**19 June 2013**

**PRESS SUMMARY**

**Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No. 1) [2013] UKSC 38**
***On appeal from [2011] EWCA Civ 1***

**JUSTICES**: Lord Neuberger (President), Lord Hope (Deputy President), Lady Hale, Lord Kerr, Lord Clarke, Lord Dyson, Lord Sumption, Lord Reed, Lord Carnwath

## BACKGROUND TO THE APPEAL

This appeal concerns the use of a closed material procedure ("CMP") in the Supreme Court. A CMP involves the production of material which is so confidential and sensitive that it requires the court not only to sit in private, but to sit in a closed hearing. At a closed hearing, the court considers the material and hears submissions about it without one of the parties to the appeal seeing the material or being present, although that party's interests are protected, at least to an extent, by the presence of special advocates who make such submissions as they can on behalf of that party. A CMP also involves the court at least contemplating giving a judgment, part of which will be closed and not be seen by one of the parties or the public.

Pursuant to various provisions of the Counter-Terrorism Act 2008 ("the 2008 Act"), the Treasury made the Financial Restrictions (Iran) Order 2009 ("the 2009 Order"), which Parliament subsequently approved. The 2009 Order effectively shut down the United Kingdom operations of Bank Mellat ("the Bank") and its subsidiary. Section 63 of the 2008 Act gives any party affected by such an order the right to apply to the High Court to set it aside. The Bank made such an application. The Government took the view that some of the evidence relied on by the Treasury to justify the 2009 Order was of such sensitivity that it could not be shown to the Bank or its representatives.

In the High Court, Mitting J accepted the Government's case that justice required that the evidence in question be put before the court and that it had to be dealt with by a CMP. The hearing before him was partly in open court and partly at a closed hearing. Mitting J handed down an open judgment, in which he dismissed the Bank's application, and a shorter closed judgment, which was seen by the Treasury, but not by the Bank, and is not publicly available. In the Court of Appeal, the appeal was heard largely by way of an open hearing. However, there was a short closed hearing at which the closed judgment of Mitting J was considered. The Court of Appeal dismissed the Bank's appeal in an open judgment, and while it referred in general terms to the closed material in that open judgment, the Court of Appeal found it unnecessary to give a closed judgment.

Before the Supreme Court, the Bank's appeal was divided into two issues. The first issue concerned the use of a CMP in the Supreme Court. The second issue concerned the Bank's appeal against the Court of Appeal's decision to approve Mitting J's upholding of the 2009 Order. This judgment is on the first issue. A second judgment is given on the second issue: see *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39.

## JUDGMENT

The Supreme Court decides (i) by a majority of six to three (Lord Hope, Lord Kerr and Lord Reed dissenting), that it is possible for the Supreme Court to adopt a CMP on an appeal, (ii) by a majority of five to four (Lord Hope, Lord Kerr, Lord Dyson, and Lord Reed dissenting), that it was appropriate to adopt a CMP in this appeal. Lord Neuberger gives the judgment of the majority on both (i) and (ii).

## REASONS FOR THE JUDGMENT

### Closed material procedures in the Supreme Court

Section 40(2) of the Constitutional Reform Act 2005 ("the 2005 Act") provides that an appeal lies to the Supreme Court against any judgment of the Court of Appeal. That must extend to a judgment which is wholly or partially closed. It would appear to be implicit in the notion that an appeal can be brought against a closed judgment that the appellate court can consider the closed judgment, and, at least at first sight, that could only be done at a closed hearing. That view is reinforced once one considers the other alternative courses of action, all of which are patently unsatisfactory **[38]-[42]**. The notion that the Supreme Court has power to take such a course is reinforced by section 40(5) of the 2005 Act, which gives the Court the power to determine any question necessary for the purposes of doing justice **[37]**. Therefore, the Supreme Court can conduct a CMP where it is satisfied that it may be necessary to do so in order to dispose of an appeal **[43]**. It follows that the Supreme Court has the power to entertain a CMP on appeals against decisions of the courts of England and Wales on applications brought under section 63 of the 2008 Act **[47]**. Where a CMP has been adopted at first instance and in the Court of Appeal, for the Supreme Court to entertain an appeal without considering the closed material would, at least in many cases, not be doing justice, either in the sense of fairly determining the appeal, or in the sense of being seen fairly to determine the appeal **[44]**.

