> See, for example, *PMOI II* (n 137) [55], and T-341/07 *Sison v Council of the European Union* [2009] [98].

as was applied in the *OMPI* case, to be ‘approved and endorsed’ by the Court of Justice, it applied the *OMPI* standard as modified by subsequent case law.<sup>181</sup>

It could be argued, when taking into account the earlier considerations on the differences between the two regimes, that applying the same standard to the situation in the *Kadi II* case results in a more substantive review, in the sense that these cases would include a review of material (and not merely formal) evidence underlying the individual’s designation. In this regard, it should be noted that in *PMOI I* the General Court held that the evidence relied on must be factually accurate, reliable, and consistent.<sup>182</sup> With regard to the direct application of targeted sanctions, such review may be all the more essential, since it is the only procedural safeguard available for the individual concerned to ensure the protection of fundamental rights.<sup>183</sup> The restrictions on his rights of defence and to a fair hearing, which are part of the administrative procedure leading to the impugned decision, could be compensated for only by a strict judicial review after the adoption of that decision.<sup>184</sup>

In addition, the General Court in the *Kadi II* case found that the sanctions measures’ marked and long-lasting effect on the fundamental rights of the individuals concerned justified all the more a full and rigorous judicial review.<sup>185</sup> In this regard, the Court called into question whether the targeted sanctions could still be classified as temporary precautionary measures.<sup>186</sup> Moreover, it contemplated whether the measures should not be seen as criminal instead of administrative.<sup>187</sup> However, apart from confirming the justification of the earlier

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<sup>181</sup> The Court of Justice had also applied this modified standard in the earlier decided case of *Spain v Lenzing* (n 179), which did not concern targeted sanctions. See also footnote 179.

<sup>182</sup> *PMOI I* (n 162) [138]. Also in this respect the General Court raised its standard of review compared to the one set out earlier in the *OMPI* case. In that case it merely held that it must review whether the facts were accurate. See *OMPI* (n 11) [159].

<sup>183</sup> See *Kadi II* (n 8) [144].

<sup>184</sup> See *Ibid.* See also *OMPI* (n 11) [155]. See in the same case, as to the distinction on procedural safeguards before the actual listing and those after the listing, paragraph 94.

<sup>185</sup> *Kadi II* (n 8) [151].

<sup>186</sup> *Ibid.* [149]-[150]. See *Kadi I* (first instance) (n 157) [248], and *Kadi I* (appeal) (n 9) [358].

<sup>187</sup> *Kadi II* *ibid.* [150].

specified standard and intensity of judicial review, it is not entirely clear what the General Court meant to say by these additional considerations. It seems that it merely took the opportunity to criticize the procedural flaws in the sanctions regime. In any case, it does not seem to add anything to the already existing standard and intensity of judicial review.

## **8.6. Conclusion**

Most cases in which courts find domestic implementations of targeted sanctions to be in conflict with the human rights of the individual concerned mainly consider the impossibility for this individual to obtain an effective judicial review of his designation. First, there is currently no court within the international (or UN) legal order competent to hear affected individuals' challenges of Sanctions Committees' designations. Second, domestic and regional courts, even if they are willing and competent to ensure these individuals' judicial protection, have no access to the grounds and evidence on the basis of which these designations were made. Hence, they cannot engage (indirectly) in an effective review of specific individuals' designations. Third, these individuals themselves are not aware of the grounds and evidence underlying the allegations made against them. Therefore it is almost impossible for them to defend their case properly. They are not in a position to refute the allegations effectively, or justify their claim that they do not meet the criteria for listing.<sup>188</sup> This situation causes a significant limitation on the individuals' right to a fair trial. Moreover, from the perspective of domestic and regional courts being able to fill the gap in judicial protection at the international level, the ability of these courts to review effectively the merits of individual cases remains limited if they are not provided with sufficient relevant information.

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<sup>188</sup> *Aboufian Abdelrazik v The Minister of Foreign Affairs* [2009] 2009 FC 580 [53]. As the Canadian Federal Court held: 'The 1267 Committee regime is [...] a situation for a listed person not unlike that of Josef K. in Kafka's *The Trial*, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime.' *Ibid.* [53].

In addition to the fact that lack of access to confidential information forms the core of the problem of the targeted sanctions regime, it is also the most difficult to remedy. As was discussed in the present chapter, courts have sought to find solutions for this dilemma. They have acknowledged the concerns of both the executive and the targeted individual. Several of them have held that a balance must be struck between, on the one hand, the executive's legitimate security concerns regarding the dissemination of confidential information, and on the other, protection of the affected individual's human rights. Arriving at a fair balance may involve the use of special advocates.

Still, the application of such a procedure does not entirely remove the obligation upon the executive to disseminate at least some information. The targeted individual needs to be made aware, at least, of the essence or gist of the case against him, in order for him to be able to effectively instruct a special advocate. The ECtHR, followed by the House of Lords, phrased this requirement as an absolute minimum from which no derogation is possible. The right to a fair trial is not considered to be absolute.<sup>189</sup> However, in the present circumstances these courts seem to have discerned an irreducible core, which allows for no limitation. The information disseminated to the individual concerned does not necessarily have to include evidential material or the sources thereof.<sup>190</sup> For a fair procedure it is sufficient that the individual concerned is provided with detailed allegations against him. What is essential is that the targeted individual is able to enjoy effective legal protection.

