Trinity Term
[2013] UKSC 38
On appeal from: [2011] EWCA Civ 1

JUDGMENT

Bank Mellat (Appellant) *v* Her Majesty's Treasury (Respondent) (No. 1)

before

Lord Neuberger, President
Lord Hope, Deputy President
Lady Hale
Lord Kerr
Lord Clarke
Lord Dyson
Lord Sumption
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

19 June 2013

Heard on 19, 20 and 21 March 2013

Appellant
Michael Brindle QC
Amy Rogers
Dr Gunnar Beck
(Instructed by Zaiwalla and Co)

Respondent
Jonathan Swift QC
Tim Eicke QC
Robert Wastell
(Instructed by Treasury Solicitors)

Special Advocates
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Intervener
Nicholas Vineall QC

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Intervener
Dinah Rose QC
Charlotte Kilroy
(Instructed by Liberty)

LORD NEUBERGER (with whom Lady Hale, Lord Clarke, Lord Sumption and Lord Carnwath agree)

1. This judgment is concerned with two connected questions:

(i) Is it possible in principle for the Supreme Court to adopt a closed material procedure on an appeal? If so,

(ii) Is it appropriate to adopt a closed material procedure on this particular appeal?

A closed material procedure 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 (ie a hearing at which the court considers the material and hears submissions about it without one of the parties to the appeal seeing the material or being present), and to contemplate giving a partly closed judgment (ie a judgment part of which will not be seen by one of the parties).

Open justice and natural justice

2. The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum – see, for instance *A v Independent News & Media Ltd* [2010] EWCA Civ 343, [2010] 1 WLR 2262, and *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 WLR 1645. Examples of such cases include litigation where children are involved, where threatened breaches of privacy are being alleged, and where commercially valuable secret information is in issue.

3. Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party ("the excluded party") knowing, or being able to test, the

contents of that evidence and those arguments ("the closed material"), or even being able to see all the reasons why the court reached its conclusions.

4. In *Al Rawi v Security Service* [2012] 1 AC 531, Lord Dyson made it clear that, although "the open justice principle may be abrogated if justice cannot otherwise be achieved" (para 27), the common law would in no circumstances permit a closed material procedure. As he went on to say at [2012] 1 AC 531, para 35, having explained that, in this connection, there was no difference between civil and criminal proceedings:

> "[T]he right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that".

5. The effect of the Strasbourg Court's decisions in *Chahal v United Kingdom* (1996) 23 EHRR 413 and *A and others v United Kingdom* [2009] ECHR 301 is that Article 6 of the European Convention on Human Rights ("Article 6", which confers the right of access to the courts) is not infringed by a closed material procedure, provided that appropriate conditions are met. Those conditions, in very summary terms, would normally include the court being satisfied that (i) for weighty reasons, such as national security, the material has to be kept secret from the excluded party as well as the public, (ii) a hearing to determine the issues between the parties could not fairly go ahead without the material being shown to the judge, (iii) a summary, which is both sufficiently informative and as full as the circumstances permit, of all the closed material has been made available to the excluded party, and (iv) an independent advocate, who has seen all the material, is able to challenge the need for the procedure, and, if there is a closed hearing, is present throughout to test the accuracy and relevance of the material and to make submissions about it.

6. The importance of the requirement that a proper summary, or gist, of the closed material be provided is apparent from the decision of the House of Lords in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269. At para 59, Lord Phillips said that an excluded party "must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations", and that this need not include "the detail or the sources of the evidence forming the basis of the allegations". As he went on to explain:

> "Where, however, the open material consists purely of general assertions and the case against the [excluded party] is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

7. The nature and functions of a special advocate are discussed in *Al Rawi* [2012] 1 AC 531, by Lord Dyson, paras 36-37, and by Lord Kerr, para 94. As Lord Dyson said, the use of special advocates has "limitations", despite the fact that the rule-makers and the judges have done their best to ensure that they are given all the facilities that they need, and despite the fact that the Treasury Solicitor has ensured (to the credit of the Government) that they are of consistently high quality.

8. In a number of statutes, Parliament has stipulated that, in certain limited and specified circumstances, a closed material procedure may, indeed must, be adopted by the courts. Of course, it is open to any party affected by such legislation to contend that, in one respect or another, its provisions, or the ways in which they are being applied, infringe Article 6. However, subject to that, and save maybe in an extreme case, the courts are obliged to apply the law in this area, as in any other area, as laid down in statute by Parliament.

The statutory and factual background to this appeal

9. The statute in question in this case is the Counter-Terrorism Act 2008 ("the 2008 Act"), which, as its name suggests, is concerned with enabling steps to be taken to prevent terrorist financing and the proliferation of nuclear weapons, and thereby to improve the security of citizens of the United Kingdom. The particular provisions which apply in the present case are in Parts 5 and 6 of the 2008 Act. The first relevant provision is section 62, which is in Part 5 and "confer[s] powers on the Treasury to act against terrorist financing, money laundering and certain other activities" in accordance with Schedule 7.

10. Paragraphs 1(4), 3(1) and 4(1) of Schedule 7 to the 2008 Act permit the Treasury to "give a direction" to any "credit or financial institution", if "the Treasury reasonably believes" that "the development or production of nuclear …. weapons in [a] country … poses a significant risk to the national interests of the United Kingdom". According to paras 9 and 13 of the schedule, such a direction may "require" the person on whom it is served "not to enter into or to continue to participate in … a specified description of transactions or business relationships with a designated person". Paragraph 14 requires any such direction to be approved by affirmative resolution of Parliament.

11. Pursuant to these provisions, on 9 October 2009, the Treasury made the order the subject of these proceedings, the Financial Restrictions (Iran) Order 2009 ("the 2009 Order"), which, three days later, was laid before Parliament, where it was approved. The 2009 Order, which was in force for a year, directed "all persons operating in the financial sector" not to "enter into, or … continue to participate in, any transaction or business relationship" with two companies, one of which was Bank Mellat ("the Bank"), or any branch of either of those two companies.

12. The Bank is a large Iranian bank, with some 1800 branches and nearly 20 million customers, mostly in Iran, but also in other countries, including the United Kingdom. In 2009, prior to the 2009 Order, it was issuing letters of credit in an aggregate sum of over US$11bn, of which around 25% arose out of business transacted in this country. It has a 60% owned subsidiary bank incorporated and carrying on business here, which was at all material times regulated by the Financial Services Authority. The Order effectively shut down the United Kingdom operations of the Bank and its subsidiary, and it is said to have damaged the Bank's reputation and goodwill both in this country and abroad.

13. The first section of Part 6 of the 2008 Act is section 63, of which subsection (2) gives any person affected by a direction the right to apply to the High Court (or the Court of Session) to set it aside, and any such application is defined by section 65 as "financial restrictions proceedings". The Bank issued such proceedings to set aside the Order on 20 November 2009. 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. 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 closed material procedure. Accordingly, he gave appropriate directions as to how the hearing should proceed.

14. The two day hearing before him was partly in open court and partly a closed hearing. The open hearing involved all evidence and arguments (save the closed material) being produced at a public hearing, with both parties, the Bank and the Treasury, seeing the evidence and addressing the court through their respective counsel, in the normal way. The closed hearing was conducted in private, in the absence of the Bank, its counsel, and the public, and involved the Treasury producing the closed material and making submissions on it through counsel. The interests of the Bank were protected, at least to an extent, by (i) the Treasury providing the Bank with a document which gave the gist of the closed material, and (ii) the presence at the closed hearing of special advocates, who had been cleared to see the material, and who made such submissions as they could on behalf of the Bank about the closed material.

15. Following the two-day hearing, Mitting J handed down two judgments on 11 June 2010. The first judgment was an open judgment, in which the Judge dismissed the Bank's application for the reasons which he explained - [2010] EWHC 1332 (QB). The second judgment was a closed judgment, which was seen by the Treasury, but not by the Bank, and is, of course, not publicly available. The closed judgment was much shorter than the open judgment, although it should be added that the open judgment is not particularly long.

16. In his open judgment, Mitting J referred to his closed judgment in two passages. At [2010] EWHC 1332 (QB), para 16, the Judge considered, inter alia, the activities of one of the Bank's former customers, Novin. Having referred to the fact that Novin had been "designated by the [UN] Security Council … as a company

which ‘operates within … and has transferred funds on behalf of” the Atomic Energy Organisation of Iran (“AEOI”), he said that “[b]y reason of the designation and for reasons set out in the closed judgment I accept that Novin was an AEOI financial conduit and did facilitate Iran’s nuclear weapons programme”. At [2010] EWHC 1332 (QB), para 18, the Judge considered the activities of another of the Bank’s former customers, Doostan International and its managing director, Mr Shabani. He said that “[f]or reasons which are set out in the closed judgment, I am not satisfied that Mr Shabani has made a full disclosure … and am satisfied that he and Doostan have played a part in the Iranian nuclear weapons programme”.

17. The Bank appealed, and the appeal was heard by the Court of Appeal largely by way of an ordinary, open, hearing. However, there was a short closed hearing at which they considered the closed judgment of Mitting J, and at which the special advocates, but not representatives of the Bank, were present. The Bank’s appeal was dismissed by the Court of Appeal (Maurice Kay and Pitchford LJJ, Elias LJ dissenting in part) in an open judgment, which was handed down on 13 January 2011 – [2011] EWCA Civ 1. In the last paragraph of his judgment, [2011] EWCA Civ 1, para 83, Maurice Kay LJ said that although the Court “held a brief closed hearing in the course of the appeal”, he did not “find it necessary to refer to it or to the closed judgment of Mitting J”.

18. The Bank then appealed to this Court. Before the hearing of the appeal, it was clear that the Treasury would ask this Court to look at the closed judgment of Mitting J. Therefore, it was agreed between the parties that the first day of the three day appeal should be given over to the question of whether the Supreme Court could conduct a closed hearing. At the end of that day’s argument, we announced that, by a majority, we had decided that we could do so and that we would give our reasons later.

19. The second day and most of the third day of the hearing were given over to submissions made in open court by counsel for the Bank (and counsel for certain interested parties, shareholders in the Bank) in support of the appeal, and to submissions in reply on behalf of the Treasury. We were then asked by counsel for the Treasury to go into closed session in order to consider the closed judgment of Mitting J. This was opposed by counsel for the Bank and by the special advocates. While we were openly sceptical about the necessity of acceding to the application, by a bare majority we decided to do so. Accordingly, the Court had a closed hearing which lasted about 20 minutes, at which we heard brief submissions on behalf of the Treasury and counter-submissions from the special advocates. We then resumed the open hearing for the purpose of counsel for the Bank making his closing submissions.

20. Contemporaneously with this judgment, we are giving our judgment on the substantive issue, namely whether the 2009 Order should be quashed. The purpose of this judgment is (i) to explain why we decided that we had power to have a closed material hearing, and (ii) to consider the closed material procedure we adopted on this appeal, and to give some guidance for the future in relation to the closed material hearing procedure on appeals.

The closed material procedure in the courts of England and Wales

21. The practice and procedure of the civil courts of England and Wales (the County Court, the High Court and the Court of Appeal) are governed by the Civil Procedure Act 1997 ("the 1997 Act"). Section 1(1) of the 1997 Act provides for the practice and procedure to be set out in the Civil Procedure Rules ("CPR"), and states that they are to be made, and modified, by the negative statutory instrument procedure. Section 1(3) of the 1997 Act states that the power to make the CPR "is to be exercised with a view to securing that the civil justice system is accessible, fair and efficient".

22. The underlying purpose of the CPR is enshrined in the so-called "overriding objective" in CPR 1(1), which requires every case to be dealt with "justly". By CPR 1(2), this expression is stipulated to include "so far as is practicable …ensuring that the parties are on an equal footing [and] ensuring that [every case] is dealt with … fairly". The CPR contain detailed rules with regard to procedures before, during and after trial, which seek to ensure that all civil proceedings are conducted in a way which is fair and effective, and, in particular for present purposes, in a way which achieves, as far as is possible in this imperfect, complex and unequal world, openness and equality of treatment as between the parties.

23. In a series of provisions in Part 6 of the 2008 Act, Parliament has recognised that financial restrictions proceedings may require the rules of general application in the CPR to be changed or adapted if a closed material procedure is to be permitted. The first of those provisions is section 66(1), which explains that:

> "The following provisions apply to rules of court relating to—
>
> (a) financial restrictions proceedings, or
>
> (b) proceedings on an appeal relating to financial restrictions proceedings."

Section 66(2) requires the "rules of court" to have regard to "the need to secure that" both (a) directions made under schedule 7 to the 2008 Act "are properly reviewed", and (b) that information is not disclosed "when [it] would be contrary to the public interest".

24. Section 66(3) of the 2008 Act states that "rules of court" may make provision for various aspects of financial restrictions proceedings, including (a) "the mode of proof and about evidence" and (c) "about legal representation". Section 66(4) states that "[r]ules of court" may (a) enable "the proceedings to take place without full particulars of the [direction] being given to a party …", (b) enable "the court to

conduct proceedings in the absence of any person, including a party …", (c) deal with "the functions of … a special advocate", (d) empower the court "to give [an excluded] party … a summary of evidence taken in the party's absence."

25. Section 67 of the 2008 Act is concerned with rules about disclosure in cases covered by section 66(1). Section 67(2) provides that, subject to the ensuing subsections, "[r]ules of court" must secure that the Treasury give disclosure on the normal principles - ie that they must disclose material which (i) they rely on, (ii) adversely affects their case, and (iii) supports the case of another party. Section 67(3) states that "[r]ules of court" must secure that (a) the Treasury can apply not to disclose material, (b) they can do so under a closed material procedure, with a special advocate present, and (c) the court should accede to the application "if it considers that the disclosure of the material would be contrary to the public interest", in which case (d) the court must "consider requiring the Treasury to provide a summary of the material to every party", provided that (e) the summary should not include material "the disclosure of which would be contrary to the public interest". Section 67(6) emphasises that nothing in the section should require the court to act in such a way as to contravene Article 6.

26. Section 68 of the 2008 Act is concerned with the appointment of special advocates for the purpose of financial restrictions proceedings. Section 72 of the 2008 Act enabled the Lord Chancellor to make the original rules referred to in the preceding sections. Section 72(4) provides that (a) any such rules should be laid before both Houses of Parliament, and (b) if they are not approved within forty days, any such rules will "cease to have effect".

27. The final provision in Part 6 of the 2008 Act is section 73, the interpretation section, which states that, for the purposes of Part 6 of the 2008 Act:

> "'rules of court' means rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session".

28. Pursuant to sections 66 and 67 of the 2008 Act, the Civil Procedure (Amendment No 2) Rules (SI 2008/3085) were made by the Lord Chancellor on 2 December 2008, laid before Parliament the next day, and came into force on 4 December 2008. As a result, the CPR now include a new rule 79, which applies to "Proceedings under the Counter-Terrorism Act 2008". CPR 79.2 (1) modifies the overriding objective "and so far as relevant any other rule", to accommodate (2) the court's duty to "ensure that information is not disclosed contrary to the public interest".

29. CPR 79 then goes on to modify, disapply or replace many of the generally applicable provisions of the CPR in relation to proceedings under the 2008 Act. Most of these variations arise from the provision for a closed material procedure in some

such proceedings. Thus, the CPR are amended to take into account the potential need for (i) involvement of special advocates (in e.g. CPR 79.8, CPR 79.18-21), (ii) an application for a closed material procedure (dealt with in CPR 79.11 and CPR 79.25), (iii) directions if such a procedure is ordered (in CPR 79.26), (iv) modification of the rules in relation to evidence and disclosure, including disapplication of CPR 31 relating to public interest immunity (in CPR 79.22), and (v) the possibility of a closed judgment (in CPR 79.28).