The minority consider that Parliament has not conferred the power to conduct a CMP on the Supreme Court **[78],[134]**. For the Supreme Court to conduct a CMP would be contrary to the fundamental principle of the common law right to a fair trial **[103],[138]**. There is a strong presumption that Parliament does not intend to interfere with the exercise of fundamental rights, and it will be understood as doing so only if it does so expressly or by necessary implication **[105],[135]**. In the 2008 Act, Parliament introduced a CMP for the High Court, the Court of Session, and the Court of Appeal, but did not introduce such a procedure for the Supreme Court **[125]**. It is inconceivable that it was intended that the Supreme Court should have the power to carry out a CMP while leaving it bereft of the structure and safeguards which were deemed essential for those courts in which such a hearing is expressly permitted **[116]**. There are alternatives to CMPs in the Supreme Court, and choices to be made in relation to them, which are appropriately made by Parliament after full consideration **[137]**.

### Closed material procedure in this appeal

Despite strong suspicions that nothing in Mitting J's closed judgment would have any effect on the outcome of the appeal, the majority decided to grant the Treasury's request to hold a CMP to consider it. This was because they could not be sure, without seeing the closed judgment and listening to submissions on it, whether the closed judgment would have any effect on the outcome of the appeal, and there seemed to be a real risk of justice not being seen to be done to the Treasury if the Supreme Court did not proceed to hold a closed hearing **[64]**. Having held a closed hearing, it turned out that there had been no point in the Supreme Court seeing the closed judgment, because there was nothing in it which could have affected the Supreme Court's reasoning in relation to the substantive appeal on the 2009 Order **[65]-[66]**. Several conclusions can be drawn from this experience, which should be considered by any appellate court considering whether to adopt a CMP and by any advocate considering inviting an appellate court to take such a course **[67]-[74],[89]-[97]**.

The minority consider that the Treasury fell far short of what was needed to show that a CMP was necessary in this case **[90],[130],[139],[145]**. This was because (i) the Court of Appeal did not find it necessary to refer to the closed judgment in any detail **[91]**, (ii) there was no closed ground of appeal in this case **[92]**, and (iii) the Treasury failed to indicate how looking at the closed judgment would assist in the disposal of the appeal **[93]-[96]**. A CMP should be resorted to only where it has been convincingly demonstrated to be genuinely necessary in the interests of justice **[128],[140]**. If the Court strongly suspects that nothing in the closed material is likely to affect the outcome of the appeal, it should not order a closed hearing **[144]**.

*References in square brackets are to paragraphs in the judgment*

**19 June 2013**

**PRESS SUMMARY**

**Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No.2) [2013] UKSC 39**

*On appeal from: [2011] EWCA Civ 1*

**JUSTICES**: Lord Neuberger (President), Lord Hope (Deputy President), Lady Hale, Lord Kerr, Lord Clarke, Lord Dyson, Lord Sumption, Lord Reed, Lord Carnwath.

## BACKGROUND TO THE APPEAL

This appeal concerns measures taken by the Treasury to restrict access to the UK's financial markets by a major Iranian commercial bank on account of its alleged connection with Iran's nuclear programme. On 9 October 2009 the Treasury made a direction under Schedule 7 of the Counter-Terrorism Act 2008 ("the Act") requiring all persons operating in the financial sector not to have any commercial dealings with Bank Mellat. The Act lays down three safeguards: (1) the direction must be laid before Parliament after being made and unless approved by affirmative resolution within 28 days will cease to have effect thereafter; (2) the direction must be proportionate having regard to the risk to the national interest presented by, in this case, nuclear proliferation; and (3) any person affected by the direction may apply to the High Court to set it aside.

Bank Mellat sought to have the direction set aside on procedural and substantive grounds. On the substantive grounds, Bank Mellat's case is that the direction was irrational, disproportionate and discriminatory; that the Treasury failed to give adequate reasons for making it, and that the Treasury's reasons were vitiated by irrelevant considerations and mistakes of fact. As to the procedural grounds, Bank Mellat's case was that the Treasury failed to give it the opportunity to make representations before making the direction. Although it had no express statutory right to such an opportunity, it contended that such an opportunity was required at common law or by Article 6 (right to a fair trial) and Article 1, Protocol 1 (right to peaceful enjoyment of property) of the European Convention on Human Rights. In the High Court, Mitting J dismissed Bank Mellat's application under both heads. The Court of Appeal (Maurice Kay, Elias and Pitchford LJJ) dismissed the appeal, unanimously in the case of the substantive grounds, and by a majority (Elias LJ dissenting) in the case of the procedural grounds.

