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Does European Human Rights Law  
Capture War on Terror Activity?  
On whose evidence?

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# DOES EUROPEAN HUMAN RIGHTS LAW CAPTURE WAR ON TERROR ACTIVITY? ON WHOSE EVIDENCE?

*Elspeth Guild\**

## **Abstract**

On 12 September 2012, the European Court of Human Rights handed down judgment in a complicated case regarding the freezing of assets and travel ban on a dual Italian Egyptian national resident in an Italian enclave surrounded by Switzerland. The human right on which the case was decided was the man's claim to respect for his private and family life. The security claim was that he was engaged in terrorist activities (mainly unspecified) and that the freezing of his assets and ban on travel were necessary to protect international security as determined by the UN Security Council. Many issues arise in the case, not least that of the entitlement to a remedy which was central to the Kadi case in the Court of Justice of the European Union. In this contribution I examine the role of legal expertise - what claims are made in the name of legal expertise and how does the Court of Human Rights understand those claims. In the examination of the claims regarding legal expertise, the meaning itself of legal expertise as a concept becomes contested and embedded in practices of security and confidentiality. To what extent does a claim to legal expertise require that expertise to be accessible to those outside of the specific group which created it? Can a claim to legal expertise be confidential and at the same time performative in the face of a human rights challenge? These are the core questions of this article which are answered through a close reading of the reasoning of the Human Rights Court.

## **Keywords**

legal expertise, terrorism, freezing of assets, travel ban.

## **1 The War on Terror and Legal Expertise in European Human Rights Law – Examining the European Court of Human Rights in *Nada v Switzerland***

On 12 September 2012, the European Court of Human Rights handed down judgment in a complicated case regarding the freezing of assets and travel ban on a dual Italian Egyptian national resident in an Italian enclave surrounded by Switzerland. The human right on which the case was decided was the man's claim to respect for his private and family life. The security claim was that he was engaged in terrorist activities (mainly unspecified) and that the freezing of his assets and ban on travel were necessary to protect international security as determined by the UN Security Council. Many issues arise in the case, not least that of the entitlement to a remedy which was central to the Kadi case in the Court of Justice of the European Union. In this contribution I examine the role of legal expertise - what claims are made in the name of legal exper-

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tise and how does the Court of Human Rights understand those claims. In the examination of the claims regarding legal expertise, the meaning itself of legal expertise as a concept becomes contested and embedded in practices of security and confidentiality. To what extent does a claim to legal expertise require that expertise to be accessible to those outside of the specific group which created it? Can a claim to legal expertise be confidential and at the same time performative in the face of a human rights challenge? These are the core questions of this article which are answered through a close reading of the reasoning of the Human Rights Court.

## **2. On law, knowledge and expertise**

Knowledge and the power to define knowledge are core components of law. The force of law comes from these two sources when coupled with enforcement mechanisms. Law in its active form, as performed in the court room and in legal procedures provides a mechanism by which claims to knowledge which reveal truth and pitted against one another. The parties to any legal proceeding make claims to knowledge about what 'actually' happened in any specific instance in the past and produce information, witnesses etc in support of their claim to that knowledge. These claims are founded on attributions of expertise of some sort – in the most mundane form, to expertise simply because the witness was present and watching at the time an event occurred and by this happenstance has expertise in the form of present knowledge embedded in personal memory of what happened. In more sophisticated ways the expertise which may be performed in a legal action may include persons claiming special knowledge on the basis of diplomas or practical experience which give them sustainable claim to more knowledge than others. The legal procedure is designed to privilege some claims to expertise over others. Judges and juries will be persuaded of the superior expertise of some witnesses over others in the process of determining the case before them. Guilt or acquittal in a criminal case, victory or defeat in a civil or administrative case depends on how the judges and juries allocate credibility to the claims to expertise of all kinds. Whether it is a case of witnesses to an event or highly qualified university professors whose written reports on a specific aspect of knowledge are presented to the court, the judge and jury will decide what weight to give to that expertise and where in the hierarchy of decision making it will be slotted.