In none of the cases examined in the present chapter has a court made explicit whether, in situations in which there is no special advocates procedure in place, the degree or type of information that should be disseminated to the targeted individual has to be different. However, it could be argued that it should, because the level of information required by the ECtHR in the *A and Others v United*

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<sup>189</sup> See, for example, *Control Orders II* (appeal) (n 34) [20]-[22].

<sup>190</sup> See *A v United Kingdom* (n 50) [220], and *Control Orders II* (UKHL) (n 48) [86].

*Kingdom* case was dependent on the question of whether the individual concerned could, on the basis of that information, effectively instruct a special advocate. This special advocate can then, on behalf of the individual, challenge the reliability of the underlying evidence and test the executive's claim for confidentiality. Hence, where such procedure is available, less information will have to be disseminated to the individual concerned than where he must be put in a position to be able to challenge effectively the imposition of sanctions before a court himself.

It is also possible that other procedural guarantees are put in place to compensate for the individual's information deficit. Within the EU legal order, no special advocates procedure exists. However, the General Court in the *Kadi II* case applied the same criteria for dissemination of information to the individual concerned as the ECtHR had done in a situation in which there was a special advocate available.<sup>191</sup> This might indicate that the General Court understood the same criteria to apply in both situations. Alternatively, the General Court might have regarded itself, as an independent judicial authority, as able to guarantee sufficiently the targeted individual's right to a legal remedy, without the assistance of a special advocate.<sup>192</sup> This could be in line with the ECtHR's case law which considered the special advocates, at most, to constitute an important additional safeguard. It considered it primarily for independent courts to ensure a sufficient legal remedy.<sup>193</sup>

In this regard, the Court of Justice suggested, and this was indeed reiterated by the General Court, that if it had been possible for the Court itself to engage in a full review of the evidence, this might have constituted an effective remedy for the infringements of the individual's human rights caused by that individual's

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<sup>191</sup> See *Kadi II* (n 8) [176]-[177].

<sup>192</sup> This might explain why the General Court merely mentioned that the Court of Justice referred to these 'techniques' without considering itself the possibility of applying such a mechanism to assist in drawing a balance between the two competing interests involved. *Ibid.*

<sup>193</sup> *A v United Kingdom* (n 50) [219].

lack of access to such information.<sup>194</sup> In other words, as long as the courts have access to all relevant information, the executive does not have to inform the targeted individual of the evidence underlying the imposition of sanctions. What then still remains is that the executive must communicate to the affected individual sufficiently detailed allegations, for example, in a (summary of the) statement of reasons, in order for him to be able to effectively defend himself.

In any case, the courts before which the complaint is brought need to be informed of all the relevant grounds and evidence to enable them to fully review the merits of an individual's designation. The CJEU required in this regard that it should be put in the position that it is able to engage in a 'full' or 'strict' review of the merits of a case.<sup>195</sup> Such review includes the interpretation made by the responsible EU institution of the relevant facts.<sup>196</sup> With respect to the evidence relied on, the courts must not only establish whether such evidence is factually accurate, reliable, and consistent, but must also ascertain whether it contains all the relevant information to be taken into account in order to assess the situation, and whether it is capable of substantiating the conclusions drawn from it.<sup>197</sup> Accordingly, in contrast to the position of the targeted individuals, no essential information can be withheld from the courts.

The fact that domestic authorities implementing targeted sanctions in the domestic legal orders often do not have knowledge themselves of the information underlying the imposition of these sanctions makes the issue even more problematic. Even if they wished to communicate the relevant information to a court they cannot do so, because they do not possess it. This means that the problem cannot be solved solely by techniques that are meant to ensure a balance between the two competing interests, such as the use of special advocates. A solution might be to adopt a decentralized method for designation, similar to that

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<sup>194</sup> *Kadi I* (appeal) (n 9) [350] and to the same effect *Kadi II* (n 8) [182].

<sup>195</sup> See, respectively, *Kadi I* (appeal) (n 9) [326] and *Kadi II* *ibid.* [144].

<sup>196</sup> *Kadi II* *ibid.* [142].

<sup>197</sup> *Ibid.*

applied with regard to the EU's implementation of UNSC resolution 1373. In that way, sensitive confidential information can stay closer to home and has to be shared only with the country's own domestic courts, and possibly with security-cleared special advocates. Such a system enhances the possibility of ensuring targeted individuals a sufficient measure of legal protection.

In addition to highlighting the problem of lack of access to confidential information, the present chapter has also sought to illustrate the position of domestic and regional courts trying to fill the gap in judicial protection that exists in the international legal order. The infringements with the human rights of the affected individuals are partly due to the fact that these courts are not put in a position whereby they could effectively guarantee these rights: primarily the rights to a fair trial and to an effective remedy. The CJEU acknowledged that it needed to fill the gap in judicial protection that existed in the international legal order.<sup>198</sup> However, if domestic courts are not provided with relevant information, the only thing they can do, if they wish to uphold individuals' rights to a fair trial and to an effective remedy, is to annul the implementation in relation to the individual concerned. In itself this might provide him with a measure of relief within a domestic legal order. However, it does not take him off the UNSC blacklist. Moreover, such a domestic ruling does not contribute to the integrity of the international legal system, and may eventually undermine the effectiveness of UNSC action.

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<sup>198</sup> See *Kadi I* (appeal) (n 9) [326], and *Kadi II* *ibid.* [187].