

Inclusion of LTTE on the EU terrorism list – Interpretation of the term ‘Acts of terrorism’ – Scope and purpose of anti-terrorism rules - Article 2(3) of Council Regulation (EC) No 2580/2001 (specific restrictive measures directed against certain persons and entities with a view to combating terrorism) – Article 1(6) of Council Common Position 2001/931/CFSP (on the application of specific measures to combat terrorism)

(A and Others against Minister of Foreign Affairs)

The Administrative Jurisdiction Division of the Council of State (Division) referred questions to the ECJ for preliminary rulings concerning the decision of the Dutch minister of foreign affairs to designate four individuals as persons to which anti-terrorism sanctions apply. According to the minister, this decision was (*inter alia*) based on the fact that these individuals were affiliated with the Liberation Tigers of Tamil Eelam (LTTE); a group included on the list of Article 2(3) of Regulation (EC) 2580/2001. LTTE was maintained on that list by the Council of the European Union in 2010 through the Implementing Regulation (EU) 610/2010. The appellants have argued that this regulation is invalid on the ground that the activities of the LTTE were not terrorist acts. In their view, the LTTE was in fact a ‘non-State armed force’ engaged in a ‘non-international armed conflict’ in Sri Lanka. Consequently, its activities were governed only by international humanitarian law and not by EU law and international rules on combating terrorism.

In Judgment C-158/14 of 14 March 2017 the ECJ rules (*inter alia*) that: ‘actions by armed forces during periods of armed conflict’, within the meaning of international humanitarian law, may constitute ‘terrorist acts’. The fact that the activities of the ‘LTTE may constitute actions by armed forces does not affect the validity of the acts of the EU relating to their inclusion on the EU terror list of those whose funds are to be frozen’.

Shortly after the ECJ judgment the minister withdrew his designation decision, which also ended the financial sanctions for the appellants. In three of the four appeals a settlement was reached with the appellants and the appeals were subsequently withdrawn. Nevertheless, this particular appellant wanted to continue the appeal at the Division because he thinks that the minister should never have designated him to the EU terrorists list under these anti-terrorism rules. He referred to the outcome of the procedure instituted by the LTTE against its inclusion on the European terrorism list (*Judgment of the General Court, T-208/11 and T-508/11 of 16 October 2014, ECLI:EU:T:2014:885*) whereby maintenance in 2011 and later - that is to say after the designation decision of 8 June 2010 - of the LTTE on the European terrorism list in view of the defeat of the LTTE in May 2009 was considered to be inadequately reasoned and was therefore annulled.

In his final decision the Division rules that the minister of foreign affairs should not have frozen the financial assets of the appellant. The minister imposed the financial sanctions in 2010. They were directly linked to the minister's decision to designate the appellant as member of a terrorist group based on the anti-terrorism rules because of his activities for the LTTE. The Division considers that the minister was not authorized to designate the appellant as a member of a terrorist group on the basis of the anti-terrorism rules. The purpose of such a designation is primarily to prevent a person or organizations from committing terrorist acts. So it is a preventive measure. That is why the minister can only designate someone if there is a danger that this person or organization will be involved in (future) terrorist activities. The Division considers that there was no such danger under the specific circumstances on which the minister based his decision for the appellant. Concluding, this means that the designation of the appellant under the anti-terrorism rules was unjustified and that therefore the minister could not have imposed the financial sanctions.

The appellant won the case.