In this consideration of expertise, at some levels, the concept of expertise becomes synonymous with evidence. Evidence is a form of expertise for the purposes of judicial proceedings. However, I will focus on expertise which is based on specific knowledge claims about a field of knowledge – international securi-

ty – rather than knowledge claims about individual events. In particular, I am interested here in how claims to international security expertise both explicit and implicit fare before a supra-national court charged with considering claims of human rights violations. Claims to specific expertise in the field of security are characterised by claims to confidentiality and secrecy<sup>1</sup>. The exigencies of the protection of national and international security are frequently the reasons provided by security experts as the reason why they cannot make available the information on the basis of which their assessment of security needs are based. Their expertise cannot be tested in the normal way through an examination of the information on the basis of which it was formed. Instead, the expertise rests on the authority of the expert making the claim.<sup>2</sup> The more serious the expert's claim to national or international security imperatives, the greater the sensitivity of the information on which it is based. How are these claims to expertise which can only be probed at the most superficial levels dealt with by a supranational human rights court? This is the central question of this article.

The clash between history and law provide an excellent example regarding the capacity to privilege knowledge.<sup>3</sup> While historians claim a specific monopoly over knowledge of the past based on their social science methodologies, legal systems constitute a different methodology to determine the past which permits not only a determination of what happened in the past but is also final and unassailable results in the form of concrete consequences for individuals (eg prison sentences). When the court of final instance speaks, the state's coercive organs carry out the sentence. It is because of this finality surrounding the decision of the court on what happened, that miscarriages of justice, when revealed have such impact. When historians take on the judges and legal systems they need to be very determined as the capacity to capture 'truth' is highly institutionalised structures and to defended their truths against criticism.

What is this knowledge which expertise creates? How is it constructed and who captures it? In this article I am going to examine only one judgment regarding a Mr Nada, a dual Italian and Egyptian citizen – from the European Court of Human Rights of 12 September 2012. This was a particularly momentous day in the annals of terrorism not only as it was 10 years and a day after the attacks in the USA, but also because it was the same day that a US ambassador

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1 David Cole, *Enemy aliens: Double standards and constitutional freedoms in the war on terrorism*, New York: The New Press 2003; Barbara Olshansky, *Secret trials and executions: military tribunals and the threat to democracy*, Open Media Series, Vol. 7, New York: Seven Stories Press 2003.

2 David D. Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis', *Michigan Law Review*, Vol. 101, No. 8, August 2004. Available at SSRN: <http://ssrn.com/abstract=519442>.

3 Barbara J. Shapiro, *Probability and certainty in seventeenth-century England: A study of the relationships between natural science, religion, history, law, and literature*, Princeton, NJ: Princeton University Press 1983.

was killed in Libya in what appears to have been a terrorist attack, a victim of the continuing aftermath of the 11 September 2001 events.<sup>4</sup> The judgment is about the legitimacy of the expertise on the basis of which a man's name was put on the UN Sanctions list against the Taliban as a result of which all his assets were frozen and he was effectively blocked in a tiny Italian enclave surrounded by Switzerland for 13 years by the time the matter came before the European Court of Human Rights (ECtHR).<sup>5</sup> The struggle is a rather Titan one. On the one hand, the UN Sanctions Committee (the composition of which is effectively the same as the Security Council) relying on its privileged knowledge of who is a Taliban, who is a terrorist threat associated with the Taliban, claims a monopoly over knowledge about threat and risk from this (and other) sources. This knowledge is based on privileged information, the revelation of which might endanger people all over the world. This monopoly is upheld by the state authorities of all the UN member states who implement through their national law the sanctions called for by the UN Committee. It is a very specific form of expertise which permits these claims to knowledge to succeed. On the other side is the ECtHR a supranational, regional human rights court which claims the authority of any court to determine the content of facts, truth and life itself. Its right to determine the validity of expertise, even in the form of national and international security expertise, is that which is inherent in its duty to determine whether a human rights violation has occurred or not. In order to carry out this obligation, the ECtHR may be required, as in this case, to assess, explicitly or implicitly the weight of the expertise presented and to privilege some claims over others. Following the ECtHR are all the national courts of the Council of Europe states, obliged by the European Convention on Human Rights and national law to implement correctly and in accordance with the ECtHR's judgments the truth and facts as determined by it.

