



## HIGHLIGHT

# THE COMPANY YOU KEEP: THE COURT OF JUSTICE CONFIRMS SANCTIONS AGAINST PERSONS ASSOCIATED WITH ZIMBABWE REGIME

SEVERIN KLINKMÜLLER\*

KEYWORDS: restrictive measures – CFSP – Art. 29 TEU – listing criteria – persons associated with the regime – Zimbabwe.

On 28 July 2016, the European Court of Justice confirmed the legality of restrictive measures taken by the European Union against the former Attorney General of Zimbabwe and further 120 persons and entities.<sup>1</sup> The Court held that the grave violations of fundamental rights committed by the Government of Zimbabwe justified the listings of the individuals who held prominent administrative posts and thus could be considered as associated with the country's regime.

The former Attorney General Johannes Tomana along with 109 other individuals and eleven entities were included into the list of individuals subject to the EU's restrictive measures against Zimbabwe by the Council in 2012. The listing of Mr Tomana was motivated by his involvement in actions that seriously undermined democracy, the respect for human rights and the rule of law in Zimbabwe. Similarly, the Council justified the listing of the other persons and entities – among those high-ranking functionaries of the army and the police – with their role in the country's regime's policy of violence, intimidation and violation of fundamental rights of the Zimbabwean people.

The African country has been subject to EU restrictive measures pursuant to Art. 29 TEU since 2002.<sup>2</sup> The sanctions regime includes the freezing of funds as well as travel bans against listed individuals and entities that are either part of or are associated with

\* Law clerk (*Rechtsreferendar*), Kammergericht Berlin, sklinkmueller@gmail.com.

<sup>1</sup> Court of Justice, judgment of 28 July 2016, case C-330/15 P, *Johannes Tomana and Others v. Council and Commission*.

<sup>2</sup> Council Common Position 2002/145/CFSP of 18 February 2002 concerning restrictive measures against Zimbabwe.

the autocratic regime by long-standing President Robert Mugabe. The restrictive measures have since been regularly amended and renewed by the Council.<sup>3</sup> To date, EU Courts have confirmed the legality of restrictive measures taken against individuals under the sanctions regime against Zimbabwe.<sup>4</sup>

With its judgment, the Court of Justice upheld a previous judgment by the General Court of 22 April 2015 that had dismissed Tomana's and the other individuals and entities' initial application for the nullification of the restrictive measures.<sup>5</sup> The General Court had held that those measures were well founded on their legal basis and that the EU institutions had neither violated their obligation to state reasons for the listings, nor had committed a manifest error of assessment.<sup>6</sup> Tomana and the other claimants then appealed this judgment of the General Court.

The Court of Justice pointed out that the legal base for the restrictive measures against the appellants – i.e., Art. 4, para. 1, of Council Decision 2011/101 –<sup>7</sup> distinguished three categories of individuals who could be subject to the sanctions regime against Zimbabwe: members of the Government of Zimbabwe, natural persons associated with it, as well as other natural persons whose activities undermine democracy, respect for human rights and the rule of law in Zimbabwe.<sup>8</sup>

Arguing the existence of an evident error of assessment, the appellants claimed that the Council could have targeted only those individuals whose own actions undermined democracy and human rights in Zimbabwe. In particular, they argued, the General Court had wrongly classified certain individuals as being 'associated' with the regime on the basis of actions or positions they had held in the distant past. This, however, would amount to the presumption that, due to their previous posts, those individuals had maintained a collusive connection to the power holders who were responsible for the policy of violence and intimidation.

This posed the core question for the Luxembourg Court to answer in the case at hand: the interpretation of the broad criteria for the listing of persons 'associated' with members of the Mugabe regime. In line with the General Court, the Court of Justice took the view that it was necessary to assess whether the appellants' situation constituted sufficient proof of collusion between them and the leaders of the Government of

<sup>3</sup> Council Decision (CFSP) 2016/220 of 15 February 2016 amending Decision 2011/101/CFSP concerning restrictive measures against Zimbabwe.

<sup>4</sup> See most notably, General Court, judgment of 21 July 2016, case T-66/14, *John Arnold Bredenkamp and Others v. Council and Commission*; and General Court, judgment of 18 September 2014, case T-168/12, *Aguy Clement Georgias, and Others v. Council and Commission*.

<sup>5</sup> General Court, judgment of 22 April 2015, case T-190/12, *Johannes Tomana and Others v. Council and Commission*.

<sup>6</sup> *Ibid.*, paras 133, 183, 251.

<sup>7</sup> Council Decision (CFSP) 2011/101 of 15 February 2011 concerning restrictive measures against Zimbabwe.

<sup>8</sup> *Tomana v. Council and Commission*, C-330/15 P, cit., para. 75.

Zimbabwe.<sup>9</sup> It recalled its previous case law, according to which a sufficient link could be established between the person subject to restrictive measures and the sanctioned regime through a set of indicia sufficiently specific, precise and consistent.<sup>10</sup> Considering the specific situation in Zimbabwe, the Court pointed out that the political party of Mugabe had effectively monopolised power during the period of serious fundamental rights abuses. Thus, it concluded that “those who hold senior posts, such as the individuals involved in military, police or security operations, must be regarded as being fully associated with the Government of Zimbabwe”.<sup>11</sup>

This conclusion – the Court was eager to point out that it had not applied a presumption – could only be rebutted if the appellants had taken specific actions demonstrating their rejection of the regime’s practices. Under the given circumstances, the Court also did not object the fact that some of the appellants had already left their senior posts within the Zimbabwean Government. In this regard, it underlined that even after leaving their posts, the former senior officials could have been legitimately considered to remain associated with the leaders of the Zimbabwean regime.<sup>12</sup>

With this judgment, the Court has taken a considerable step towards clarifying the possible scope of EU sanctions against a country’s *nomenklatura*. Evolving from a sanctions strategy that initially targeted persons based on their individual responsibility – mostly used in the fight against international terrorism – the Union has today moved towards a more comprehensive approach. In order to exert pressure on a political regime that is subject to EU sanctions, it has become a common strategy to target a nation’s elite that is profiting from the political regime, predominantly businessmen and senior members of the security forces. In its present judgment, the Court of Justice has now approved the EU’s strategy of targeting individuals that are associated with a sanctioned regime. Most crucially, the Court accepted that individuals belonging to a country’s economic and security apparatus can be subject to EU restrictive measures even in the absence of individual responsibility for that country’s policy of systematic human rights abuses. This change in the EU’s strategy of applying restrictive measures will also impact on the Member States, as it is up to their customs and foreign trade authorities to implement the sanctions against the various individuals listed by the EU Council.

<sup>9</sup> *Ibid.*, para. 81.

<sup>10</sup> *Ibid.*, para. 82 with reference to Court of Justice, judgment of 21 April 2015, case C-605/13 P, *Issam Anbouba v. Council*, para. 52.

<sup>11</sup> *Tomana v. Council and Commission*, C-330/15 P, cit., para. 84.

<sup>12</sup> *Ibid.*, para. 86.