The statutory provisions and procedural rules of the Supreme Court

30. The Supreme Court was created by the Constitutional Reform Act 2005 ("the 2005 Act"). Section 40(2) of the 2005 Act states that "[a]n appeal lies to the Court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings". The effect of section 40(3) is that the right of appeal to the Supreme Court from any Scottish court remains the same as it was in relation to appeals to the House of Lords. Section 40(5) states that the Supreme Court "has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment". Section 40(6) provides that "[a]n appeal under subsection (2) lies only with the permission of the Court of Appeal or the Supreme Court …".

31. Section 45(1) of the 2005 Act provides that the President of the Supreme Court "may make rules (to be known as 'Supreme Court Rules') governing the practice and procedure to be followed in the Court". Section 45(3) states that this power must be exercised so as to ensure that "(a) the Court is accessible, fair and efficient", and "(b) the rules are both simple and simply expressed". Section 46 of the 2005 Act states that these rules (1) must be submitted to the Lord Chancellor by the President of the Supreme Court (or, in the case of the initial rules, the senior Lord of Appeal in Ordinary), and then (2) must be laid before Parliament by the Lord Chancellor, and (3) are then subject to the negative resolution procedure.

32. Pursuant to sections 45 and 46 of the 2005 Act, the Supreme Court Rules 2009 (SI 2009/1603) were duly made and laid before Parliament, and came into force on 1 October 2009, the day on which the Supreme Court opened. These rules ("SCR") now govern the procedure of this Court. They are far simpler than the CPR (unsurprisingly, as they are only concerned with appeals, indeed appeals which are almost always second, or even third, appeals).

33. SCR 2 is headed "Scope and objective", and SCR 2(2) states that "the overriding objective" of the SCR is "to secure that the Court is accessible, fair and efficient". The SCR contain no provisions which enable public interest immunity to be avoided, and no express provisions for closed procedures other than SCR 27(2), as set out in the next paragraph. Thus, SCR 22(1)(b) provides for the service by the appellant of "an appendix … of the essential documents which were in evidence before, or which record the proceedings in, the courts below", and SCR 28 states that a Supreme Court judgment "may be … delivered in open court; or … promulgated by

the Registrar". However, it is to be noted that SCR 29(1) begins by stating that "In relation to an appeal …, the Supreme Court has all the powers of the court below".

34. SCR 27 is headed "Hearing in open court", and it provides:

> "(1) Every contested appeal shall be heard in open court except where it is necessary in the interests of justice or in the public interest to sit in private for part of an appeal hearing.
>
> (2) Where the Court considers it necessary for a party … to be excluded from a hearing or part of a hearing in order to secure that information is not disclosed contrary to the public interest, the Court must conduct the hearing, or that part of it from which the party [is] excluded, in private but the Court may exclude a party … only if a person who has been appointed as a special advocate to represent the interests of that party is present when the party [is] excluded.
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> (3) Where the Court decides it is necessary for the Court to sit in private, it shall announce its reasons for so doing publicly before the hearing begins.
>
> ….. "

Can the Supreme Court conduct a closed material procedure: introductory

35. If a closed material procedure was lawfully conducted at the first instance hearing, it would seem a little surprising if an appellate court was precluded from adopting such a procedure on an appeal from the first instance judgment. As the advocate to the Court said in the course of his full and balanced argument, one would normally expect an appeal court to be entitled to have access to all the material available to the court below and to see all the reasoning of the court below. Otherwise, it is hard to see how an appeal process could be conducted fairly or even sensibly. And, if that involves the appellate court seeing and considering closed material, it would seem to follow that that court would have to adopt a closed material procedure.

36. However, particularly in the light of the fundamental principle established in *Al Rawi* [2012] 1 AC 531, the question needs to be looked at with great care. In particular, it is necessary to enquire whether statute requires the Supreme Court to adopt a closed material procedure, at least in some circumstances, on an appeal from the Court of Appeal upholding (or reversing) a first instance decision on an application under section 63(2) of the 2008 Act. As was said by counsel for Liberty (interveners on this appeal), supported by counsel for the Bank, any contention that a closed material procedure in a particular court in particular circumstances is sanctioned by a statute must be closely and critically scrutinised.

The case for saying that this Court can conduct a closed material procedure

37. The contention that this court has the power to have a closed material procedure is based on section 40(2) of the 2005 Act, supported by section 40(5). The argument proceeds as follows. (i) Section 40(2) provides that an appeal lies to the Supreme Court against "any" judgment of the Court of Appeal; (ii) that must extend to a judgment which is wholly or partially closed; (iii) in order for an appeal against a wholly or partially closed judgment to be effective, the hearing would have to involve, normally only in part, a closed material procedure; (iv) such a conclusion is reinforced by the power accorded to the Court by section 40(5) to "determine any question necessary … for the purposes of doing justice", as justice will not be able to be done in some such cases if the appellate court cannot consider the closed material.

38. The strength of this argument is reinforced when one considers the possible outcomes if the Supreme Court cannot consider a closed judgment (or the closed part of the judgment) under a closed material procedure. If that were the case, then, as I see it, there would be five possible consequences.

39. The first possibility would be that the appeal could not be entertained: that cannot be right, because it would conflict with section 40(2), which simply and unambiguously confers on the Supreme Court the power to hear appeals from "any" judgment of the Court of Appeal. The Supreme Court frequently refuses permission to bring an appeal from the Court of Appeal, but that is covered by section 40(6) of the 2005 Act, which expressly provides for such permission. It is one thing to cut down section 40(2) by providing that permission to appeal can be refused on a case by case basis expressly catered for in section 40(6); it is quite another to suggest that a whole class of appeals is impliedly excluded from the wide and general words of section 40(2).

40. The second possibility would be that the Supreme Court could consider the whole judgment, with the closed part being considered in open court. While it can be said that such a course would not involve a breach of any specific provision of Part 6 of the 2008 Act, if construed on a strictly semantic basis, it would wholly undermine its purpose, and the procedural structure it has set up. Unsurprisingly, this second possibility was not canvassed in argument.

41. The third possibility would be that the appeal could be entertained, but only on the basis that the Supreme Court could not look at the closed material. In an extreme case, where the whole judgment of the Court of Appeal was closed, this would be impossible, and would run into the same difficulty under section 40(2) as identified in para 39 above. Even in a case where the Court of Appeal judgment was only closed in part, such a course would be self-evidently unsatisfactory and would seriously risk injustice, and in some cases it would be absurd.

42. The fourth possibility would be that the Court was bound to allow the appeal; the fifth possibility would be that, conversely, the Court was bound to dismiss the appeal. There are clearly theoretical arguments in favour of either course, but it is unnecessary to consider them, because each of those courses is self-evidently equally unsatisfactory. If either of them was correct, it would mean that, when exercising its power to give permission under section 40(6) of the 2005 Act, the Supreme Court would effectively be deciding the appeal, and, indeed, would be doing so without seeing the whole of the judgment below, and without hearing oral argument.

43. In my view, subject to any arguments to the contrary, this analysis establishes that the Supreme Court can conduct a closed material procedure where it is satisfied that it may be necessary to do so in order to dispose of an appeal. This conclusion is reinforced by section 40(5) of the 2005 Act. An appeal under section 40(2) is "an appeal … under any enactment". Accordingly, where an appeal is brought against a decision under the 2008 Act, the Supreme Court has "power to determine any question necessary to be determined for the purposes of doing justice in" such an appeal. On any appeal where the judgment is wholly or partly closed, it seems to me that this court could not do justice, or at least would run a very serious risk of not doing justice, if it could not consider the closed material, and it could only do that if it adopted a closed material procedure.

44. It might, I suppose, be said that adopting a closed material procedure on any appeal would involve the antithesis of "doing justice in" that appeal. In a case where Parliament and the CPR have lawfully provided for a closed material procedure at first instance and in the Court of Appeal, I am of the view that, on the contrary, for this 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, notwithstanding that the material will be considered in a closed hearing.

45. The view that the Supreme Court can conduct a closed material procedure also derives some support from the provisions of SCR 27(2), and from SCR 29(1). However, if the Supreme Court would not otherwise have the power to conduct a closed material procedure, it could not, in my view, derive such a power solely from its rules. Accordingly those two rules can fairly be said to do no more than to give comfort to my conclusion.

46. It is right to mention that on this appeal, we are not being invited to consider a closed judgment of the Court of Appeal, as they did not find it necessary to give a closed judgment or even to include a closed paragraph in their open judgment. However, the trial judge gave a closed judgment, and, if it is open to this Court to consider, in a closed material procedure, a closed Court of Appeal judgment for the reasons just discussed, it must follow that we can consider, in a closed material procedure, a closed judgment given by the trial judge.

47. Accordingly, I conclude that, unless there are stronger arguments to the contrary, the Supreme Court has power to entertain a closed material procedure on appeals against decisions of the courts of England and Wales on applications brought under section 63(2) of the 2008 Act.

The arguments that we cannot conduct a closed material procedure

48. Having reached this provisional conclusion, it is right to acknowledge and consider the contrary arguments. Those arguments are:

i. A closed material procedure is such a serious inroad into natural justice that it can only be justified by clear and unambiguous statutory words, such as are found in Part 6 of the 2008 Act, but not in the 2005 Act;
ii. Parliament has plainly limited the closed material procedure under the 2008 Act to the High Court, the Court of Appeal and the Court of Session;
iii. It is appropriate to exclude the Supreme Court from the courts which can have a closed material procedure, given its role as a constitutional court and ultimate guardian of the common law;
iv. A closed material procedure requires a set of rules such as CPR 79 which are detailed and appropriately modify the generally applicable rules, and there is no such set of rules for the Supreme Court.

49. None of these points meets the basic argument which persuades me that it is open to the Supreme Court to undertake a closed material procedure, but they nonetheless merit careful attention. Before discussing them, however, it is right to address Liberty's understandable reliance on the fact that, in *Al Rawi* [2012] 1 AC 531, this Court uncompromisingly set its face against introducing a closed material procedure.

50. The stand taken by this Court in *Al Rawi* [2012] 1 AC 531 remains unquestioned, but it does not amount to any sort of indication that there could be no circumstances in which those concerned with the administration of justice could reasonably introduce a closed material procedure. Indeed, at the end of the short passage quoted in para 4 above from Lord Dyson's judgment, he acknowledged that Parliament can do so.

51. Having said that, any judge, indeed anybody concerned about the dispensation of justice, must regard the prospect of a closed material procedure, whenever it is mooted and however understandable the reasons it is proposed, with distaste and concern. However, such distaste and concern do not dictate the outcome in a case where a statute provides for such a procedure; rather, they serve to emphasise the care with which the courts must consider the ambit and effect of the statute in question.

52. At a relatively high level, in terms of constitutional principle and governmental functions, it seems to me that the following propositions apply. (i) The executive has a duty to maintain national security, which includes both stopping the financing of terrorism and nuclear proliferation and ensuring that some of the information relating to the financing of terrorism remains confidential; (ii) the rule of law requires that any steps aimed at preventing financing of terrorism which damage a person should be reviewable by the courts, and, as far as possible in open court and in accordance with natural justice; (iii) given that such reviews will often involve the executive relying on confidential material, it is for the legislature to decide and to prescribe in general how the tension between the need for natural justice and the need to maintain confidentiality is to be resolved in the national interest; (iv) in the absence of a written constitution, it is the European Convention, through Article 6, as signed up to by the executive and interpreted by the courts, which operates as a principled control mechanism on what the legislature can prescribe in this connection; (v) it is for the courts to decide, within the parameters laid down by the legislature, how the tension between the two needs of natural justice and confidentiality is to be resolved in any particular case.

53. In the more specific context of the issues with which the 2008 Act is concerned, it would be unreasonable not to accept that (i) the Act's aims of fighting the spread of terrorist activity and nuclear proliferation, and improving the security of UK citizens, are important aspects of the most fundamental duties of the executive, and (ii) those aims would be at real risk of being severely hampered if the courts hearing financial restrictions proceedings could not adopt a closed material procedure. Point (i) is self-evident: the two most fundamental functions of the executive are the maintenance of the defence of the realm and of the rule of law, and the 2008 Act appears to me to be within the scope of both those functions. In relation to point (ii), if there can be no closed material procedure, either (a) sensitive material would be seen by a person who may be supporting terrorism or nuclear proliferation, which might advance the very activities which the 2008 Act is designed to deter, or (b) such material would not be put in evidence, in which case a direction under that Act, which was appropriate and in the public interest, may be discharged for lack of evidential support.

54. The legislature has laid down in Part 6 of the 2008 Act, as expanded by CPR 79, how challenges to a direction under schedule 7 to the 2008 Act should be dealt with by the courts, and this includes a closed material procedure, which aims to strike a balance between two competing public interests, and it is a balance which has been held by the Strasbourg Court to be compatible in principle with Article 6. Whether or not one agrees with it, the justification for the way in which the balance has been struck by the legislature in Part 6 of the 2008 Act is clear, lawful and rational. It is against that background that the issue of principle raised on this appeal must be judged.

55. Turning now to the four arguments raised by the intervener and the Bank, there is a basic principle that fundamental rights cannot be taken away by a generally or ambiguously expressed provision in a statute – see eg per Lord Hoffmann in *R v*

Secretary of State, Ex p Simms [2000] 2 AC 115, 132. There is also a basic principle that fundamental rights can only be overridden by a statutory provision through express words or by necessary implication, not merely by reasonable implication – see eg per Lord Hobhouse in *R (Morgan Grenfell) v Special Commissioners* [2003] 1 AC 563, para 45.

56. While these two basic principles are of fundamental importance, they should not be applied without regard to the purpose and context of the statutory provision in issue. Section 40(2) is plainly intended to render every decision of the Court of Appeal to be capable of being appealed to the Supreme Court (unless specifically precluded by another statute), and, as explained, where it is necessary for this court to consider closed material in order to dispose of the appeal justly, this would only be achievable if a closed material procedure could be adopted. In any event, I am unconvinced that the wording of section 40(2) of the 2005 Act could be fairly described as "general" in the sense that that word is used in *Simms* [2000] 2 AC 115, 132: it would be more accurate to describe it as being broad, indeed as broad as possible, in its intended application. Further, if section 40(2) is to be given its full natural meaning, then, for the reasons discussed in the preceding section of this judgment, it necessarily means that the Supreme Court can adopt a closed material procedure.

57. It is true that section 67, read together with section 73, of the 2008 Act only extends to the rules of the Court of Appeal, High Court and Court of Session, but there were no Supreme Court Rules when that Act was passed. Indeed, there was no Supreme Court at that time: the Judicial Committee of the House of Lords, the Law Lords, were still in place, although they had a very short life expectancy (as an institution). They sat as a committee of the House of Lords, and could have been expected to look after their own procedure. It is true that the 2005 Act had been enacted by the time that the Bill which became the 2008 Act was being considered, but those drafting and debating the Bill would have known that the 2005 Act contained sections 40(2) and (5); they would also have known that the SCR had yet to be promulgated, and could have assumed that they would provide for a closed material procedure – as indeed they do in SCR 27(2), and, indirectly, in SCR 29(1).

58. In any event, rules governing what should be done before and during a trial have to be far more detailed than those governing what should be done before and during an appeal. Given that there were to be very detailed procedures prescribed for a closed material procedure at first instance (and on the first appeal), Parliament could fairly have assumed that there would be no need for very detailed provisions for a closed material procedure in this Court: again, in the light of SCR 27(2) and 29(1), such a view would have been prescient. It is true that sections 66-73 of the 2008 Act apply to the Court of Appeal as well as to the High Court, but that is because the CPR apply to both courts.

59. I am unimpressed by the argument that the Supreme Court was intentionally excluded from the ambit of closed material procedures in sections 66-73 of the 2008

Act, because of the Court's status. If that was the legislative intention, one would have expected it not only to have been spelt out, but to have been catered for, especially in the light of section 40(2) of the 2005 Act. It seems most unlikely that Parliament would have left section 40(2) unamended, while intending the Supreme Court to be unable to adopt a closed material procedure. If it had had such an intention, Parliament would, in my view, have provided that, in relation to cases where the courts below had adopted a closed material procedure, appeals to the Supreme Court were excluded, or could only proceed on a certain specified procedural basis. Otherwise, on this hypothesis, Parliament would have intended to leave this Court with the series of unsatisfactory options considered in paras 39-42 above.