Two supranational systems enter into direct competition regarding the entitlement to determine what expertise is and how it is created in respect of a specific individual – Mr Nada. The first is the UN Sanctions Committee which on the basis of expertise brought to its attention determined that Mr Nada was such a threat to international security that a very fundamental interference with his life was justified – the freezing of all his assets and a travel ban.<sup>6</sup> The second is

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4 'Chris Stevens, US ambassador to Libya, killed in Benghazi attack', *Guardian newspaper*, 12 September 2012, <http://www.guardian.co.uk/world/2012/sep/12/chris-stevens-us-ambassador-libya-killed>, visited 31 October 2012.

5 *Nada v Switzerland European Court of Human Rights*, 12 September 2012 (not yet reported).

6 Marieke De Goede, 'The politics of preemption and the war on terror in Europe', *European Journal of International Relations*, 14.1 (2008), p. 161-185; Elspeth Guild, 'The Uses and Abuses of Counter-Terrorism Policies in Europe:

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the ECtHR a regional supranational human rights court. As discussed below, four countries claimed the expertise to determine the existence or otherwise of a national and international security threat which Mr Nada posed. Both supranational systems are founded on claims of legality – the Sanctions List is a UN Resolution adopted by the UN Security Council and transposed into the national laws of the UN member states. The list of people whose assets must be frozen and who must not be permitted to move about freely is a creation of one type of law.<sup>7</sup> The entitlement of the ECtHR to determine the facts and law is based on another supranational system of law, human rights law (the European Convention on Human Rights) which gives it the entitlement to determine according to its rules what knowledge is about threat and risk.<sup>8</sup> While this story is not so unusual, one might even call it banal and the daily stuff of authorities and courts – authorities make laws, courts interpret them not always in the way the authorities envisaged – the extraordinary feature of this conflict about the entitlement to determine the quality of expertise is the fact that it takes place in the territory of national and international security. This field of global threat and security imperative has been staked out by the experts of security as their monopoly.<sup>9</sup> The right to decide expertise on threat and risk has been claimed by them in such a comprehensive manner that challenge by any authority exterior to the experts (including by the courts) is excluded by law both national and supranational.<sup>10</sup> Even the principle of transparency and the right to know the content of the allegations against the person subject to the measures are suspended. There is no right to a criminal trial against the allegations even though the penalties for being under suspicion are in most ways more severe than those which apply to convicted criminals. This claim to knowledge expertise is not of the garden variety. It is ring-fenced against challenge in the most complete manner possible.<sup>11</sup> Thus the struggle of the titans which takes place in this judgment is particularly interesting to an understanding of the nature and power of legal expertise and its capacity to challenge and be challenged.

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The Case of the 'Terrorist Lists', *JCMS: Journal of Common Market Studies*, 46.1 (2008), p. 173-193; Peter Gutheirie, 'Security Council Sanctions and the Protection of Individual Rights', *NYU Ann. Surv. Am. L.*, 60 (2004), p. 491.

7 Andrea Bianchi, 'Assessing the effectiveness of the UN Security Council's anti-terrorism measures: the quest for legitimacy and cohesion', *European Journal of International Law* 17.5 (2006), p. 881-919.

8 David Harris et al., *Law of the European Convention on Human Rights*, Oxford Oxford University Press 2009.

9 Anna Leander, 'The power to construct international security: on the significance of private military companies', *Millennium-Journal of International Studies* 33.3 (2005), p. 803-825.

10 Mikkel Vedby Rasmussen, 'It Sounds Like a Riddle': Security Studies, the War on Terror and Risk', *Millennium-Journal of International Studies* 33.2 (2004), p. 381-395.

11 Didier Bigo, *Terror, insecurity and liberty: illiberal practices of liberal regimes after 9/11*, Routledge studies in liberty and security, Vol. 1, London/New York: Routledge, 2008.



