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

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Implementation by Switzerland of United Nations counter-terrorism resolutions entailed a violation of human rights

In today's Grand Chamber judgment in the case of **Nada v. Switzerland** (application no. 10593/08), which is final[1], the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, and

a violation of Article 8 taken together with Article 13 (right to an effective remedy) of the Convention.

The case concerns the restricting of the applicant's cross-border movement and the addition of his name to a list annexed to a federal Ordinance, in the context of the implementation by Switzerland of United Nations Security Council counter-terrorism resolutions.
The Court observed that Switzerland could not simply rely on the binding nature of the Security Council resolutions, but should have taken all possible measures, within the latitude available to it, to adapt the sanctions regime to the applicant's individual situation. As Switzerland had failed to harmonise the international obligations that appeared contradictory, the Court found that there had been a violation of Article 8.

Principal facts

The applicant, Youssef Moustafa Nada, is an Italian and Egyptian national who was born in 1931 and has lived since 1970 in Campione d'Italia, an Italian enclave of about 1.6 sq. km inside the Swiss Canton of Ticino, separated from the rest of Italy by Lake Lugano.

On 15 October 1999, in response to attacks by Osama bin Laden and his network, the UN Security Council adopted Resolution 1267 (1999) imposing sanctions on the Taliban and creating a committee to monitor the sanctions. On 2 October 2000 the Swiss Federal Council adopted an Ordinance instituting measures against the Taliban ("the Taliban Ordinance").

By Resolution 1333 (2000) the Security Council extended the sanctions regime, requesting the UN Sanctions Committee to draw up a list of persons and organisations associated with Osama bin Laden and al-Qaeda. The Taliban Ordinance was amended accordingly by the Swiss Government.

On 24 October 2001 the Swiss Federal Prosecutor opened an investigation into Mr Nada's activities. In November 2001 the applicant and a number of organisations associated with him were added to the Sanctions Committee's list, then to the list in the Annex to the Taliban Ordinance. In January 2002 the Security Council adopted Resolution 1390 (2002) introducing a travel ban for all individuals, groups, undertakings and associated entities on the sanctions list. The Swiss Taliban Ordinance was amended accordingly, so

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

that all persons listed in Annex 2, including the applicant, were banned from entering or transiting through Switzerland.

When he visited London in November 2002, the applicant was arrested and deported back to Italy, his money also being seized. In October 2003 the Canton of Ticino revoked the applicant's special border-crossing permit and in November the Swiss Federal Office for Immigration, Integration and Emigration (the "IMES") informed him that he was no longer authorised to cross the border. In March 2004 Mr Nada lodged a request with the IMES for leave to enter or transit through Switzerland for the purposes of medical treatment in that country and legal proceedings in both Switzerland and Italy, but the request was dismissed as ill-founded.

In May 2005 the Swiss Federal Prosecutor closed the investigation concerning the applicant, finding that the accusations against him were unfounded. The applicant then asked the Federal Council to delete his name and those of the organisations associated with him from the Annex to the Taliban Ordinance. His request was rejected on the grounds that Switzerland could not delete names from its national list while they still appeared on the UN Sanctions Committee's list.

Mr Nada unsuccessfully lodged an administrative appeal with the Federal Department for Economic Affairs then appealed to the Federal Council, which referred his case to the Federal Court. That court dismissed his appeal on the merits, finding that, under Article 25 of the United Nations Charter, the UN member States had undertaken to accept and carry out the decisions of the Security Council.

On 22 February 2008, at a meeting between the applicant's lawyer and a representative of the Federal Department of Foreign Affairs, the latter indicated that Mr Nada could ask the Sanctions Committee for a more extensive exemption on account of his particular situation, also repeating that Switzerland could not itself apply for delisting. The Swiss Government would nevertheless be prepared to support him, in particular by providing him with an attestation confirming that the criminal proceedings against him had been discontinued. The representative lastly suggested that the lawyer contact the Italian Permanent Mission to the United Nations.