60. The notion that the Supreme Court's constitutional role is so important that it cannot conduct a closed material procedure has a certain appeal (particularly perhaps to a Supreme Court Justice), but I am unimpressed by it. The Supreme Court is not a special constitutional court, but it generally limits the appeals it considers to those that raise points of general public importance. If the Supreme Court were to adopt a closed material procedure on an appeal, it would be most unlikely to result in a judgment which contained any statements of general public importance, or even of general significance, which were in closed form. Almost by definition, the closed evidence will be factual (including, possibly, expert) in nature, and it will normally be specific to the particular case. It is hard to believe that there could be circumstances in which it would be impossible for the Court to provide an open judgment which dealt clearly and comprehensively with all the points of any general legal significance in the appeal, even if some of the discussion of the details of the evidence and arguments has to remain closed. And if such circumstances did arise, then the problem would be a measure of the extraordinary sensitivity of the material concerned, which would make it all the more important that it remained closed. Having read in draft the judgment of Lord Hope, I would like to record my agreement with what he says in paras 98-100 in connection with this Court giving a closed judgment.

61. We were taken to other statutes which provide for a closed material procedure, but all that they establish, in my view, is that there is more than one drafting technique available to prescribe for such procedures.

62. All in all, therefore, I am unpersuaded by the various arguments raised against my provisional view that it is open to this Court to adopt a closed material procedure in an appeal under the 2008 Act if justice requires it.

The decision to have a closed material procedure on this appeal

63. At the end of their open submissions in defence of the decision of the Court of Appeal that the 2009 Order should be discharged, counsel for the Treasury asked us to adopt a closed material procedure in order to consider the closed judgment of Mitting J. We were sceptical about the need to do so, for three reasons. First, the proposal was opposed on the ground that it was unnecessary, by the special advocates (who had seen the closed judgment) and by counsel on behalf of the Bank (who had not seen the

closed judgment). Secondly, the Judge had referred in his open judgment to the closed judgment on two occasions; on each occasion, it was to draw support for a conclusion which was not challenged before us, and we thought it unlikely that he would have relied to any significant extent on any other part of his closed judgment without saying so in his open judgment. Thirdly, the Court of Appeal had found it unnecessary to refer to any part of the closed judgment.

64. Nonetheless, on instructions from his clients, counsel for the Treasury told us that a closed session could make a difference to the outcome of this appeal. By a bare majority, with those in the majority (which included me) all having real misgivings, the Court decided that it should accede to the proposal to have a closed material procedure. Although we strongly suspected that nothing in the closed judgment would have any effect on the outcome of the appeal, we could not be sure in the absence of seeing the closed judgment and listening to submissions on it. And, as we all appreciated that there was a real possibility that we were going to allow the appeal, and therefore to disagree with Mitting J (who gave the closed judgment) and the Court of Appeal (who had seen the closed judgment), we felt that there would be a real risk of justice not being seen to be done, and an outside possibility of justice actually not being done, to the Treasury if we did not proceed to hold a closed hearing, as the Treasury requested.

65. In anticipation that we might take that course, we had required counsel for the Treasury to supply the special advocates with a note summarising the Treasury's case on the closed judgment. Having decided to have a closed hearing, we proceeded to read the closed judgment and heard argument on it in a closed hearing from counsel for the Treasury, from the special advocate, and from counsel to the court (who, like us, saw the closed judgment for the first time just before the closed hearing).

66. In my opinion, there was no point in our seeing the closed judgment. There was nothing in it which could have affected our reasoning in relation to the substantive appeal, let alone which could have influenced the outcome of that appeal. So far as it was said to have included relevant findings, the most that could be said of the closed judgment is that it put some evidential flesh on some fairly bare bones embodying some of the conclusions of fact reached in the open judgment. It is fair to say that, in two respects, Mitting J made findings in his closed judgment, which supported views he had expressed in his open judgment, over and above the two passages referred to in para 16 above. However, as with the views expressed in those two passages, the views were not ones which were challenged on this appeal.

Applications for closed material hearings on appeal

67. I draw certain conclusions from this experience.

68. First, where a judge gives an open judgment and a closed judgment, it is highly desirable that, in the open judgment, the judge (i) identifies every conclusion in that

judgment which has been reached in whole or in part in the light of points made or evidence referred to in the closed judgment, and (ii) that the judge says that this is what he or she has done. This was a point made by Carnwath LJ, in a judgment given after Mitting J's judgments in this case, in *AT v Secretary of State for the Home Department* [2012] EWCA Civ 42, para 51.

69. Secondly, a judge who has relied on closed material in a closed judgment, should say in the open judgment as much as can properly be said about the closed material which he has relied on. Any party who has been excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and arguments it received. Further, the more the judge can say about the closed material in the open judgment, the less likely it is that a closed hearing will be asked for or accorded on an appeal. In cases where judges have to give a closed judgment, they should say in their open judgment, as far as they properly can, what the closed material has contributed to the overall assessment they have reached in their open judgment.

70. On an appeal against an open and closed judgment, an appellate court should, of course, only be asked to conduct a closed hearing if it is strictly necessary for fairly determining the appeal. So my third point is that any party who is proposing to invite the appellate court to take such a course should consider very carefully whether it really is necessary to go outside the open material in order for the appeal to be fairly heard. If the advocate for one of the parties invites an appellate court to look at the closed judgment on the ground that it may be relevant to the appeal, it is very difficult for the court to reject the application, at least without looking at the closed judgment, which involves the initiation of a closed material procedure, which should be avoided if at all possible. This puts an important onus on the legal representatives of the party asking an appeal court to look at closed material. An advocate acting for a party who wants a closed hearing should carefully consider whether the request is one which should, or even can properly, be made and advise the client whether such a course is necessary or appropriate. Advocates, perhaps particularly when acting for the executive, have a duty to the court as well as a duty to their clients, and the court itself is under a duty to avoid a closed material procedure if that can be achieved.

71. Fourthly, if the appellate court decides that it should look at closed material, careful consideration should be given by the advocates, and indeed by the court, to the question whether it would nonetheless be possible to avoid a closed substantive hearing. It is quite feasible for a court to consider, and be addressed on, confidential material in open court. If such a course is taken, the advocates and the court must obviously take care in how they refer to the contents of the closed material, and sometimes a brief closed hearing will be necessary to set the ground rules. Sometimes, the closed material will be so sensitive or so difficult to refer to elliptically, that such a course will be impracticable. However, it should always be considered, as it is plainly less objectionable to have a brief closed procedural hearing to discuss the possibility than to have a closed hearing which considers substantive issues. I should add that, if such a course is taken, the court should order that, despite it being referred to and

looked at in open court, the documents in issue cannot be shown to anyone and their contents cannot be referred to out of court.

72. Fifthly, if the court decides that a closed material procedure appears to be necessary, the parties should try and agree a way of avoiding, or minimising the extent of, a closed hearing. This would also involve the legal representatives to the parties to any such appeal advising their clients accordingly, and, if a closed hearing is needed, doing their best to agree a gist of any relevant closed document (including any closed judgment below).

73. Sixthly, if there is a closed hearing, the lawyers representing the party who is relying on the closed material, as well as that party itself, should ensure that, well in advance of the hearing of the appeal, (i) the excluded party is given as much information as possible about any closed documents (including any closed judgment) relied on, and (ii) the special advocates are given as full information as possible as to the nature of the passages relied on in such closed documents and the arguments which will be advanced in relation thereto.

74. Finally, appellate courts should be robust about acceding to applications to go into closed session or even to look at closed material. Given that the issues will have already been debated and adjudicated upon, there must be very few appeals where any sort of closed material procedure is likely to be necessary. And, in those few cases where it may be necessary, it is hard to believe that an advocate seeking to rely on closed material or seeking a closed hearing, could be unable to articulate convincing reasons in open court for taking such a course. As already mentioned, the closed material procedure on this appeal added nothing. Had counsel for the Secretary of State had the benefit of the guidance set out above, and in particular in paras 70 and 71, I very much doubt that he would have felt able to contend that we should have a closed material procedure. For the future, any party or appellate court considering whether to adopt such a procedure would do well to bear in mind what Lord Hope says in paras 89-97 of his judgment, with which I agree.

LORD HOPE (dissenting)

75. This case raises some fundamental issues about the effect of provisions in Parts 5 and 6 of the Counter-Terrorism Act 2008. Part 5 of the Act, which gives effect to Schedule 7, confers far-reaching powers on the Treasury to deal with terrorist financing and money laundering. Part 6 creates a scheme for appeals against financial restrictions decisions by the Treasury. In a nutshell these issues can be summarised in a single sentence: how much attention should this court pay to what Parliament has, or has not, actually said as to how financial restriction proceedings are to be conducted in the courts?

76. Parliament has set out in Part 6 of the 2008 Act provisions for the use in appeals against financial restrictions decisions of the Treasury of material that the Treasury refuse to disclose to appellants or their legal representatives, commonly referred to as "closed material". Chapter 2 of Part 6 is closely modelled on the Schedule to the Prevention of Terrorism Act 2005. Section 67(3), which appears in that Chapter, requires that rules of court must provide the Treasury with the opportunity to apply to the court for permission not to disclose material otherwise than to the court and to any person appointed as a special advocate. Section 73 provides that in that Chapter the expression "rules of court" means "rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session".

77. But no mention is made here, or anywhere else in the 2008 Act, of the use of closed material in the court of last resort in the United Kingdom – the appellate committee of the House of Lords as it then was, or the Supreme Court of the United Kingdom as it was to become. The 2008 Act received the Royal Assent on 26 November 2008. The bulk of Part 3 of the Constitutional Reform Act 2005, which made provision for the Supreme Court, was not brought into force until 1 October 2009: Constitutional Reform Act 2005 (Commencement No 11) Order 2009 (SI 2009/1604). But sections 45 and 46, which provide for the making of the Rules of the Supreme Court, were brought into force on 27 February 2006: Constitutional Reform Act 2005 (Commencement No 4) Order (SI 2006/228). These rules were already in draft and had been circulated to consultees for their comments by 28 November 2008. Yet the Treasury, by which the legislation in Parts 5 and 6 of the 2008 Act was being promoted, did not seek the views of Parliament as to whether the Rules of the Supreme Court should, like those of the other courts mentioned in section 73, make provision for the use of closed material in proceedings brought under Part 6 of the 2008 Act.

78. In the light of this background, which leaves the issue for decision by this court uninstructed by Parliament, I am unable, with respect, to agree with the conclusions reached on it by the majority.

Closed material

79. The issue as to the use of closed material, as I see it, raises three distinct questions, although they are all interconnected. The first is an issue of principle: when, if ever, will it be open to the Supreme Court to adopt a closed material procedure? The second is whether it is necessary, in the interests of justice or in the public interest, for the closed material to be seen and considered by the court in this case. The third is whether, having done so, the court should issue a closed judgment, bearing in mind that the effect of doing this will be that the party to whom the material has not been disclosed will be unable to see the court's reasons for the conclusions that it has reached on a consideration of that material.

(a) the issue of principle

80. The issue of principle as to the use of closed material was examined by Lord Dyson in *Al Rawi v Security Service* [2011] UKSC 43, [2012] 1 AC 531. He concluded that a closed material procedure should only be introduced in ordinary civil procedure if Parliament saw fit to do so. I said that I agreed with the reasons that he gave, as did Lord Kerr. But we both added some further reasons of our own. It is worth noting too the width of the issue to which the argument both in the Court of Appeal and in this court was addressed: see para 71. I thought that the view which we took would resolve the issue in a case of this kind too.

81. The crucial points that we all made can be summarised, quite briefly, in this way. The right to know and effectively challenge the opposing party's case is a fundamental feature of the judicial process. The right to a fair trial includes the right to be confronted by one's accusers and the right to know the reasons for the outcome. It is fundamental to our system of justice that, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. There may come a point where a line must be drawn when procedural choices of one kind or another have to be made. A distinction may be drawn between choices which do not raise issues of principle and choices that affect the very substance of a fair trial. There is no room for compromise where the choices are of the latter kind. The court cannot abrogate the fundamental common law right by the exercise of any inherent power. Any weakening of the law's defences would be bound to lead to state of uncertainty and, sooner or later, to attempts to widen the breach still further. The court has for centuries been the guardian of these fundamental principles. The rule of law depends on its continuing to fulfil that role.

82. Acknowledging that closed material procedures and the use of special advocates were controversial, Lord Dyson said in para 47 of his judgment in *Al Rawi* that it was not for the courts to extend the procedure beyond the boundaries which had been drawn for its use by Parliament. I said in para 74 of my judgment that fundamental issues as to where the balance lay between the principles of open justice and of fairness and the demands of national security were best left for determination through the democratic process by Parliament. Lord Brown and Lord Kerr were doubtful whether it would be possible as a matter of principle for the court to be invested with jurisdiction in this way: paras 86, 99.

83. I would, for my part, be content to agree with the way Lord Dyson put it in para 48 of *Al Rawi*, where he said:

> "The common law principles to which I have referred are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consultation and proper consideration of the sensitive issues involved. It is not surprising that Parliament has seen fit to make provision for a closed material procedure in certain carefully defined

> situations and has required the making of detailed procedural rules to give effect to the legislation."

In para 69 he agreed with the Court of Appeal that the issues of principle raised by the closed material procedure were so fundamental that a closed material procedure should only be introduced in ordinary civil litigation if Parliament saw fit to do so. He then added these words:

> "No doubt, if Parliament did decide on such a course, it would do so in a carefully defined way and would require detailed procedural rules to be made (such as CPR Pts 76and 79) to regulate the procedure."

84. The answer which I would give to the first of the three questions which I have identified in para 79, above, is that it will be open to the Supreme Court to adopt a closed material procedure if, but only if and only to the extent that, the use of that procedure has been expressly sanctioned by Parliament. The fact that this procedure has been sanctioned for use in the lower courts does not meet Lord Dyson's point that the procedure nevertheless erodes fundamental common law principles. And the fact that it has been used in the lower courts leaves open the question whether it would be consistent with fundamental principle for it to be used in the court of last resort. It leaves open the question whether it can ever be right for the Supreme Court, of all courts, without the sanction of Parliament to hear argument on points of which one of the parties has had no notice and is unable to address in argument, and whether it can ever be right for it to have to give its reasons, in whole or in part, in a closed judgment.

85. The word "fundamental", which appears so often in Lord Dyson's judgment in *Al Rawi*, and appears again in my own judgment in paras 72-74 and Lord Kerr's judgment in para 94, serves to emphasise the enormity of the issues that are at stake if the objections to such a procedure are to be overcome. If the procedure is to be used in this court, the issues of principle require that its use should always be carefully provided for and defined by Parliament and never be left to implication. Only then can one be confident that Parliament really has squarely confronted what it is doing. Otherwise, as Lord Hoffmann said in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 132, there is too great a risk that the full implications may have passed unnoticed in the democratic process.

86. The absence of a direction in Part 6 of the 2008 Act that the provisions about rules of court relating to proceedings on an appeal relating to financial restrictions proceedings extend to the Supreme Court is, therefore, especially significant. This makes it plain that Parliament was not asked to address its mind to this issue at all. Nor was the Supreme Court, for its part, put on notice that the President when making the Supreme Court Rules, the provisions about which were already in force (see para 77, above), was to have regard to the matters set out in sections 63(2)-(4) of the Act. The fact that rule 27(2) of the Supreme Court Rules contemplates that the court might consider it necessary for a party and that party's representative to be excluded from a

hearing in order to secure that information is not disclosed contrary to the public interest does not answer this point. It was, no doubt, a wise precaution to make provision for a variety of situations of that kind that might arise. But it does not address directly the use of a closed material procedure with all the consequences that might then follow, including the possibility of having to issue a closed judgment. The question whether the Supreme Court had power to adopt such a procedure had not yet been tested in argument when the rules were made, and it was not open to the President in the exercise of his rule-making function to confer on the court a power that it did not have.