### 3. **Nada v Switzerland 12 September 2012 European Court of Human Rights**

#### **The facts**

Mr Nada was born in 1931 and has been living since 1970 in Campione d'Italia, which is an Italian enclave of about 1.6 sq. km in the Province of Como (Lombardy), surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by Lake Lugano. According to the ECtHR, he described himself as a practising Muslim and a prominent businessman in the financial and political world, in which he purported to be highly regarded. An engineer by training, he worked in very diverse sectors, in particular banking, foreign trade, industry and real estate. In the course of his business activities he founded numerous companies of which he was the sole or principal shareholder. He has a number of medical conditions requiring hospital treatment.

On 15 October 1999 Security Council Resolution 1267 was adopted providing for sanctions against the Taliban (in the wake of the bombing of the US embassy in Dar-es-Salaam). This was implemented by the Swiss authorities. The Sanctions list was extended in 2000 to include friends of Osama bin Laden and Al Qaeda. The Swiss authorities implemented this too. On 7 November 2001 the US President blocked the assets of Bank Al Taqwa of which Mr Nada was chairman and principal shareholder. Two days later, Mr Nada's name was added to the Sanctions list which requires all UN states to freeze the assets and prevent free movement of people on it. In the meantime a Swiss prosecutor commenced an inquiry into Mr Nada. Security Council Resolution 1390, adopted on 16 January 2002 introduced entry and transit bans for people on the Sanctions list. When Mr Nada visited London in November 2002 he was arrested and removed to Italy. All his money was seized.

It seems that the Swiss (and Italian) authorities were not terrible quick off the mark in subjecting Mr Nada to sanctions. Apparently, this kind of failing was sufficiently important that a Monitoring Group was established under Security Council Resolution 1363 in 2001 comprised on five experts (selected on the basis of equitable geographical distribution apparently) to monitor states and make sure they carry out their listing obligations. This Group criticised the Swiss implementation of the Sanctions list and bans. As a result the Swiss Canton of Ticino revoked Mr Nada's border-crossing permit, after which time he was effective a prisoner in the Italian enclave. On 31 May 2005, the Swiss prosecutor closed his investigation into Mr Nada, finding that the accusations against him were unsubstantiated.

Mr Nada began various legal proceedings in Switzerland to have his name deleted from the national implementing measure of the Sanctions list. This fai-

led as the Swiss authorities and courts considered that as they were only carrying out a UN Security Council Resolution, the remedy had to come from that source and not from the Swiss authorities.<sup>12</sup> Mr Nada applied to the Sanctions Committee to have his name removed which application was rejected without reasons and with an express refusal to provide information regarding which state had proposed his listing and on what grounds.<sup>13</sup> Eventually, and with the intervention of both the Italian and Swiss authorities, Mr Nada's name was finally removed from the list in 2009.

### **A Human Rights Issue?**

Mr Nada claimed that the actions of the Swiss authorities rendering him a prisoner in his little enclave (where there were inadequate medical facilities for his medical conditions) breached the following human rights:

- His right to liberty guaranteed under Article 5 ECHR;
- His right to respect for his private and family life, honour and reputation guaranteed by Article 8;
- His treatment was tantamount to ill-treatment contrary to the prohibition in Article 3 of torture, inhuman or degrading treatment or punishment;
- His right to manifest his religion and beliefs (as he could no longer go to the mosque to pray as this was outside his enclave) guaranteed by Article 9;
- His right to an effective remedy in circumstances where a substantive right has been breached as there was no court or tribunal to which he could take his case and get a remedy contrary to his right to an effective remedy in Article 13.

The European Court of Human Rights found that only the claims of a breach of Article 8 (the right to respect for family and private life) and Article 13 (the right to an effective remedy) were admissible. It found that Switzerland is responsible for a breach of both articles in respect of Mr Nada. It awarded Mr Nada €30,000 in damages for the breach.

There has been some legal analysis of the case since the decision. Milanovic<sup>14</sup> considered that the ECtHR chose to determine the case on relatively narrow grounds of the right to private life not least to assist in avoiding a decision on

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12 Clemens A. Feinäugle, *The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?*, *The Exercise of Public Authority by International Institutions* 2010, p. 101-131.