## JUDGMENT

The Supreme Court allows the appeal of Bank Mellat, on the procedural ground by a majority of 6 to 3 ((Lords Hope, Reed and Carnwath dissenting); and on the substantive grounds by a majority of 5 to 4 (Lords Neuberger, Hope, Dyson and Reed dissenting). It accordingly sets aside the direction and quashes the order giving effect to it. Lord Sumption gives the lead judgment.

## REASONS FOR THE JUDGMENT

*Substantive Grounds*

The essential question is whether the interruption of Bank Mellat's commercial dealings in the UK bore some rational and proportionate relationship to the statutory purpose of hindering the pursuit by Iran of its nuclear weapons programmes [19]. For the majority, there were two particular difficulties with the direction: (1) it did not explain or justify the singling out Bank Mellat; and (2) the justification

was not one which ministers advanced before Parliament, and was in some respects inconsistent with it [22]. As to (1), on the findings of the judge, the risk was not specific to Bank Mellat but an inherent risk of banking, and the risk posed by Bank Mellat's access to those markets was no different from that posed by other comparable banks. Singling out Bank Mellat was arbitrary and irrational, and disproportionate to any contribution which it could rationally be expected to make to the direction's objective. By contrast, the minority were satisfied that, in view of the wide margin of appreciation given to the Treasury in these matters, the direction was rationally connected to the objective and was proportionate [126, 133, 173]. It was not decisive that the justification in the courts below was not the same as the statement laid before Parliament [119, 133]. There were good reasons for not involving all other Iranian banks, and the facts showed that the choice was not arbitrary [114-5].

*Procedural Grounds*

The majority also holds that Bank Mellat is entitled to succeed on the ground that it received no notice of the Treasury's intention to make the direction, and therefore had no opportunity to make representations before it was made [28]. This makes it unnecessary to decide whether a duty of prior consultation arose under the ECHR. [49] The common law duty of prior consultation depended on the particular circumstances in which each direction is made. [31] Unless a statute expressly or impliedly excludes a duty of consultation, or in the particular case consultation would be impractical or frustrate the object of the direction, fairness required that a person specifically targeted by it should have an opportunity to make representations. The direction had serious effects on Bank Mellat's business, came into force immediately and took effect for up to 28 days pending Parliamentary approval [32]. There were no significant practical difficulties about consultation: the Bank could as easily re-arrange its affairs after the direction as before it, and the Treasury could have disclosed before making the direction the material which they were properly required by Mitting J to disclose in the subsequent proceedings [31].

The duty of fairness was not excluded by (1) the statutory right under the Act of recourse to the courts after the direction; or (2) the fact that the order was subordinate legislation [33]. As to (1), the statutory right substantially reproduces the rights which a person affected would have anyway on judicial review. It should not limit other procedural rights. It is also inadequate where the effects of an order are immediate [37]. As to (2), the statutory instrument is the instrument of the minister who is empowered by the enabling Act to make it. The fact that it requires Parliamentary approval does not alter that [44]. The direction, although made by statutory instrument, involves the application of a discretionary legislative power against identifiable individuals. The statutory instrument is simply the form which the specific application of the particular legislation is required to take [46].

For the minority, the Act laid down a detailed procedural scheme which made no provision for representations to be made. The absence of such a provision was understandable, given the circumstances in which such orders might be made [56]. To require the Treasury to apply a case-by-case approach would place it in an unduly difficult position [60]. The existence of a duty of consultation made little sense of the provision preventing participation in the procedure leading to its approval by Parliament [61]. The Act protected persons affected by an order by giving them the right to apply to the courts [62]. A procedure involving consultation would contribute to good administration, but there were other competing considerations and it was not for the courts to re-write the scheme intended by Parliament [64, 153].

**NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**
www.supremecourt.gov.uk/decided-cases/index.html