87. The argument that the provisions of sections 40(2) and (5) of the 2005 Act show that this court can conduct such a procedure to dispose of an appeal where the judgment appealed against was wholly or partly closed does not meet my point that the issue is so fundamental that it must be left to an express and carefully defined provision by Parliament. I do not think that a point of such fundamental importance can be left to implication. It is plain that the issue was not brought before Parliament when it enacted Part 3 of the 2005 Act. There is nothing in the express language of section 40 which shows that the statute must have given authority to the Supreme Court for the use of this procedure: see *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, para 45 per Lord Hobhouse.

88. For these reasons I was of the opinion at the end of the hearing on the first day's argument that it was not open to the Supreme Court to adopt a closed material procedure in this case, as it had not been expressly authorised by Parliament. I remain of that opinion. The effect of the decision of the majority, however, is that there is now no way back on this issue. The Rubicon has been crossed.

(b) should the closed material be seen and considered in this case?

89. As the majority view was in favour of the view that it was open in principle to the court to resort to the closed material procedure, I gave careful thought to the question whether it should be resorted to in this case. It seemed to me that the onus was on the Treasury to show that this was necessary. It was not just a question of asserting, without reasons, that there was material in Mitting J's closed judgment at [2010] EWHC 1332 (QB) that was relevant to the issues in the appeal. I do not think that it would be inconsistent with the majority's decision on the issue of principle for the court to set a high standard on the issue of necessity. Convincing reasons must be given as to why the closed material should be looked at.

90. The Treasury submitted that the court would have to have regard to the judgment if it was to be in a position properly and fairly to exercise its jurisdiction in the appeal, unless it was prepared to dismiss the Bank's case. This was because the closed reasons formed part of Mitting J's findings on the Treasury's evidence and of his conclusions as to its case. So it might be impossible for the appeal to be fairly determined if the court was not willing to have regard to them. But there are various

reasons why, as it seemed to me, the Treasury's approach fell far short of what was needed to show that it was necessary for this procedure to be resorted to.

91. First, there is the fact that the Court of Appeal, which did see and consider Mitting J's closed judgment and held a brief closed hearing in the course of the appeal to that court, did not find it necessary to refer to the closed judgment in more detail than the judge himself did: [2011] EWCA Civ 1, [2012] QB 101, para 83. That, in itself, would not be a conclusive reason for not resorting to the procedure in this court if it was necessary to do justice on the appeal. But it does point to the need for the Treasury to give convincing reasons as to why this should be done. Mitting J referred to his closed judgment in para 16 of his judgment, where he said that he accepted that Novin Energy Company was a conduit for the Atomic Energy Organisation of Iran and that it did facilitate Iran's nuclear weapons programme. He referred to it again in para 18, where he said that for the reasons set out in the closed judgment, he was satisfied that Doostan International had played a part in the Iranian nuclear programme. The Court of Appeal had the opportunity to say if those findings were not justified. It did not do so, and it was not submitted for the Bank that the reasons that the judge gave for those findings should be reviewed again by this court.

92. Second, there are the views of the special advocates to which close attention should always be paid. Mr Chamberlain drew attention to the fact that there was no closed ground of appeal in this case, and that neither of the two findings which were based on material in the closed judgment was in issue. This was because the Bank's case was that those findings were not enough to justify the order made by the Treasury. His advice was that the court did not need to consider closed material in order to determine that issue.

93. Third, there are the reasons that were set out in a note that was provided to the special advocate at the court's request by the Treasury and which the special advocates had seen when Mr Chamberlain gave the advice referred to in the previous paragraph. It was to the contents of this note that much of the discussion as to whether it was necessary for the court to see the closed judgment was directed.

94. The first three paragraphs of the note refer to various passages in the closed judgment which, as was stated in the fourth paragraph, demonstrated the weight to be attached to the judge's conclusion that the Bank had the capacity to assist proliferators, that such assistance could be afforded to a range of companies involved in proliferation and that the assistance provided was material. It did not seem to me that it was necessary to look at the closed material to reinforce this point, as its importance was already apparent from points made by Mitting J in his open judgment. In the last sentence of para 16, having described the Bank's relationship with Novin, the judge said that he accepted the conclusion of the Treasury's witness Mr Robertson that Iran's banking system provides many of the financial services which underpin procurement of the raw materials and components needed for its nuclear and ballistic missile programmes.

95. The fifth paragraph of the note was in these terms:

> "See further, the last sentence of para 5 of the closed judgment. This point is important in its own right in demonstrating the existence of the rational/proportionate connection."

Mr Eicke QC for the Treasury was asked repeatedly to say what "the point" was to which this paragraph refers. It was made clear that the court was looking not for the details which supported whatever was said in that sentence, but simply for an indication of its subject matter. Mr Eicke declined, no doubt on instruction, to provide this information. He declined also to say what "the point" was to which para 6(3) was directed, where it was said that, to the extent that it was necessary to do so, the Bank's case at para 60 was contradicted by the point at para 2 of the closed judgment. In para 60 of its case the Bank states that there is nothing in the judge's findings to suggest that the Bank had done anything to materially increase the risk that the United Kingdom financial sector would be embroiled in proliferation-related transactions. It seemed reasonable to ask how looking at the closed judgment would assist on this point, but the court was provided with no answer as to how it might do so.

96. I was not impressed by Mr Eicke's inability to answer these questions. The guiding principles seem to me to be these. Resort to the closed material procedure will result in every case in an inequality of arms between the State, which will always be the party who invokes the procedure and will always have access to that material, and the other party against whom the State has taken action and to whom access to that material is always denied. Regard must, of course, be had to the national interest which requires that some sensitive material must be kept secret. But the court must be astute not to allow the system to be over-used by those in charge of that material. The need for care in this respect increases as the issues are refined at the stage of an appeal. In a case of this kind, where the judge has told the appellate courts in his open judgment how he has used the closed material and the Court of Appeal has found nothing in the closed judgment that required comment, resort to it for further information could only be justified if there was a point of real substance in it that had, in fairness to the State, to be taken into account at the stage of the appeal. The Treasury's refusal to come out of its closet and provide even the merest hint as to what these points were was as unattractive as it was unconvincing.

97. I would therefore, if left to myself, have declined to look at the closed judgment. It seemed to me that the judge had said enough in his judgment to explain the significance of the points to which the Treasury had regard when they decided to make the Order. Any points to which emphasis had to be attached could be made sufficiently in open court in the course of the oral argument.

(c) should the court issue a closed judgment?

98. The most obnoxious feature of the closed material procedure at the stage of an appeal is the possibility that the appellate court may have to give the whole or part of its reasons for the disposal of the appeal in a judgment to which the State only, and not the other party to the appeal or anyone else, has access. As was stressed several times by Lord Dyson and those who agreed with him in *Al Rawi*, fundamental principles of the right to a fair trial include the right to know the reasons for the outcome: see, for example, [2012] 1 AC 531, para 45. This point loses none of its force at the stage of an appeal. And it has even more force at the stage of a final appeal, as once the Supreme Court has given its reasons in a judgment of that kind there will be no opportunity for any further review of the closed material by a special advocate or by anyone else. Secret justice at this level is really not justice at all.

99. I very much hope that the Supreme Court will never find itself in a position when it has to resort to the giving of a closed judgment in the disposal of an appeal. A stern and steadfast resistance to the use of that procedure would go some way to redressing the unwelcome departure from the principle of open justice that the decision that the Supreme Court may in principle adopt a closed material procedure will inevitably give rise to. In itself, merely looking at a closed judgment to see whether there is anything in it that might be of significance may be thought not give rise to any unfairness to the party who does not have access to that material. A check of that kind may not seem a large step to take. It is an entirely different matter if it leads to the issuing of even more material in the form of a closed judgment that the other party cannot see.

100. As it happened, it was not necessary to answer this question. It became clear in this case, when the judge's closed judgment had been seen and considered, that there was nothing in it which required any such judgment to be issued by this court. The fact this was so reinforces my suspicion that the Treasury were being over-cautious in their refusal to offer any assistance as to what the points were to which reference was made in their note to the Special Advocates and that they were over-using the procedure. I am not to be taken as suggesting that it was wrong for the Treasury to make use of closed material in the lower courts, where its use has been expressly authorised by Parliament. But the attitude which they have adopted in this appeal was a misuse of the procedure, because they invited the court to look at the closed judgment when there was nothing in it that could not have been gathered equally well from a careful scrutiny of the open judgment. This experience should serve as a warning that the State will need to be much more forthcoming if an invitation to this court to look at closed material were to be repeated in the future.

LORD KERR (dissenting)

101. Two principles of absolute clarity govern the law in relation to the manner in which trials should be conducted. The first is that a party to proceedings should be

informed of the case against him and should have full opportunity to answer that case in open court. The second principle is that the first principle may not be derogated from except by clear parliamentary authority.

102. These principles received emphatic endorsement by the Supreme Court in *Al-Rawi v Security Service* [2012] 1 AC 531. In delivering the leading judgment, Lord Dyson said this:

> "10. There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. The importance of the open justice principle has been emphasised many times: see, for example, *R v Sussex Justices, Ex p McCarthy* [1924] r KB 256, 259, per Lord Hewart CJ, *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 449H-450B, per Lord Diplock, and recently *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* QB 218, paras 38-39, per Lord Judge CJ.
>
> 11. The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In *Scott v Scott* [1913] AC 417, Lord Shaw of Dunfermline (p 476) criticised the decision of the lower court to hold a hearing in camera as constituting 'a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security'. Viscount Haldane LC (p 438) said that any judge faced with a demand to depart from the general rule must treat the question 'as one of principle, and as turning, not on convenience, but on necessity'.
>
> 12. Secondly, trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance. The Privy Council said in the civil case of *Kanda v Government of Malaya* [1962] AC 322,337:
>
> 'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.'

> 13. Another aspect of the principle of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses. As was said by the High Court of Australia in *Lee v The Queen* (I998) I95 CLR 594, para 32: 'Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.'"

103. The essential ratio of *Al-Rawi*, so far as concerns the present appeal, was neatly expressed by Lord Dyson in para 35 where he said, "… the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that." The simple question which lies at the heart of this appeal is whether Parliament has done that for hearings before the Supreme Court.

104. It was suggested that the decision in *Al-Rawi* can be distinguished or that it has no application to the present appeal because it was concerned with a trial and not with an appeal from a decision in proceedings where there was statutory authority to conduct a closed hearing. I do not accept this argument. The principle recognised in *Al-Rawi* is both fundamental and general. Its effect is straightforward. Courts do not have power to authorise a closed material procedure unless they has been given that power by Parliament. If Parliament has not conferred the power on this court, it matters not that those courts from which an appeal lies to this court have been empowered to conduct such a hearing.

105. Representing as it does such a radical departure from the conventional mode of trial and, more importantly, such a drastic infringement on a centuries old right, it is to be expected that a closed materials procedure would be provided for in the most unambiguous and forthright terms or by unmistakably necessary implication. On that basis alone, section 40(5) of the Constitutional Reform Act is hardly a promising candidate. But before looking more closely at that provision, I should say something about the relevant provisions in the Counter-Terrorism Act 2008, principally to examine how Parliament has in fact set about making explicit provision for closed material procedures in other courts and to point up the contrast with the route that the respondent in this case would have us take to arrive at the same destination.

106. The first and most obvious thing to say about the Counter-Terrorism Act is, of course, that it was enacted three years after the Constitutional Reform Act. We now know (not least by reason of *Al-Rawi*) that the High Court and the Court of Appeal could not have ordered a closed material procedure in a case such as the present by recourse to an inherent power. This required the authorisation of the 2008 Act. It appears to me, therefore, that an argument that the Supreme Court did have power to hold such a hearing before 2008, when the High Court and the Court of Appeal did not, would be utterly implausible. But if section 40(5) did not empower the Supreme Court before 2008 to hold a closed material procedure hearing, how can it be said to have done so after the enactment of the Counter-Terrorism Act and Rules made

thereunder, all of which conspicuously make no reference whatever to this court? I shall return to this question briefly below.

107. Bank Mellat's proceedings before the High Court were brought under section 63 of the 2008 Act. Section 63(2) gives a person affected by a decision taken by the Treasury in connection with a range of asset freezing and other financial powers the right to apply to the High Court to have that decision set aside. These are known as "financial restrictions proceedings" - section 65. Provisions as to how they are to be conducted are made in sections 66 to 72.

108. Section 66 contains general provisions about rules of court to be made in relation to financial restrictions proceedings. Subsection (2) enjoins the person making the rules to have regard to (a) the need to secure that the decisions that are the subject of the proceedings are properly reviewed; and (b) the need to secure that disclosures of information are not made where they would be contrary to the public interest. Subsection (3) states that rules of court may make provision (a) about the mode of proof and about evidence in the proceedings; (b) enabling or requiring the proceedings to be determined without a hearing; and (c) about legal representation in the proceedings.

109. Section 66(4) is an important provision which foreshadows rules of court authorising significant differences from the conventional mode of trial in the way that financial restrictions proceedings may be conducted. It provides:

> "Rules of court may make provision-
>
> (a) enabling the proceedings to take place without full particulars of the reasons for the decisions to which the proceedings relate being given to a party to the proceedings (or to any legal representative of that party);
>
> (b) enabling the court to conduct proceedings in the absence of any person, including a party to the proceedings (or any legal representative of that party);
>
> (c) about the functions of a person appointed as a special advocate;
>
> (d) enabling the court to give a party to the proceedings a summary of evidence taken in the party's absence."

110. Section 67(2) provides that rules of court must secure that the Treasury is required to disclose material on which they rely; material which adversely affects its case; and material which supports the case of a party to the proceedings. This subsection is made subject to the succeeding provisions of the section, however. These

include subsection (3) which introduces significant qualifications on the duties imposed in subsection (2). It provides:

> "(3) Rules of court must secure-
>
> (a) that the Treasury have the opportunity to make an application to the court for permission not to disclose material otherwise than to-
>
> (i) the court, and
>
> (ii) any person appointed as a special advocate;
>
> (b) that such an application is always considered in the absence of every party to the proceedings (and every party's legal representative);
>
> (c) that the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be contrary to the public interest;
>
> (d) that, if permission is given by the court not to disclose material, it must consider requiring the Treasury to provide a summary of the material to every party to the proceedings (and every party's legal representative);
>
> (e) that the court is required to ensure that such a summary does not contain material the disclosure of which would be contrary to the public interest."

111. As the interveners, Liberty, have pointed out, section 67(3) heralded the effective disapplication of the law relating to public interest immunity. Simply stated, that law required a court, faced with a request by a party to authorise the withholding of relevant evidence, to balance the public interest which the application was said to protect against those public interests which favoured its production, including the fair administration of justice. No such weighing of competing interests could take place after the enactment of the rules which section 67(3) stipulated should secure, among other things, that the court *must* give permission for material not to be disclosed if it considered that its disclosure would be contrary to the public interest. That outcome was inevitable as soon as the conclusion that revelation of the material was contrary to the public interest. Countervailing interests such as the due and fair administration of justice were to be of no consequence.

112. The effective abolition of public interest immunity in financial restrictions proceedings and the requirement that applications be entertained for evidence to be withheld from all except the court and special advocates clearly called for the protection, in some other guise, of the interests of the litigant who had been denied access to the withheld material. This was provided for in section 68. Subsection (1) of that section provides:

> "(1) The relevant law officer may appoint a person to represent the interests of a party to-
>
> (a) financial restrictions proceedings, or
>
> b) proceedings on an appeal, or further appeal, relating to financial restrictions proceedings, in any of those proceedings from which the party (and any legal representative of the party) is excluded.
>
> This is referred to in this Chapter as appointment as 'a special advocate'."