On 5 July 2008 the Italian Government submitted to the Sanctions Committee a request for the applicant's delisting on the ground that the case against him in Italy had been dismissed, but the Committee denied that request.

In August 2009, in accordance with the procedure laid down by Security Council Resolution 1730 (2006), the applicant submitted a request for the deletion of his name from the Sanctions Committee's list. On 23 September 2009 Mr Nada's name was finally deleted from the list annexed to the Security Council resolutions and on 29 September 2009 the Annex to the Taliban Ordinance was amended accordingly. By a motion introduced on 12 June 2009 by Dick Marty and passed on 1 March 2010 by the Swiss Parliament, the Foreign Policy Commission of the National Council requested the Federal Council to inform the UN Security Council that from the end of 2010 the sanctions prescribed against individuals under the counter-terrorism resolutions would no longer be applied.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicant argued that the ban imposed on him, preventing him from entering or transiting through Switzerland, had breached his right to respect for his private, professional and family life. As a result of the ban, he had been unable to see his doctors in Italy or in Switzerland or visit family and friends. The addition of his name to the list annexed to

the Taliban Ordinance had damaged his honour and reputation. Relying on Article 13 (right to an effective remedy) he complained that there had been no effective remedy by which to have his complaints examined in the light of the Convention. Under Article 5 § 1 (right to liberty and security) the applicant argued that by preventing him from entering or transiting through Switzerland, because his name was on the UN Sanctions Committee's blacklist, the authorities had deprived him of his liberty. Lastly, under Article 5 § 4 (right to a prompt decision on the lawfulness of detention) he complained that the Swiss authorities had not reviewed the lawfulness of the restrictions on his freedom of movement.

The application was lodged with the European Court of Human Rights on 19 February 2008. On 30 September 2010 the Chamber relinquished jurisdiction in favour of the Grand Chamber.

Under Article 36 of the Convention, the President of the Grand Chamber authorised the French and United Kingdom Governments, together with the non-governmental organisation JUSTICE, to submit written comments as third parties, and the United Kingdom Government also took part in the hearing.

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

Nicolas **Bratza** (the United Kingdom), *President*,
Jean-Paul **Costa** (France),
Françoise **Tulkens** (Belgium),
Josep **Casadevall** (Andorra),
Nina **Vajić** (Croatia),
Dean **Spielmann** (Luxembourg),
Christos **Rozakis** (Greece),
Corneliu **Bîrsan** (Romania),
Karel **Jungwiert** (the Czech Republic),
Khanlar **Hajiyev** (Azerbaijan),
Ján **Šikuta** (Slovakia),
Isabelle **Berro-Lefèvre** (Monaco),
Giorgio **Malinverni** (Switzerland),
George **Nicolaou** (Cyprus),
Mihai **Poalelungi** (the Republic of Moldova),
Kristina **Pardalos** (San Marino),
Ganna **Yudkivska** (Ukraine),

and also Michael **O'Boyle**, *Deputy Registrar.*

Decision of the Court

Article 8

The Court reiterated that a State was entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of non-nationals into its territory. The Convention did not guarantee the right of an alien to enter a particular country.

However, the Federal Court itself had found that the measure in question constituted a significant restriction on Mr Nada's freedom, as he was in a very specific situation on account of the location of Campione d'Italia, an enclave surrounded by the Swiss Canton of Ticino. Agreeing with that opinion, the Court observed that the measure preventing Mr Nada from leaving the enclave for at least six years was likely to make it more difficult for him to exercise his right to maintain contact with other people living outside

the enclave. There had thus been an interference with the applicant's right to respect for his private and family life.

The aim of the restrictions was to prevent crime and, as the relevant Security Council resolutions had been adopted to combat international terrorism under Chapter VII of the United Nations Charter, they could also contribute to Switzerland's national security and public safety.

As to the necessity of the measures, the Court was prepared to take account of the fact that the threat of terrorism was particularly serious at the time of the adoption of the resolutions imposing the sanctions. However, the maintaining or reinforcement of those measures had to be justified convincingly.