13 Jorge Godinho, 'When worlds collide: Enforcing United Nations Security Council asset freezes in the EU legal order', *European Law Journal* 16.1 (2009), p. 67-93.

14 Marko Milanovic, 'European Court decides Nada v Switzerland', *EJIL Talk!*, 14 September 2012.

the question of supremacy under the UN Charter (Article 103). The conflict of norms between the ECtHR and the UN Security Council was avoided, in his opinion because the ECtHR held that the measures taken by the Swiss authorities were not proportionate and the Swiss could have done more to alleviate Mr Nada's situation within the scope of the Security Council resolution. Henderson<sup>15</sup> highlights the fact that the ECtHR insisted on the limited but nevertheless real latitude which the Swiss authorities had in how to implement the UNSC resolution. He notes that some of the judges in a concurring opinion to the judgment express concern about this finding as possibly unrealistic. He considers that the ECtHR followed the EU's court, the Court of Justice of the European Union in its judgment in *Kadi*<sup>16</sup> in effectively finding that there are two different systems of law and that international law did not prevent the court from reviewing something done by a state or institutions in order to comply with an international law obligation. The result, according to him is that while a state must obey the UN even when risking a breach of a human right but must always allow the individual an effective remedy (a fairly controversial assessment of the decision). Thienel<sup>17</sup> takes a somewhat different approach. He examines the options which were open to the ECtHR and its choice to find a breach of the right to respect for private and family life of Mr Nada. Switzerland ought to have alerted Italy, as the country of nationality and residence of Mr Nada that there was no reasonable suspicion against him and to adapt the sanctions to his particular situation. So far the commentary on the case has not focused on the issue of expertise – which experts are to be believed and on the basis of what knowledge?

#### 4. Why was Mr Nada on the Sanctions Committee's List?

Turning then to the judgment and its use of information – what claims are made for finding that Mr Nada was a security risk? The central issue for Mr Nada is the expertise used to justify his inclusion on the Sanctions list. His listing occurred on 9 November 2001. The allegation in the Sanctions list created by UN Resolution 1267 (1999) was that those on the list were associates or members of al-Qaeda or the Taliban. The ECtHR cites the conclusions of the Swiss national court which had to grapple with the issue before it went to Strasbourg, which is

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15 Alasdair Henderson, 'When the UN breach human rights... who wins?', *UK Human Rights Blog*, 5 October 2012.

16 Katja S. Ziegler, 'Strengthening the Rule of Law, But Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights (April 2009)', *Human Rights Law Review*, Vol. 9, No. 2, 2009; Oxford Legal Studies Research Paper No. 11/2009. Available at SSRN: <http://ssrn.com/abstract=1358376/>.

17 Tobias Thienel, 'Nada v Switzerland: the ECtHR Does not Pull a Kadi (But Mandates It for Domestic Law)', *Invisible College Blog*, 12 September 2012.

rather unsatisfactory as it refers to an event which post-dates the listing by seven years. When pressed by a national court in Switzerland, the Swiss authorities informed the court that Mr Nada had, in April 2008, been convicted (in absentia) by a Military Tribunal in Egypt to ten years imprisonment for providing financial support to the Muslim Brotherhood. When pressed by the ECtHR in chamber, the Swiss authorities stated that Mr Nada had been listed by the USA, but by the time this information was provided, in the summer of 2009, the USA had requested the de-listing of Mr Nada (this took place on 23 September 2009). The political choice of the Swiss authorities in the first instance, before their own courts was to claim expertise of the same kind and nature as the knowledge about to be turned into expertise by the Swiss court – a judgment of a court itself. Albeit an Egyptian Military Tribunal, nonetheless, the intention is to claim legitimacy for the expertise on the basis of the decision of another judicial instance. In the second step, when the ECtHR itself in chamber pressed the Swiss authorities about the listing, they chose no longer to rely on the judgment of the Egyptian court but rather to refer to another country, the USA, as the source of expertise. Beyond the generic indication of a country no further expertise is produced. The implication is that interstate solidarity and trust is the source of the legitimacy of the expertise on the basis of which Mr Nada's life was made exceedingly uncomfortable. The US claimed expertise in submitting Mr Nada's name for inclusion on the sanctions list. The Swiss authorities accepted that expertise because the US authorities had put it forward and it had been accepted by the Sanctions Committee. There is no suggestions that the Swiss authorities considered that they had an entitlement to know anything further about that expertise.