113. The 2008 Act had therefore set up a reasonably elaborate structure for the making of rules which would authorise, in financial restrictions proceedings, a significant departure from the system of trial that would normally obtain in most other forms of civil disputes. But section 73 of the Act made it clear that this system of trial was intended only for the High Court, the Court of Appeal and the Court of Session for it provided that "rules of court", where that expression had been used in the legislation, meant rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session.

114. The principal rules in the Civil Procedure Rules are made pursuant to section 1 of the Civil Procedure Act 1997. Section 1(3) of this Act provides that the power to make Civil Procedure Rules shall be exercised with a view to securing that the civil justice system is accessible fair and efficient. Part 79 of the Civil Procedure Rules (which was designed to implement the rules which Part 6 of the 2008 Act, dealing with financial restrictions proceedings, contemplated) was inserted in the Civil Procedure Rules by the Civil Procedure (Amendment No 2) Rules 2008/308517. As well as making detailed rules to fulfil the provisions of sections 66 and 67, Parts 79.2 and 79.13 modified the overriding objective which otherwise applies to proceedings in both the High Court and the Court of Appeal. That objective is stated in CPR Part 1.1, to be to deal with cases justly. Rule 1.1 (2) (a) provides that dealing with cases justly includes, so far as is practicable, ensuring that parties are on an equal footing. But by Parts 79.2 and 79.13 this overall objective (in so far as it related to financial restrictions proceedings) was to be read and given effect to compatibly with the court's statutory duty (in section 66(2) of the 2008 Act) to ensure that information was not disclosed contrary to the public interest. Part 79.22 disapplied in its entirety Part 31 of the CPR which had contained the procedural rules relating to public interest

immunity. Again it can be seen that, in relation to financial restrictions proceedings a fairly radical re-ordering of the rules that governed most forms of civil litigation was introduced.

115. All of this is in stark contrast to the position as regards the Supreme Court. Section 40(5) of the Constitutional Reform Act 2005 provides:

> "(5) The Court has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment."

116. As I have said, there cannot be any plausible argument that this provision gave the Supreme Court power to conduct a closed procedures hearing before the enactment of the Counter-Terrorism Act in November 2008. Is it possible that the power of the court to conduct such a hearing has been animated by the 2008 Act? One can recognise a theoretical argument that in order to determine any question in an appeal against a finding made by a lower court in a closed material procedures hearing, it is necessary for the Supreme Court to be able to conduct such a hearing. That argument must, however, immediately confront the fact that nothing in the 2008 Act refers to the Supreme Court. Notwithstanding the elaborate structure that has been put in place to govern the conduct of such a hearing in the High Court, the Court of Appeal and the Court of Session, no provision has been made as to how a closed material procedure hearing in the Supreme Court might take place. For my part, I find it inconceivable that it was intended that the Supreme Court should have power to carry out a closed materials procedure while leaving it bereft of the structure and safeguards which were deemed essential for the other courts in which such a hearing is expressly permitted.

117. Moreover, the use of a closed materials procedure involves the suspension of the law relating to public interest immunity. Thus, for the Supreme Court to recognise that it has power to conduct a closed materials procedure hearing necessarily involves an acceptance that its power to conduct an inquiry into whether public interest immunity requires the withholding of the material is no longer available. That this should be the effect of section 40(5) would be surprising enough. But that it should have that effect for the first time three years after the Constitutional Reform Act 2005 was passed is surely wholly improbable.

118. Section 40(5) gives the Supreme Court power to determine questions which need to be determined for the purposes of doing justice in an appeal. But the conferring of that power should not be confused with authorising the use of a wholly different procedure for the manner in which those questions are to be determined. This is particularly so when that different procedure was not in contemplation at the time the section was enacted.

119. It is significant that the subsection confers the power for the express purpose of doing justice in an appeal. The doing of justice is conventionally understood to mean that all parties to litigation will have equal access to material which is liable to influence the outcome of the dispute. This is echoed in section 45 of the Constitutional Reform Act – the provision which deals with rule making powers. Section 45(1) invests the President of the Court with the power to make rules governing the practice and the procedure to be followed in the court. Subsection (3)(a) requires that the President must exercise that power with a view to securing that the court is accessible, fair and efficient. This mirrors section 1(3) of the Civil Procedure Act 1997. And Rule 2 of the Supreme Court Rules 2009 sets out the overriding objective as being to secure that the court is accessible, fair and efficient, terms which are not dissimilar to the overall objective in CPR 1.1. There has been no modification of this overall objective such as was introduced by Part 79 of the CPR, however. Indeed, nothing in the 2009 Rules intimates an intention to accommodate a closed material procedure in any way.

120. Rule 27(1) states that every contested appeal shall be heard in open court except where it is necessary in the interests of justice or the public interest to sit in private for part of an appeal hearing. Rule 27(2) provides:

> "(2) Where the Court considers it necessary for a party and that party's representative to be excluded from a hearing or part of a hearing in order to secure that information is not disclosed contrary to the public interest, the Court must conduct the hearing, or that part of it from which the party and the representative are excluded, in private but the Court may exclude a party and any representative only if a person who has been appointed as a special advocate to represent the interests of that party is present when the party and the representative are excluded."

121. In my view, it is clear that this rule was made to allow an ex parte application to be made for the withholding of material as part of a public interest immunity exercise. To suggest that it was designed to cover the holding of a closed material procedure would be farfetched, given that there is no mention in any other part of the rules of such a procedure. Indeed, the very next rule, rule 28 states that a judgment of the court may be delivered in open court or, if the court directs, be promulgated by the Registrar.

122. But for the circumstance that the 2008 Act introduced a closed material procedure for the High Court, the Court of Appeal and the Court of Session and that appeals lie from those courts to the Supreme Court, there would be no argument that the Constitutional Reform Act and the Supreme Court rules even address, much less contemplate, the possibility of such a hearing taking place before this court. It is only by a process of ex post facto rationalisation that section 40(5) is said to permit a closed materials procedure in the Supreme Court. That cannot be said to have been its original purpose. In my view, the revised and expanded purpose which the respondent seeks to ascribe to it cannot be accepted. The contended for modification of the

court's powers and procedures involves simply too important, not to say too fundamental, a transformation to be countenanced.

123. It can be submitted that a steadfast refusal to allow some softening of the *Al-Rawi* line in relation to appeals is unrealistic; that the failure to admit closed material in an appeal before the Supreme Court when the same material had been before the courts against whose decisions the appeal is brought creates an asymmetrical anomaly. And indeed, it has been suggested by the advocate to the court, Mr Tam QC, that advantages in recognising at least the power of the Supreme Court to receive closed material can be detected. The primary advantage he identified was the assistance which such an exercise provided in enabling the court to arrive at the "correct" result. For the reasons that I gave in *Al-Rawi* and the associated case of *Tariq v Home Office* [2012] 1 AC 452, I consider that the assumption that a court, presented with all of what is claimed to be "relevant" material, will be in a better position to arrive at the right conclusion when some of that material is untested is, at least, misplaced and may prove in some cases to be palpably wrong. But I do not consider it profitable to renew the debate on that particular topic in the present case. For the sake of examining the claim that this court should recognise a power to examine closed material, let us assume that there is force in the argument that a court is, as a matter of principle and common experience, better placed to reach a more correct result if it receives all the material which one of the parties says is relevant to its decision, even though the other party is denied knowledge of its content. Does that circumstance warrant recognition of the power? In my view it does not.

124. Pragmatic considerations can – and, where appropriate, should – play their part in influencing the correct interpretation to be placed on a particular statutory provision. But pragmatism has its limits in this context and we do well to recognise them. As a driver for the interpretation of section 40(5) for which the respondent contends, pragmatism might seem, at first blush, to have much to commend it. After all, this is an appeal from courts where closed material procedures took place. How, it is asked, can justice be done to an appeal if the court hearing the appeal does not have equal access to a closed material procedure as was available to the courts whose decision is under challenge? And if one proceeds on the premise that the court will be more fully informed and better placed to make a more reliable decision, why should the Supreme Court not give a purposive interpretation to section 40(5)?

125. The answer to this deceptively attractive presentation is that this was never the purpose of section 40(5). It was not even a possible, theoretical purpose at the time that it was enacted. It was never considered that it would be put to this use. The plain fact is that Parliament introduced a closed material procedure for the High Court, the Court of Session and the Court of Appeal and did not introduce such a procedure for the Supreme Court. This court has said in *Al-Rawi* that it does not have the inherent power to introduce a closed material procedure. Only Parliament could do that. Parliament has not done that. And to attempt to graft on to a statutory provision a purpose which Parliament plainly never had in order to achieve what is considered to be a satisfactory pragmatic outcome is as objectionable as expanding the concept of inherent power beyond its proper limits.

126. A majority of this court has held that it does have power to hold a closed material procedure, however, and it is therefore necessary for me to address the question of whether it was right to hold a closed material procedure on this appeal.

127. It was not in dispute between the parties, the interveners and the advocate to the court that, as Mr Chamberlain on behalf of the special advocates put it, if section 40(5) confers on the court power to consider closed material, it does so only if, and to the extent that, closed material is relevant to a question whose determination is *necessary* for the purposes of doing justice in the appeal. Equally, it was not disputed that the obligation to show that the closed material was relevant and the extent to which it was relevant rested with the party so asserting, in this instance the respondent.

128. But the circumstances of this case immediately exemplified the inherent difficulty in applying that principle. In seeking to persuade the court that it was necessary to look at the closed judgment, the respondent felt unable to state what the closed judgment contained. This is, of course, a problem which will beset every application for a closed material procedure. And, ultimately, counsel for the respondent was driven to utter warnings couched in the most general terms of the danger of this court reaching a conclusion on the appeal in the appellant's favour when it *might* have been influenced to a different view had it seen the closed material. If the principle that the closed material procedure has to be shown to be necessary is to be something more than an empty aspiration, then the party asking for a closed material procedure must surely do more than merely assert that this is necessary. Here, however, the respondent did not even do that. The Treasury's final position was that, in a certain eventuality (the appellant's appeal succeeding), the material *might* cause the court to take a different view. That seems to me to be an impossibly far cry from showing that it was necessary that we should look at the closed judgment.

129. The difficulty is enhanced where, as here, article 6 of the European Convention on Human Rights and Fundamental Freedoms governed the proceedings. Where that is the case, nothing in the closed material, or the judge's conclusion on it, may be determinative of the outcome unless the gist of the material has been relayed to the appellant. So one must start the examination of whether it is necessary to examine the closed judgment on the basis that nothing in that judgment can have been determinative of the case against the bank. The examination of whether the necessity test has been satisfied then must include acknowledgment of Mitting J's single reference to his closed judgment in para 16 of his open judgment to the effect that there were closed reasons as well as those expressed in his open judgment for his finding that one of the bank's customers, Novin Energy Company, had imported materials which could be used to produce or facilitate the production of nuclear weapons. In the first place, the fact that open reasons for that finding had been given certainly does not help the case that it was necessary to look at the closed judgment. But that case was weakened further by the judge's statement that this was common ground between the parties and, in my view, it was demolished by the fact that this finding was not challenged by Bank Mellat before this court.

130. In truth, this court's decision to look at the closed judgment depended on nothing more than the plea of counsel for the Treasury that, against the possibility that we might be inclined to find for the appellant, we should look at the closed material just in case it might persuade us to a different view. That, in my opinion, comes nowhere near to showing that it was necessary to look at the closed judgment and sadly, but all too predictably, when the closed judgment was considered in the course of a closed material procedure, it became abundantly clear that it was quite unnecessary for us to have done so.

LORD REED (dissenting)

131. This appeal has raised several points of constitutional importance. The present judgment is concerned with the questions whether this court can adopt a closed material procedure in a case of this nature, and, if so, whether it ought to do so in this particular case. I agree with the judgments` of Lord Hope and Kerr, and add some observations only in view of the importance of these issues and the division in the court.

The issue of principle

132. The first question raised is whether this court has the power, when hearing an appeal relating to financial restrictions proceedings under Part 6 of the Counter-Terrorism Act 2008 ("the 2008 Act"), to exclude from the hearing the party challenging the Treasury's exercise of its powers, to consider a "closed judgment" which has not been disclosed to that party, and to give a closed judgment, containing part or all of the reasons for its decision, which is not disclosed to that party or to the public. I was of the opinion, when the issue arose at the end of the first day of the hearing, that the court has no such power. I remain of that opinion.

133. It is a fundamental principle of justice under the common law that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party (see for example *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 615 per Lord Mustill, and the other authorities cited in *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738, para 16 per Lord Bingham of Cornhill). That principle can only be qualified or overridden by statute. It is also a basic principle of justice that a party is entitled to be present during the hearing of his case by the court (subject to a number of established exceptions, none of which is germane to the present case), and to know the reasons for the court's decision.

134. Section 66 of the 2008 Act, read with section 73, makes special provision for rules of court regulating the practice and procedure to be followed in appeals relating to financial restrictions proceedings in the High Court, the Court of Appeal and the Court of Session. Section 66(4) permits such rules of court to make provision for a

closed material procedure. Section 67 imposes specific duties in relation to disclosure upon persons making rules of court in respect of those courts alone. The law relating to public interest immunity is by implication disapplied. It is plain beyond argument that Parliament did not apply those provisions to the court of last resort. If Parliament had intended the same procedures to be applied in this court, it would surely have said so.

135. The general powers conferred upon this court by the Constitutional Reform Act 2005 ("the 2005 Act") are silent on the matter. It is argued that they are to be construed as conferring the necessary powers, since the court cannot decide an appeal in a case where a "closed judgment" has been issued without knowing, and hearing argument upon, all the reasons for the decisions of the courts below, and must therefore hear argument upon the closed judgment, necessarily in a hearing from which the party challenging the Treasury's exercise of its powers is excluded. There is however a strong presumption that Parliament does not intend to interfere with the exercise of fundamental rights. It will be understood as doing so only if it does so expressly or by necessary implication (*R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 574 per Lord Browne-Wilkinson; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131 per Lord Hoffmann). The common law rights of a party to an appeal to be present throughout the hearing of the appeal, to see the material before the court, and to know the reasons for the court's decision of the appeal, are undoubtedly fundamental rights to which that principle applies. The argument advanced on behalf of the Treasury is directly contrary to that principle: reliance is placed upon general words to override a fundamental right. I find it particularly difficult to accept the argument against the background of the specific provision made by Parliament in respect of other courts in the 2008 Act. In so far as the argument seeks to rely upon the Supreme Court Rules made under the 2005 Act, it begs the anterior question as to the effect of the 2005 Act itself.

136. I accept of course, as a general proposition, that it is desirable that an appellate court should be able to consider all the reasoning of the courts below, and all the material which was before them. This court has not however in the past found it either necessary or appropriate to consider closed judgments of the courts below: *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 AC 110, para 3. I do not in any event regard these pragmatic considerations as conclusive.

137. It has to be borne in mind in the first place that it is a matter of great importance that proceedings in the highest court in the land should be conducted in accordance with the highest standards of justice: in particular, that the court should sit in public, and that all parties should be equally able to participate in the hearing. There is to my mind a very serious question whether secret justice at this level is acceptable. It also has to be borne in mind that there are other possible means of protecting national security in court proceedings besides the adoption of a closed material procedure, and that some of those means enable the court to sit in public and the parties to attend the whole of the hearing. One possibility, where a closed judgment

has been issued by a lower court, is to determine the appeal on the basis of the material which that court, exercising its judgment, has set out in its open judgment. That was the procedure followed in *RB (Algeria).* Another is to apply the law relating to public interest immunity, as the House of Lords did in the past. Another is to follow the approach adopted in a number of European courts, such as the German courts, where the court can examine the material for itself, without its being canvassed during the hearing. A comparative analysis might disclose other possibilities. That is not to say that the alternatives to closed material procedure are necessarily preferable: they may cause equal or greater concern for other reasons. The point of these considerations, however, is that there are choices to be made. Those choices are appropriately made by Parliament after full consideration and debate. They are too important to be left to judges.