The investigations conducted by the Swiss and Italian authorities had concluded that the suspicions about the applicant were unfounded. The Swiss Federal Prosecutor had closed the relevant criminal investigation that had been started in October 2001, and in July 2008 the Italian Government had submitted to the UN Sanctions Committee a request for the applicant's delisting on the ground that the proceedings against him in Italy had been discontinued. The Court was surprised that the Swiss authorities had not informed the Sanctions Committee until September 2009 of the conclusions of investigations closed in May 2005. More prompt communication might have led to the deletion of the applicant's name from the United Nations list, and accordingly from the Swiss list, at an earlier stage. The Court further noted that the case had a medical aspect, because the applicant was elderly and had health problems: the IMES and the ODM had denied a number of requests for exemption from the entry and transit ban that had been submitted by the applicant for medical reasons, among others.

During the meeting of 22 February 2008 the representative of the Federal Department of Foreign Affairs had indicated that the applicant could ask the Sanctions Committee to grant a broader exemption in view of his particular situation. The applicant had not made any such request, but it did not appear that the Swiss authorities had offered him any assistance to that end.

It was established that the applicant's name had been added to the United Nations list on the initiative of the USA, not that of Switzerland. In any event, it was not for the Swiss authorities to approach the Sanctions Committee to trigger the delisting procedure, Switzerland not being the State of the applicant's nationality or residence. However, it did not appear that Switzerland had ever sought to encourage Italy to undertake such action or to offer it assistance for that purpose. The Swiss authorities had merely suggested that the applicant contact the Italian Permanent Mission to the United Nations.

In conclusion, the Court considered that the Swiss authorities had not sufficiently taken into account the realities of the case, especially the geographical situation of the Campione d'Italia enclave, the duration of the measures imposed or the applicant's nationality, age and health. As it had been possible for Switzerland to decide how the Security Council resolutions were to be implemented in its legal order, it could have been less harsh in imposing the sanctions regime on the applicant.

The Court observed that Switzerland could not simply rely on the binding nature of the Security Council resolutions, but should have taken all possible measures, within the latitude available to it, to adapt the sanctions regime to the applicant's individual situation. As Switzerland had failed to harmonise the international obligations that appeared contradictory, the Court found that there had been a violation of Article 8.

Article 13

The Court observed that the applicant had been able to apply to the Swiss authorities to have his name deleted from the list annexed to the Taliban Ordinance. However, the Federal Court had taken the view that it could not by itself lift the sanctions, observing that the UN Sanctions Committee alone was competent to take such a decision. The Court thus concluded that the applicant did not have any effective means of obtaining the removal of his name and therefore no remedy in respect of the violations of his rights. It found that there had been a violation of Article 13 taken together with Article 8.

Article 5

The Court acknowledged that the restrictions had been imposed on Mr Nada for a considerable length of time, but found that they had not prevented him from freely living and moving within the territory of his permanent residence, which he had chosen of his own free will. Mr Nada had not been in a situation of detention, nor formally under house arrest: he had only been prohibited from entering or transiting through a given territory. He had not been subjected to any surveillance by the Swiss authorities and had not been obliged to report regularly to the police. Nor did it appear that he had been restricted in his freedom to receive visitors. Lastly, the sanctions regime had permitted him to seek exemptions from the entry or transit ban and that when two such exemptions had been granted he had not made use of them.

The Court, like the Federal Court, thus found that the applicant had not been "deprived of his liberty" within the meaning of Article 5 § 1 by the measure prohibiting him from entering and transiting through Switzerland.

Just satisfaction (Article 41)

The Court held that Switzerland was to pay the applicant 30,000 euros in respect of costs and expenses.

Separate opinions

Judges Bratza, Nicolaou and Yudkivska expressed a joint concurring opinion; Judge Rozakis expressed a concurring opinion, joined by Judges Spielmann and Berro-Lefèvre; and Judge Malinverni also expressed a concurring opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.