In all the court proceedings, in Switzerland, Italy and before the ECtHR, the nature of the expertise on the basis of which Mr Nada had been listed in the first place was never revealed. This expertise was never even alluded to in the ECtHR judgment. The implicit expertise of the Sanctions list was that if a state proposed an individual for the list then the expertise on which the state had done so was valid and beyond question. The confidential nature of the expertise on the basis of which people are included on the Sanctions list was not challenged by the ECtHR. It did not insist that the background information on the basis of which the claim to expertise was based be revealed. Instead, it accepted that the act of putting Mr Nada on the list had been carried out in accordance with the SC Resolution.

## **5. What was the role of knowledge claims in the case?**

It is clear from the facts that the knowledge claims of at least four countries were at stake:

- Switzerland – its counter terrorism authorities (about which the judgment is silent) and its criminal justice authorities;
- Italy – its counter terrorism authorities (about which the judgment is silent) and its criminal justice authorities;
- Egypt – the Egyptian military criminal justice authorities hand down a judgment in absentia (about which proceedings Mr Nada claimed he had no idea) against Mr Nada for financial support of the Muslim Brotherhood and sentenced him to ten years imprisonment;
- The USA – this state actor only appears very late in the affair when in 2009 the Swiss authorities state that Mr Nada was listed at the request of that country.

The human rights breaches which the ECtHR found in this case revolved around the assessment by the Swiss authorities that the action of containing Mr Nada in an enclave in Italy was necessary in a democratic society. In order to satisfy that test, the action must answer a pressing social need and be proportionate to the legitimate aim pursued. The reasons given by the national authorities to justify the measures must be relevant and sufficient. In order to fulfil this test, there must be an assessment by the authorities that the possible recourse to an alternative measure that would cause less damage to the fundamental right at issue whilst fulfilling the same aim must be ruled out. The final evaluation of whether the interference is necessary remains a matter for the ECtHR to review on the basis of the evidence placed before it. Thus the question of who is entitled to decide what is expertise in the field of assessment of terrorism threats on the basis of which actions may be justified or not, rests not with the national authorities at the end of the day but with the supranational court. It is for the national authorities to show that their expertise was relevant and sufficient. In this assessment, the ECtHR stated that it was prepared to take into account the fact that the threat of terrorism was particularly serious at the time when the Sanctions regime was adopted (1999-2002). The proof of that state of heightened terrorist threat is given as 'the wording of the resolutions and the context in which they were adopted'. There is no apparent expertise beyond the words and context (which is never spelt out).

Of particular importance for the ECtHR is the fact that the investigations by the criminal justice authorities in Italy and Switzerland concluded that the suspicions about Mr Nada's participation in activities related to international terrorism were unfounded. Thus the ECtHR privileges the expertise of the criminal justice authorities of two Council of Europe member States over the UN Sanctions Resolution as regards the assessment of the necessity of the measures. The Court highlighted the fact that the Swiss Federal Prosecutor closed its investigation on

31 May 2005 and on 5 July 2008 the Italian Government submitted to the Sanctions Committee a request for Mr Nada to be de-listed on the grounds that the proceedings against him in Italy had been discontinued.

The ECtHR claimed a monopoly in the final instance of determining what expertise is, implicitly if not explicitly. By claiming the right to determine whether Mr Nada's human rights had been violated, the Court was entitled to examine all the expertise on the basis of which that violation has taken place. That expertise which is not made available to the Court is not taken into account. Elsewhere the Court will have to determine the validity of judicial proceedings where the expertise is placed before a court but in closed proceedings where the individual (whether plaintiff or defendant) is not allowed to know its contents or to see it. This was not the issue in this case, as the ultimate expertise as to why Mr Nada was considered a security risk was never divulged.