138. The most serious difficulty with the Treasury's argument, however, is that for the court to conduct a closed hearing is contrary to a fundamental principle of the common law, and therefore requires clear statutory authority. Even interpreted as generously as possible, the 2005 Act cannot in my opinion be said to provide clear authority.

Whether this court should have adopted a closed material procedure in the present case

139. The second question raised is whether, given the view of the majority of the court that it did possess such a power, that power should have been exercised in the circumstances of the present case. I am emphatically of the opinion that it should not. The Treasury's argument, which I have already summarised, was one which would apply in every case in which a closed judgment had been given. In the present case, however, Mitting J had properly indicated in his open judgment ([2010] EWHC 1332, paras 16 and 18) the two specific findings that he had made for which his reasoning was set out in the closed judgment. Neither of those findings was challenged before this court. Counsel for the Treasury's assertion that it was nevertheless necessary for this court to hear submissions on the closed judgment, and for that purpose to sit in a closed session, was unsupported by any specific reasons why such an exceptional course should be adopted. No indication was given of the nature of the closed material, contrary to the requirement that a summary should be provided (*Secretary of State for the Home Department v AF* [2009] UKHL 28; [2010] 2 AC 269). The plea that, if there was any possibility that the court might otherwise allow the appeal, it ought to consider the closed judgment just in case anything in it might alter the court's view, falls far short of demonstrating that a departure from the fundamental principle of open justice was truly necessary.

140. When closed material procedure was first introduced in 1997, in proceedings before the Special Immigration Appeals Commission, it was said to be an exceptional measure justified by national security concerns. Having gained a foothold in the legal system, the procedure has spread progressively, initially to other specialist tribunals, and then to the courts. It has been used even where issues of national security are not

involved (as, for example, in *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738). Now that its use has been extended to proceedings before this court, it is of great importance, if a degradation of standards of justice at the highest level is to be avoided, that it should be resorted to only where it has been convincingly demonstrated to be genuinely necessary in the interests of justice.

LORD DYSON (dissenting in part)

141. I agree with Lord Neuberger that, for the reasons that he has given, this court has the power to adopt a closed material procedure in an appeal under the Counter-Terrorism Act 2008.

142. For the reasons given by Lords Hope, Kerr and Reed, I did not favour exercising the power in this case. In my view, the power should only be exercised where it has been convincingly demonstrated that it is necessary to do so in the interests of justice. I agree with what Lord Neuberger says about this at para 69 of his judgment.

143. The present case illustrates the danger of the court acceding too readily to an assertion by a party that a closed session could make a difference to the outcome of an appeal. That is what counsel for the Treasury asserted on instructions in the present case. He was unable to say more. As Lord Neuberger says at para 64, the court "strongly suspected" that nothing in the closed judgment would affect the outcome of the appeal, but we "could not be sure in the absence of seeing the closed judgment and hearing submissions on it". Our strong suspicions were amply borne out. The closed judgment contained nothing that it could reasonably have been thought would or might affect the outcome of the appeal.

144. In my view, 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.

145. I remain of the view that the power should not have been exercised in the present case. A bare plea for a closed hearing should not suffice. I agree with Lord Hope that convincing reasons should be given as to why closed material should be looked at. Anything less is likely to lead to closed hearings becoming routine. In my view, they should be exceptional.

Trinity Term
[2013] UKSC 39
On appeal from: [2011] EWCA Civ 1

JUDGMENT

Bank Mellat (Appellant) *v* Her Majesty's Treasury (Respondent) (No. 2)

before

Lord Neuberger, President
Lord Hope, Deputy President
Lady Hale
Lord Kerr
Lord Clarke
Lord Dyson
Lord Sumption
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

19 June 2013

Heard on 19, 20 and 21 March 2013

Appellant
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Dr Gunnar Beck
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Intervener
Nicholas Vineall QC

(Instructed by Zaiwalla and Co)

LORD SUMPTION (with whom Lady Hale, Lord Kerr, and Lord Clarke agree in whole; Lord Neuberger and Lord Dyson agree only on the procedural grounds, Lord Carnwath only on the substantive grounds)

Introduction

1. This appeal is about measures taken by H.M. Treasury to restrict access to the United Kingdom's financial markets by a major Iranian commercial bank, Bank Mellat, on the account of its alleged connection with Iran's nuclear weapons and ballistic missile programmes.

2. The proliferation of nuclear weapons is an international issue of great importance to the security of the United Kingdom and the international community. For a number of years, Iran has had a major industrial programme which the United Kingdom, along with the rest of the international community, believes to be directed to the development of the technical capability to produce nuclear weapons and to the improvement of its ballistic missile capabilities. Between 2006 and 2008 the United Nations Security Council adopted a number of resolutions under Article 41 of the United Nations Charter, which deals with threats to international peace and security. Security Council Resolution 1737 (2006) called on Iran to suspend various proliferation-sensitive nuclear activities, and called on states to take measures to control the trade in certain critical materials, components, equipment and services. Paragraph 12 of this Resolution also required states to freeze the assets in their national territory of a number of persons or organisations identified in Annex I as being involved in Iran's nuclear and ballistic missile programmes. Resolution 1747 (2007) extended these provisions to a number of additional persons and organisations identified in Annex I to the new resolution. These included entities providing ancillary services to Iran's nuclear and armaments industries, among them two banks. Security Council Resolution 1803 (2008) strengthened the measures required by Resolutions 1737 and 1747. In relation to the provision of banking and other financial services to support Iran's weapons programmes, the new resolution called upon all states to

> "exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad, in order to avoid such activities contributing to the proliferation sensitive nuclear activities, or to the development of nuclear weapon delivery systems."

3. There are two principal legislative instruments available to the United Kingdom government for the purpose of restricting the operations in the United Kingdom of Iranian financial institutions associated with the country's nuclear and ballistic missiles programmes. The first, which is not directly in point in these proceedings but is an important part of the background, is the Iran (Financial Sanctions) Order 2007 SI 2007/281. This is an Order in Council made under section 1 of the United Nations Act 1946, which gives effect to the asset freeze provisions of Security Council Resolutions 1737 and 1747. Article 6 of the Order freezes the assets in the United Kingdom of the entities identified in Annex I of those resolutions.

4. The second, which is the instrument directly relevant to the present appeal, is Section 62 of the Counter-Terrorism Act 2008, which gives effect to Schedule 7. Schedule 7 is not exclusively concerned with Iran or with nuclear proliferation. It empowers the Treasury to make a direction by statutory instrument in situations specified in paragraph 1, involving three categories of "risk" associated with a foreign country outside the European Economic Area. The relevant categories of risk are those arising from terrorist financing, money laundering and nuclear proliferation. The risk of nuclear proliferation is dealt with in paragraph 1(4), which imposes a statutory condition that

> "(4) ...the Treasury reasonably believe that
>
> the development or production of nuclear, radiological, biological or chemical weapons in the country, or
>
> the doing in the country of anything that facilitates the development or production of any such weapons,
>
> poses a significant risk to the national interests of the United Kingdom."

5. If the conditions in paragraph 1 as to the existence of a relevant risk are satisfied, the Treasury may give a direction to one or more persons "operating in the financial sector" (essentially credit and financial institutions) regulating their dealings with any "designated person". A "designated person" includes any person carrying on business in or resident or incorporated in the foreign country in question: see paragraph 9(1). The direction may require the financial institutions to whom it is addressed to exercise an enhanced customer due diligence so as to obtain information about the designated person and those of its activities which contribute to the risk (paragraph 10). It may require enhanced monitoring

(paragraph 11) or systematic reporting (paragraph 12) to the same end. But the most draconian provision is paragraph 13, which provides that the direction may require those to whom it is addressed "not to enter into or continue to participate in... any transaction or business relationship with a designated person." Under paragraph 16(4), any direction made in the exercise of these powers expires a year after it is made. A direction made under Schedule 7 must be contained in an order: see paragraph 14(1). By section 96, any order under the Act must be made by statutory instrument.

6. It will be apparent that for designated persons with a substantial business in the United Kingdom, especially if they are banks, the exercise of the power conferred by paragraph 13 will have extremely serious and possibly irreversible consequences. The Act provides three relevant safeguards against the unwarranted use of this power. First, under Schedule 7, paragraph 14(2), if the direction contains requirements of a kind mentioned in paragraph 13 of Schedule 7 (limiting or ceasing business with a designated person) it must be laid before Parliament after being made and unless approved by affirmative resolution within 28 days will cease to have effect at the end of that period. Second, Schedule 7, paragraph 9(6) provides that the requirements imposed by a direction must be proportionate having regard, in the case within paragraph 1(4) to the risk referred to in that paragraph. This means the risk to the national interests of the United Kingdom presented by the development of nuclear weapons, radiological, biological or chemical weapons in the foreign country. Third, section 63 of the Act provides a special procedure by which a person affected by any "decision" of the Treasury, including a decision under Schedule 7, may apply to the High Court to set it aside, applying the principles applicable on an application for judicial review.

7. On 9 October 2009 the Treasury made an order, the Financial Restrictions (Iran) Order 2009 SI 2009/2725, which came into force three days later on 12 October. It was made under Schedule 7, paragraph 13 of the Act and required all persons operating in the financial sector not to enter into or to continue to participate in any transaction or business relationship with Bank Mellat or any of its branches or with a shipping line called IRISL. The direction was laid before Parliament on 12 October 2009. It was approved by the Delegated Legislation Committee of the House of Commons on 28 October and by the Grand Committee of the House of Lords on 2 November.

8. Under Schedule 7, paragraph 16(4), the direction expired automatically after a year, on 8 October 2010. By that time it had been effectively superseded by the extension to Bank Mellat of a general asset freeze under EU legislation, which occurred on 26 July 2010. On 29 January 2013, however, the application of the EU measures to Bank Mellat was annulled by the General Court, primarily on the ground of the insufficiency of the stated reasons for it. This decision is currently under appeal to the Court of Justice of the European Union and is suspended

pending that appeal. Subject to that, there are no restrictions on Bank Mellat's business currently in force.

9. The object of the direction, as the Treasury acknowledges, was to shut the Bank out of the UK financial sector, and that has been its effect. Before the direction, the Bank had a substantial international business, much of it international trade finance transacted through London. In the year to March 2009, it issued letters of credit with an aggregate value of about US$11 billion, of which about a quarter represents letters of credit in respect of business transacted through the United Kingdom. The Bank's own estimate of its revenue losses is about US$25 million a year. In addition, the Bank has been prevented from drawing on 183 million euros of call and time deposits with its part-owned subsidiary in London. Important banking relationships have been lost to other banks. The judge found that since the direction, the bank has been unable to make profitable use of the goodwill which it had established in the United Kingdom, which was a "possession" for the purpose of article 1 of the First Protocol to the European Convention on Human Rights. He held that "on any view the effect has been substantial, and suffices to require all of the Bank's challenges to the Order to be addressed and determined." This much is not in dispute.

The present proceedings

10. On 20 November 2009, Bank Mellat applied in the High Court under section 63 of the Counter-Terrorism Act 2008 to have the direction set aside on grounds which fall under two heads. In the courts below, these were called the procedural and the substantive grounds. The procedural ground is that the Treasury failed to give the bank an opportunity to make representations before making the order. The Bank had no express statutory right to such an opportunity, but it contends that such an opportunity was required at common law and by article 6 and article 1, Protocol 1 of the European Convention on Human Rights. The substantive grounds are that the decision was irrational, disproportionate and discriminatory, that the Treasury failed to give adequate reasons for making it, and that their reasons were vitiated by irrelevant considerations or mistakes of fact. In the High Court, Mitting J dismissed the bank's application under both heads. The Court of Appeal (Maurice Kay, Elias and Pitchford L.JJ) dismissed the appeal, unanimously in the case of the substantive grounds, by a majority (Elias LJ dissenting) in the case of the procedural ground.

The Treasury's reasons

11. Bank Mellat is the only Iranian bank to have been designated under Schedule 7 of the Act. It is, however, only part of the Iranian banking sector. According to a staff report of the International Monetary Fund put before us by the

Treasury, Iran has a comparatively large banking sector. It comprises 26 banks, including eight large general commercial banks, four of which are publicly owned and the other four (among them Bank Mellat) relatively recently privatised. The Treasury's evidence is that it is difficult for Iranian banks to access the United Kingdom's financial markets directly, because few banks in the United Kingdom are willing to deal with them or hold correspondent accounts for them in view of the risks involved. It is easier for Iranian banks to do business in the United Kingdom through UK incorporated subsidiaries, which do not present the same risks for their counterparties. Five of the eight general commercial banks in Iran have wholly or partly owned subsidiaries in the United Kingdom. They are Bank Mellat, Bank Melli, Bank Sepah, Bank Saderat and Bank Tejarat. Of these, Bank Melli, Bank Sepah and Bank Saderat had wholly owned banking subsidiaries in the United Kingdom. Bank Mellat and Bank Tejarat had a jointly owned banking subsidiary, Persia International Bank Plc ("PIB"), through which they transacted most if not all of their United Kingdom business. At the time of the Treasury direction, some of the Iranian banks with banking subsidiaries in the United Kingdom were restricted under other legislation. Bank Sepah and its UK subsidiary Bank Sepah International Plc were included in Annex I to Security Council Resolution 1747, and were accordingly covered by the asset freeze imposed under the Iran (Financial Sanctions) Order 2007. Bank Melli and its UK subsidiary Bank Melli Plc were subject to a similar asset freeze under EU legislation. On 27 July 2010, some time after the direction relating to Bank Mellat was made, the EU asset freeze was extended to Bank Mellat and PIB as well as to Bank Saderat and its UK subsidiary Bank Saderat Plc which had previously been subject to reporting obligations only. At the same time the EU asset freeze was extended to three other Iranian banks which did not have UK branches or subsidiaries. That left, among banks with a UK presence, only Bank Tejarat, which was finally brought within the EU asset freeze on 24 January 2012.

12. It is abundantly clear from statements made to Parliament when the direction was laid before it that the reason for singling out Bank Mellat from other Iranian banks was that it had been identified as having assisted Iran's weapons programmes by providing banking and financial services to entities involved with them. The explanatory memorandum which accompanied the direction explained it as follows:

> "These restrictions are being imposed in respect of these entities because of their provision of services for Iran's ballistic missile and nuclear programmes. It is considered that a direction to cease business with these entities will contribute to addressing the risk to the UK national interests posed by Iran's proliferation activities."

This was expanded in a written ministerial statement. After explaining why the Treasury considered that the Iranian nuclear programme posed significant risks for the national interests of the United Kingdom, the document continued:

> "We cannot and will not ignore specific activities undertaken by Iranian companies which we know to be facilitating activity identified by the UN as being of concern, particularly where such activities have the potential to affect the UK' s interests.
>
> Of the particular entities in question ... Bank Mellat has provided banking services to a UN listed organisation connected to Iran's proliferation sensitive activities, and been involved in transactions related to financing Iran's nuclear and ballistic missile programme.
>
> The direction to cease business will therefore reduce the risk of the UK financial sector being used, unknowingly or otherwise, to facilitate Iran's proliferation sensitive activities."

In response to a request from the Bank's solicitors for further information about the contents of this statement, the Treasury wrote on 27 October 2009:

> "Iran's nuclear and ballistic missile programmes clearly require financing mechanisms to underpin them, and access to the international banking system remains essential for transactions with foreign suppliers. As set out in the Written Ministerial Statement Bank Mellat has provided banking services to a UN listed organisation connected to Iran's proliferation sensitive activities, and been involved in transactions related to financing Iran's nuclear and ballistic missile programme. The direction prevents Bank Mellat from conducting transactions or business relationships with persons operating in the UK financial sector and therefore restricts the financing mechanisms available to entities involved in lran's nuclear programme and its missile programme. It also protects the UK financial sector from being unknowingly implicated in financing Iran's nuclear programme through transactions with Bank Mellat."

Finally, on 17 December 2009, the Exchequer Secretary to the Treasury answered a number of questions relating to the order in the House of Commons. She said:

> "The first question was on how the Government assess the impact on Iran's proliferation activities. International finance services underpin

> the actions of Bank Mellat and IRISL. Restricting their access to UK financial services will lock them out of a key financial centre, which will make their contribution to Iran's nuclear programme more difficult. Obviously, our action applies to the UK. The Hon Member for Fareham used the word "sanction", but the order is not a sanction on Iran, but a direction for financial institutions in the UK."

And later in the same debate:

> "The restriction targets Bank Mellat and IRISL transactions. Other Iranian banks are not subject to the restrictions. As long as all financial sanctions and relevant risk warnings are complied with, alternative banks may be used, otherwise an application for a licence of exemption may be made to the Treasury."

13. In response to Bank Mellat's proceedings, Mr James Robertson, a senior civil servant at the Treasury, made a witness statement which in its original form was dated 18 December 2009. His statement was subsequently re-served with additional material, after Mitting J had required the Treasury to disclose certain material which they had initially sought to rely on as closed material. In his statement, Mr Robertson provided some of the detail behind the general allegations in the written ministerial statement about Bank Mellat's dealings with a "UN listed organisation connected to Iran's proliferation sensitive activities", and the "transactions related to financing Iran's nuclear and ballistic missile programme". It came down to three points:

(1) The "UN listed organisation" was Novin Energy Company, which had been identified in Annex I of Resolution 1747 as a company which "operates within AEOI and has transferred funds on behalf of AEOI to entities associated with Iran's nuclear programme." AEOI is the Atomic Energy Organisation of Iran. It is an umbrella organisation concerned with the coordination of the programme. It is listed in Annex I of Resolution 1737. Mr Robertson's evidence was that Bank Mellat had "serviced and maintained AEOI accounts mainly through AEOI's financial conduit Novin Energy."

(2) Bank Mellat was said to have provided banking services to senior officials of Iran's "Aerospace Industries Organisation" (or "AIO"), including a Mr Taghizadeh and a Mr Esbati. AIO is not an organisation listed in the Annexes to the Security Council resolutions, but it is the parent of four entities which are listed. Mr Robertson alleged that "senior AIO officials concerned with Iran's ballistic missile programme", by inference including Mr Taghizadeh and Mr Esbati, had

in 2007 and 2008 "used Bank Mellat services to conduct business with companies associated with Iranian procurement attempts".

(3) Between autumn 2007 and spring 2009 the Bank had a banking relationship with a company called Doostan International, which was said to be an intermediary company that had in the past been used by subsidiary organisations of AIO listed in the Security Council resolutions, and which was linked to Iran's nuclear programme.

14. In addition, Mr. Robertson said that the Treasury had been influenced by two wider considerations not directly related to Bank Mellat's alleged role in providing banking services to entities involved in Iran's weapons programmes. One was that it might encourage the United Kingdom financial sector to wind down business with Iran more generally. The other was that it would increase pressure on the Iranian government to comply with its international obligations, by restricting the financial services available to it for procuring material required for its weapons programmes. In this context, Mr Robertson said that it was important to note that although Bank Mellat had been privatised, the government of Iran still directly controlled 20% of its shares and indirectly controlled another 60%.

15. In his open judgment Mitting J made the following findings, which represent at best a very partial acceptance of the Treasury's case on the facts:

(1) Bank Mellat "has in place a mechanism, which it operates conscientiously, to ensure that it does not provide banking services to Security Council designated entities and individuals." This finding reflected the Bank's evidence, which described its due diligence procedures.

(2) Novin Energy Company was a "financial conduit" for AEOI and did facilitate Iran's nuclear weapons programme. But once it was designated in Security Council Resolution 1747, the Bank ran down and eventually terminated its relationship with it.

(3) Doostan International had played a part in the Iranian nuclear weapons programme. The Bank holds accounts for Doostan and for its managing director Mr Shabani, but the Bank had investigated the position in good faith and found nothing unusual or suspicious. Mitting J considered that the position with regard to Doostan "does not greatly matter".

(4) Mitting J was not satisfied on the information available to him that the Bank had provided banking services to the two individuals said to be senior officials of the AIO. Their names are very common in Iran and it had not proved possible to identify them in the Bank's records.

(5) Bank Mellat is not controlled by the Iranian government, which exercises voting rights only in respect of the 20% of the shares which it owns. Nonetheless some pressure would be brought to bear on the Iranian government by the direction.

16. In substance, therefore, Mitting J found that while the Bank had provided banking services to two entities, Novin and Doostan, which were involved in the Iranian nuclear weapons and ballistic missiles programmes, this had happened without their knowledge and in spite of their conscientiously operated procedures to avoid doing so. The judge nevertheless dismissed the Bank's substantive grounds of application because these very facts demonstrated "the risk that is in any event obvious, that however careful the bank may be, the bank's facilities are open to use by entities participating in Iran's nuclear weapons programme." The judge put the point in this way at para 16:

> "The Treasury's case is not that the bank has knowingly assisted Security Council designated entities after designation, or even that it has knowingly assisted entities liable to be designated, but which have not yet been, by providing banking facilities to them, but that it has the capacity to do so, has in one instance done so and is likely to do so in the future. The fundamental justification for the Order *is* that, even as an unknowing and unwilling actor, the bank is, by reason of its international reach, well placed to assist entities to facilitate the development of nuclear weapons, by providing them with banking facilities, in particular trade finance. Concealment of the true nature of imported goods paid for by a letter of credit is straight forward: all that an issuing bank sees are documents. On presentation of compliant documents describing innocent goods, the bank must pay, whatever the nature of the goods in fact imported. Access to the international financial system is, as the Financial Action Task Force reported on 18 June 2008, essential for what it describes as "proliferators". I accept Mr Robertson's conclusion, in paragraph 57 of his statement, that Iran's banking system provides many of the financial services which underpin procurement of the raw materials and components needed for its nuclear and ballistic missile programmes."

17. In addition to his open judgment, Mitting J delivered a closed judgment, which we have read. It contains nothing which alters or supplements the findings in his open judgment in any respect relevant to the present appeal.

18. The judge's findings of fact were not challenged before the Court of Appeal, which endorsed his conclusions about them.

The Bank's substantive grounds

19. The bank now accepts, at least for the purpose of this litigation, that the statutory prerequisites in Schedule 1, paragraph 1 of the Act for the making of the direction were satisfied. In other words, the Treasury reasonably believed that Iran's nuclear and ballistic missiles programmes posed a significant risk to the national interests of the United Kingdom. But that is not enough to justify the order. This is because unlike the Iran (Financial Sanctions) Order 2007, a Schedule 7 direction is not a sanctions regime. Its purpose is directly to restrict the availability of financial services which contribute to the relevant risk. Directions made under it are essentially preventative and remedial rather than punitive or deterrent. Thus Schedule 7 applies in the same way to the risk of terrorist financing and money-laundering associated with a foreign country as it does to the risk of nuclear proliferation. All of the specific directions for which Schedule 7 provides are addressed to the particular risks whose existence has given rise to the direction. They require things to be done by the financial institutions to whom they are addressed with a view to directly restricting the contribution which the designated person may make to that risk, whether it be by gathering or reporting of information relating to its activities or, as in the present case, by wholly ceasing business dealings with him. Critically, paragraph 9(6) of Schedule 7 posits a functional relationship between the conduct which may be required by the direction and the particular risk which justified the making of it in the first place. It follows that the essential question raised by the Bank's substantive objections to the direction is whether the interruption of commercial dealings with Bank Mellat in the United Kingdom's financial markets bore some rational and proportionate relationship to the statutory purpose of hindering the pursuit by Iran of its weapons programmes.

20. The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law, notably *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends

on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective. Lord Reed, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68-76) which I would disagree with.

21. None of this means that the court is to take over the function of the decision-maker, least of all in a case like this one. As Maurice Kay LJ observed in the Court of Appeal, this case lies in the area of foreign policy and national security which would once have been regarded as unsuitable for judicial scrutiny. The measures have been opened up to judicial scrutiny by the express terms of the Act because they may engage the rights of designated persons or others under the European Human Rights Convention. Even so, any assessment of the rationality and proportionality of a Schedule 7 direction must recognise that the nature of the issue requires the Treasury to be allowed a large margin of judgment. It is difficult to think of a public interest as important as nuclear non-proliferation. The potential consequences of nuclear proliferation are quite serious enough to justify a precautionary approach. In addition, the question whether some measure is apt to limit the risk posed for the national interest by nuclear proliferation in a foreign country, depends on an experienced judgment of the international implications of a wide range of information, some of which may be secret. This is pre-eminently a matter for the executive. For my part, I wholly endorse the view of Lord Reed that "the making of government and legislative policy cannot be turned into a judicial process."

22. Nonetheless there are, as it seems to me, two serious difficulties about the conclusion which both Mitting J and the Court of Appeal reached in the present case. The first is that it does not explain, let alone justify, the singling out of Bank Mellat, if as both courts below agreed the problem is a general problem of international banking. The second is that the justification for the direction which

they have found was not the one which ministers advanced when laying the direction before Parliament, and was in some respects inconsistent with it.

23. As I have pointed out, by reference to the various statements of Treasury ministers, the justification for the measure which was given to Parliament was that there was a particular problem about Bank Mellat which did not apply to the generality of Iranian banks. As the Exchequer Secretary pointed out on 17 December 2009, the direction was a targeted measure which did not apply to transactions with other banks. That must mean, and would certainly have conveyed to Parliament, either (i) that Bank Mellat was knowingly collaborating in transactions related to the Iranian programmes, or at least turning a blind eye to them, or else (ii) that Bank Mellat, even on the footing that it was acting in good faith had unacceptably low standards of customer due diligence, which made it especially liable to let through such transactions. The existence of special problems at Bank Mellat was also a substantial part of the justification put forward in the more detailed explanation given in Mr Robertson in his witness statement. Unfortunately, it was the part which the judge did not accept. The judge has found that Bank Mellat had a conscientiously applied policy of not providing banking facilities and banking services to entities identified in the United Nations list as being connected to the Iranian weapons programmes. He has found that it wound down and then terminated its relationship with Novin once it had been added to the list, and that an investigation into Doostan had thrown up nothing unusual or suspicious. When (after the hearing before Mitting J) Doostan was added to the list of entities connected with the Iranian weapons programmes by the United Nations Security Council, the relationship with them was terminated as it had been in Novin's case. The judge made no finding about the inadequacy of Bank Mellat's controls. Neither the Treasury ministers when justifying the measure to Parliament nor Mr Robertson when explaining it to the court suggested that they were particularly lax. Mr Robertson did say that in general Iranian standards of due diligence were low. This, he said, made them vulnerable to being used to channel illicit finance, and meant that UK financial institutions dealing with them could not assume that they would necessarily have procedures in place to screen out transactions of concern. Mr Robertson did not, however, suggest that Bank Mellat was especially deficient in this respect and the judge's finding about their procedures suggests that they were satisfactory, at any rate in relation to the weapons programmes. Against this background, the emphasis of the Treasury's argument underwent a radical shift after the order was challenged towards a justification based on the risk that Bank Mellat might be the "unwitting and unwilling" channel by which the entities directly involved in the Iranian weapons programmes financed their importation of materials, services and equipment.

24. Mitting J and the Court of Appeal accepted this argument. They considered that the justification for the direction was to be found not in any problem specific to Bank Mellat but in the general problem for the banking industry of preventing

their facilities from being used for purposes connected with the Iranian weapons programmes. As the judge pointed out, concealment of the true nature of the imported goods paid for by letters of credit is straightforward. "However careful a bank may be," he said, "the bank's facilities are open to use by entities participating in Iran's nuclear weapons programme." For this reason, he thought that the direction represented the only "reasonably practicable means of ensuring reliably that the facilities of an Iranian bank with international reach will not be used for the purpose of facilitating the development of nuclear weapons by Iran." However, the direction made no attempt to prevent every Iranian bank with an international reach from facilitating Iran's weapons programmes, but only one of them. Indeed, by emphasising that it remained open to international traders to use other banks, the Exchequer Secretary apparently invited them to use instead channels of trade finance many, perhaps all of which would be affected by precisely the same inherent problems as Bank Mellat.

25. A measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification. The classic illustration is *A v Secretary of State for the Home Department* [2005] 2 AC 68, another case in which the executive was entitled to a wide margin of judgment for reasons very similar to those which I have acknowledged apply in the present case. The House of Lords was concerned with a derogation from the Convention permitting the detention of non-nationals whose presence in the United Kingdom was considered by the Home Secretary to be a risk to national security and who could not be deported. The House held that this was not a proportionate response to the terrorist threat which provoked it: see in particular paras 31, 43-44 (Lord Bingham of Cornhill), 132 (Lord Hope of Craighead), and 228 (Baroness Hale of Richmond). No one disputed that the executive had been entitled to regard the applicants as a threat to national security. Plainly, therefore, the legislation in question contributed something to the statutory purpose of protecting the United Kingdom against terrorism, if only by keeping some potential terrorists in prison. It was nevertheless disproportionate, principally because it applied only to foreign nationals. That was relevant for two reasons. One was that the distinction was arbitrary, because the threat posed by comparable UK nationals, to whom the legislation did not apply, was qualitatively similar, although quantitatively smaller. The other was that it substantially reduced the contribution which the legislation could make to the control of terrorism, and made it difficult to suggest that the measure was necessary. This was because if (as the Committee assumed) the threat from UK nationals could be adequately addressed without depriving them of their liberty, no reason was shown why the same should not be true of foreign nationals. As Lord Hope put it at para 132, "the distinction raises an issue of discrimination, ... but as the distinction is irrational, it goes to the heart of the issue about proportionality also."

26. Every case turns on its own facts, and analogies with other decided cases can be misleading. The suppression of terrorism and the prevention of nuclear proliferation are comparable public interests, but the individual right to liberty engaged in *A v Secretary of State for the Home Department* can fairly be regarded as the most fundamental of all human rights other than the right to life and limb. The right to the peaceful enjoyment of business assets protected by article 1 of the First Protocol, is not in the same category of human values. But the principle is not fundamentally different.

27. I would not go so far as to say that the Schedule 7 direction in this case had no rational connection with the objective of frustrating as far as possible Iran's weapons programmes. On the footing that a precautionary approach is justified, the elimination of any Iranian bank from the United Kingdom's financial markets may well have added something to Iran's practical problem in financing transactions associated with those programmes, just as the incarceration of some potential terrorists under Part IV of the Crime and Security Act 2001 may have made some difference to the reduction of terrorism. But I think that the distinction between Bank Mellat and other Iranian banks which was at the heart of the case put to Parliament by ministers was an arbitrary and irrational distinction and that the measure as a whole was disproportionate. This is because once it is found that the problem is not specific to Bank Mellat but an inherent risk of banking, the risk posed by Bank Mellat's access to those markets is no different from that posed by the access which comparable banks continued to enjoy. Moreover, the discriminatory character of the direction must drastically reduce its effectiveness as a means of impeding the Iranian weapons programmes. As the Exchequer Secretary herself pointed out, "as long as all financial sanctions and relevant risk warnings are complied with, alternative banks may be used." Nothing in the Treasury's case explains why we should accept that it is necessary to eliminate Bank Mellat's business in London in order to achieve the objective of the statute, if the same objective can be sufficiently achieved in the case of comparable banks by requiring them to observe financial sanctions and relevant risk warnings. It may well be that other Iranian banks have not been found to number among their clients entities involved in Iran's nuclear and ballistic missile programmes. But it follows from the fact that this is a problem inherent in the conduct of international banking business that they are as likely to do so as Bank Mellat. The direction was irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make to its objective. I conclude that that it was unlawful.