The criminal justice authorities of Switzerland appear to be the first to undermine the accuracy of the information of the Sanctions list by their finding in 2005 that the suspicions against Mr Nada were unfounded. Their counterparts in Italy followed suit. At this point, it would seem that there was a re-assessment of the quality of the expertise by the Swiss authorities as gradually, with the assistance of a variety of Swiss courts, including its Federal Court, the expertise of the criminal justice authorities gained strength against that of the Sanctions list. The result was that the Swiss authorities were eventually convinced, with the assistance of their courts, to request the Sanctions Committee to de-list Mr Nada. This request took place on 2 September 2009.

The Italian authorities seemed to have resolved their issues about expertise on Mr Nada more slowly than their Swiss counterparts. This is slightly surprising as Mr Nada was, in any event, resident on their territory and their citizen. However, at the relevant time Italy was a member of the Security Council according to the ECtHR judgment. The Italian criminal justice authorities closed their inquiry into Mr Nada and requested his de-listing by the Sanctions Committee on 5 July 2008 (this request was rejected by the committee on 15 July 2008 without reasons).

As these events were unfolding, the bizarre case of the Egyptian military tribunal's conviction of Mr Nada occurred. He had been living in Italy since 1970 and is a dual Italian/Egyptian national. He is a civilian and since taking up residence in Italy, at least, has never been part of the military in Egypt or elsewhere as far as one can tell. In the ECtHR judgment, there is no information about the military tribunal's proceedings against Mr Nada which took place in April 2008. Indeed, the exact date of the event is missing from the judgment. The capacity of constructing this court judgment as a source of knowledge about the threat which Mr Nada might be is thus flawed as we do not even know precisely when it happened. The only evidence of the trial that the ECtHR

referred to was an article in the Italian newspaper *Corriere del Ticino*, dated 16 April 2008. The way in which the ECtHR constructs the narrative one is left with the suspicion that there is a nexus between the Italian Government's request for de-listing of Mr Nada and the sudden interest of the Egyptian authorities into Mr Nada's financial affairs. Be that as it may, the expertise of the Egyptian military tribunal as a court which has reached a criminal conviction of Mr Nada plays no further role in the case. Although this is a criminal justice authority in a fraternal relationship one might say with the Italian and Swiss criminal justice authorities (though different because the Egyptian one is military), the capacity to transform the judgment of the Egyptian military tribunal into persuasive expertise appears to be unsuccessful before the ECtHR.

It is only as the narrative of the case unfolds that the shadow of information behind the other three countries activities gradually emerges – that of the USA. This information never takes a shape more substantial than the fact of the request for the Sanctions Committee listing of Mr Nada. As the requests for de-listing of Mr Nada eventually made by the Italian authorities and their Swiss counterparts, never elicited a response with reasons of any kind, let alone a mechanism for challenge of the findings, they remain completely shielded from the judicial process. This notwithstanding, it is this expertise which appears to have driven the whole affair.

## **6. What conclusions regarding knowledge?**

What an analysis of the ECtHR decision on Mr Nada reveals is the competition inherent in claims about expert knowledge. For expertise to enter into the political or legal domain it needs champions capable of carrying their claims to knowledge and its construction. In order for that construction of expertise to be effective, its champions need to be able either to defend it if the expertise becomes public or ensure that it never becomes public. In competitions for monopolies over the reliability of expertise, the first tactic will be the most effective so long as the construction of information is sufficiently strong to support it. The second approach is more risky. In the war on terror, however, it has taken an important place in the arsenal of state responses. It depends, though, on its champions being able to protect themselves and their expertise from any inquiry by possibly sceptical third parties. In order to keep something secret, those trying to keep the secret must ensure that there is no review procedure by independent external actors which will require the secrets to be justified. When faced with such a challenge, the capacity to maintain action based on the secret knowledge is undermined. The cost of keeping the secrets secret is that they lose their capacity to found action against specific individuals. The role of human rights law which can be adjudicated by a court set outside the immedia-

te ring of separation of powers at the national level and, unlike national courts, not surrounded by other arms of government at the same supranational level, appears, at least in this case to have provided an interesting last word on expertise in the war on terror.