The Bank's procedural grounds

28. I also consider that the Bank 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.

29. The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. In *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180, the Defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. "I apprehend", said Willes J at 190, "that a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, and that rule is of universal application an founded upon the plainest principles of justice."

30. In *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560, Lord Mustill, with the agreement of the rest of the Committee of the House of Lords, summarised the case-law as follows:

> "My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

31. It follows that, unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each direction is made. Some directions that might be made under Schedule 7 of the Act could not reasonably give rise to an obligation on the Treasury's part to consult the targeted entity, for

example because there was a real problem about the implicit or explicit disclosure of secret intelligence or because prior consultation might frustrate the object of the direction by enabling the targeted entity to evade its operation, notably in a case involving money-laundering or terrorism. In this case, the Treasury has raised only two practical difficulties about consulting the Bank in advance of the direction. The first was the difficulty raised by Mr Robertson that "it would not have been appropriate to have notified Bank Mellat of the Treasury's intention to make the direction contained in the 2009 Order before 12 October 2009, because this would have provided it with the opportunity to rearrange business relationships or transactions with the UK financial sector to ensure (for example) that they were indirect and so not caught by the prohibitions." The judge rejected this, pointing out that the Bank could just as easily do that after the direction as before. That conclusion, which seems inescapable, has not been challenged on appeal. The second practical difficulty was raised by way of submission in the Court of Appeal and dealt with in the judgment of Maurice Kay LJ, who thought that it had "some force". This was the supposed practical difficulty of permitting representations in a situation where there is closed material. I have to say that for my part I am not impressed by this difficulty. In justifying the direction in the course of these proceedings, the Treasury disclosed the gist of the closed material including the provision of banking facilities to Novin and Doostan and their alleged provision to Mr Taghizadeh and Mr Esbati. I cannot see why they should have had any greater difficulty in disclosing before the making of the direction the material that they were quite properly required to disclose afterwards.

32. In my opinion, unless the Act expressly or impliedly excluded any relevant duty of consultation, it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made. In the first place, although in point of form directed to other financial institutions in the United Kingdom, this was in fact a targeted measure directed at two specific companies, Bank Mellat and IRISL. It deprived Bank Mellat of the effective use of the goodwill of their English business and of the free disposal of substantial deposits in London. It had, and was intended to have, a serious effect on their business, which might well be irreversible at any rate for a considerable period of time. Secondly, it came into effect almost immediately. The direction was made on a Friday and came into force at 10.30 a.m. on the following Monday. It had effect for up to 28 days before being approved by Parliament. Third, for the reasons which I have given, there were no practical difficulties in the way of an effective consultation exercise. While the courts will not usually require decision-makers to consult substantial categories of people liable to be affected by a proposed measure, the number of people to be consulted in this case was just one, Bank Mellat, and possibly also IRISL depending on the circumstances of their case. I cannot agree with the view of Maurice Kay LJ that it might have been difficult to deny the same advance consultation to the generality of financial institutions in the United Kingdom, who were required to cease dealings with Bank Mellat. They were the addressees of the direction, but not its targets. Their

interests were not engaged in the same way or to the same extent as Bank Mellat's. Fourth, the direction was not based on general policy considerations, but on specific factual allegations of a kind plainly capable of being refuted, being for the most part within the special knowledge of the Bank. For these reasons, I think that consultation was required as a matter of fairness. But the principle which required it is more than a principle of fairness. It is also a principle of good administration. The Treasury made some significant factual mistakes in the course of deciding whether to make the direction, and subsequently in justifying it to Parliament. They believed that Bank Mellat was controlled by the Iranian state, which it was not. They were aware of a number of cases in which Bank Mellat had provided banking services to entities involved in the Iranian weapons programmes, but did not know the circumstances, which became apparent only when the Bank began these proceedings and served their evidence. The quality of the decision-making processes at every stage would have been higher if the Treasury had had the opportunity before making the direction to consider the facts which Mitting J ultimately found.

33. In these circumstances, the only ground on which it could be said that the Treasury was not obliged to consult Bank Mellat in advance, was that such a duty, although it would otherwise have arisen at common law in the particular circumstances of this case, was excluded by the Act in cases such as the present one. It was certainly not expressly excluded. But the submission is that it was impliedly excluded on two overlapping grounds: (i) that the statutory right of recourse to the courts after the making of the direction, which is provided by section 63 of the Act, is enough to satisfy any duty of fairness, or at least must have been intended by Parliament to be enough; and (ii) that consultation is not in law required before the making of subordinate legislation, especially when it is subject to the affirmative resolution procedure. Mitting J and the majority of the Court of Appeal rejected the Bank's procedural case on both grounds.

34. I shall deal first with the implications of the statutory right of recourse to the courts.

35. The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise. As Byles J observed in *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB(NS) 190, 194, "the justice of the common law will supply the omission of the legislature." In *Lloyd v McMahon* 1987] 1 AC 625, 702-3, Lord Bridge of Harwich regarded it as

> "well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

Like Lord Bingham in *R (West) v Parole Board* [2005] 1 WLR 350 at para 29, I find it hard to envisage cases in which the maximum *expressio unius exclusio alterius* could suffice to exclude so basic a right as that of fairness.

36. It does not of course follow that a duty of prior consultation will arise in every case. The basic principle was stated by Lord Reid forty years ago in *Wiseman v Borneman* [1971] AC 297, 308, in terms which are consistent with the ordinary rules for the construction of statutes and remain good law:

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."
> Cf. Lord Morris of Borth-y-Gest at 309B-C.

37. Leaving aside, for a moment, the fact that the direction was required to be made by statutory instrument subject to Parliamentary approval, it is not in my view implicit in section 63 that the right of recourse to the courts is the sole guarantee of fairness. Nor is it implicit that what the common law would otherwise require to achieve fairness is excluded. I say this for three reasons. The first is that section 63 largely reproduces the rights which a person affected by the direction would have anyway. It confers on him the right to apply to the High Court for an adjudication based on the principles of judicial review, and on the court such powers as could be made on judicial review. The only difference which section 63 makes is that permission is not required for such an application. The express provision of a right of recourse to the courts is essentially a peg on which to hang the various procedural provisions in sections 66-72. It would I think be surprising if the mere fact that the right of persons affected to apply for judicial review had been superseded by a statutory application with substantially the same ambit, were to make all the difference to the content of the Treasury's common law duty of

fairness. Whatever else Parliament may have intended by enacting section 63, it cannot in my view have intended to reduce the procedural rights of those affected by the Treasury's orders. Second, the statutory right of recourse will not be sufficient to achieve fairness in every case and is certainly not enough to achieve it in cases like this one, falling under Schedule 7, paragraph 13. This is because a direction may take effect, as it did in this case, immediately or almost immediately and, subject to Parliamentary scrutiny, will remain in effect unless and until it is set aside by the Court. An application under section 63 is likely to require evidence on both sides. With the best will in the world it is unlikely to be determined in less than three months and may take considerably longer even without allowing for appeals. In this case, some seven months elapsed before Mitting J gave judgment. This may not matter much in the case of a direction to exercise heightened customer due diligence or to monitor or report. But it matters a great deal when the direction is in the draconian terms permitted by paragraph 13. A direction to financial institutions to cease business with a designated person is apt to achieve serious and immediate damage while it remains in effect, extending well beyond transactions related to nuclear proliferation. Even if it is set aside, the impact on the designated person's goodwill may be substantial and in some cases irreversible. In some cases, where the decision impugned infringed the applicants' Convention rights, damages will be recoverable after the event. Claims for damages are, however, far from straightforward, and loss can be difficult to prove to the standard which the courts have traditionally required. Third, the recognition of a duty of prior consultation would not frustrate the purpose of the statutory scheme, nor would it cut across its practical operation. Schedule 7 directions made in circumstances like these are not the kind of directions whose effectiveness depends on the ability to strike without warning. As the judge pointed out, the kind of avoiding action which a designated person might be minded to take could equally be taken after the direction had been made.

38. I turn, therefore, to the implications of the fact that the direction is required to be made in subordinate legislation, subject to Parliamentary approval.

39. The Treasury submit that the legislative form of a Schedule 7 direction takes it out of the area in which the courts can imply a duty of fairness or prior consultation. This is self-evident in the case of primary legislation. There is not yet a statute into which such a duty of consultation can be implied. Parliament is not in any event required to be fair. Even if a legitimate expectation has been created, the courts cannot, consistently with the constitutional function of Parliament, control the right of a minister, in his capacity as a member of Parliament, to introduce a bill in either house: *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin.) at para 49; *R (on the application of UNISON) v Secretary of State for Health* [2010] EWHC 2655 (Admin).

40. The position in relation to secondary legislation is necessarily different, because a statutory instrument is made under powers conferred by statute. These powers are accordingly subject to whatever express or implied limitations or conditions can be derived from the parent Act as a matter of construction. In *R v Electricity Commissioners Ex p London Electricity Joint Committee Company (1920) Limited* [1924] 1 KB 171, 208, Lord Atkin observed at a very early stage in the development of public law that he knew of "no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval, even where the approval has to be that of the Houses of Parliament." It has sometimes been suggested that this applies only where the ground of objection to a statutory instrument is that it is wholly outside the power conferred by the Act. This was the view expressed by Lord Jauncey and affirmed by the Inner House in *City of Edinburgh District Council v Secretary of State for Scotland* 1985 SC 261. He considered that where Parliament had reserved the right to consider the merits (as opposed to the *vires*) of a statutory instrument, it was not open to the courts to review their rationality or their procedural fairness.

41. I do not think that this distinction is sustainable. In *F. Hoffman La Roche and Co v Secretary of State for Trade and Industry* [1975] AC 295, the applicants objected to a statutory instrument under the Monopolies and Mergers Act 1965 regulating the prices of their medicines, which had been approved by Parliament under the affirmative resolution procedure. The relevant power was to make orders giving effect to a report of the Monopolies Commission, which the applicants alleged was vitiated by a failure to observe the rules of natural justice. The issue was about the availability of an injunction enforcing the order in circumstances where the Secretary of State was not prepared to give an undertaking in damages. Moreover, it is fair to say that the applicants' case was that the Commission's report was invalid for procedural reasons, and therefore that there was no report on which the Secretary of State could found any power to make the order. But Lord Diplock considered the status of the order generally, at 365:

> "In constitutional law a clear distinction can be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of members of both Houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted outwith the legislative powers conferred upon him by the previous Act of Parliament under which the order is ultra vires by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects)."

42. In *R (Asif Javed) v Secretary of State for the Home Department* [2002] QB 129, the Court of Appeal held that it was entitled to review the rationality of a minister's exercise of a statutory power to designate Pakistan by order as a country in which there was "in general no serious risk of persecution", notwithstanding that the order had been laid before Parliament in draft under the affirmative resolution procedure and the position in Pakistan to some extent discussed. Lord Phillips of Worth Matravers MR, echoing the language of Atkin LJ, said at para 51 that there was no "principle of law that circumscribes the extent to which the court can review an order that has been approved by both Houses of Parliament under the affirmative resolution procedure." The order was declared to be unlawful.

43. These statements seem to me to be correct in principle. If a statutory power to make delegated legislation is subject to limitations, the question whether those limitations have been observed goes to the lawfulness of the exercise of the power. It is therefore reviewable by the courts. In principle, this applies as much to an implied limitation as to an express one, and as much to a limitation on the manner in which the power may be exercised as it does to a limitation on the matters which are within the scope of the power. The reason why this does not intrude upon the constitutional primacy of Parliament is not simply that delegated legislation, however approved, does not have the status of primary legislation. It is that a statutory instrument is the instrument of the minister (or other decision-maker) who is empowered by the enabling Act to make it. The fact that it requires the approval of Parliament does not alter that. The focus of the court is therefore on his decision to make it, and not on Parliament's decision to approve it. If that is true (as I think it is) as a matter of general principle, it is particularly true of the statutory judicial review for which section 63 of the Counter-Terrorism Act provides. Under section 63(2) the application is to set aside a "decision of the Treasury". The relevant decision of the Treasury is the decision under Schedule 7, paragraph 1 to "give a direction". If the court sets aside that decision, it is then required by section 63(4) to quash the resulting order.

44. Where the courts have declined to review the procedural fairness of statutory orders on the ground that they have been subject to Parliamentary scrutiny, they have not generally done so on the ground that Parliamentary scrutiny excludes the duty of fairness in general or the duty of prior consultation in particular. These decisions have generally been justified by reference to three closely related concepts which for my part I would not wish to challenge or undermine in any way. First, when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy. Second, there is a very significant difference between statutory instruments which alter or supplement the operation of the Act generally, and those which are

targeted at particular persons. The courts originally developed the implied duty to consult those affected by the exercise of statutory powers and receive their representations as a tool for limiting the arbitrary exercise of statutory powers for oppressive objects, normally involving the invasion of the property or personal rights of identifiable persons. *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180 was a case of this kind, and when Willes J (at 190) described the duty to give the subject an opportunity to be heard as a rule of "universal application", he was clearly thinking of this kind of case. Otherwise the proposition would be far too wide. While the principle is not necessarily confined to such cases, they remain the core of it. By comparison, the courts have been reluctant to impose a duty of fairness or consultation on general legislative orders which impact on the population at large or substantial parts of it, in the absence of a legitimate expectation, generally based on a promise or established practice. Third, a court may conclude in the case of some statutory powers that Parliamentary review was enough to satisfy the requirement of fairness, or that in the circumstances Parliament must have intended that it should be. It is particularly likely to take this view where the measure impugned is a general legislative measure. The reason is that when we speak of a duty of fairness, we are speaking not of the substantive fairness of the measure itself but of the fairness of the procedure by which it was adopted. Parliamentary scrutiny of general legislative measures made by ministers under statutory powers will often be enough to satisfy any requirement of procedural fairness. The same does not necessarily apply to targeted measures against individuals.

45. These considerations lie behind the judgments in the Court of Appeal in *R on the application of BAPIO Action Limited v Secretary of State for the Home Department* [2007] EWCA Civ. 1139, which both Mitting J and Maurice Kay LJ in the Court of Appeal placed at the forefront of their reasoning. *BAPIO* was a judicial review of the decision of the Home Secretary to amend the Immigration Rules without prior consultation so as to abolish permit-free training for doctors without a right of abode in the United Kingdom. There were transitional provisions for those who had already begun their training under the old rules, which protected almost all those who might have claimed to have a legitimate expectation based on the old rules. Sedley LJ, who delivered the leading judgment, began by referring to a dictum of Lord Scarman in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240. This was a judicial review of the Secretary of State's assessment of the proper level of expenditure by a local authority. It was a classic issue of general policy, involving decisions about the use of resources and the level of taxation, potentially affecting every householder in Britain, and quite obviously exceptionally difficult to challenge on rationality grounds. Lord Scarman said, at 250, in a passage that is not always quoted in full:

> "To sum it up, the levels of public expenditure and the incidence and distribution of taxation are matters for Parliament, and, within

> Parliament, especially for the House of Commons... If a statute, as in this case, requires the House of Commons to approve a minister's decision before he can lawfully enforce it, and if the action proposed complies with the terms of the statute..., it is not for the judges to say that the action has such unreasonable consequences that the guidance upon which the action is based and of which the House of Commons had notice was perverse and must be set aside. For that is a question of policy for the minister and the Commons, unless there has been bad faith or misconduct by the minister. Where Parliament has legislated that the action to be taken by the Secretary of State must, before it is taken, be approved by the House of Commons, it is no part of the judges' role to declare that the action proposed is unfair, unless it constitutes an abuse of power in the sense which I have explained."

Sedley LJ rightly pointed out in *BAPIO* that this reasoning was "predicated on the inapt nature of the subject-matter – public finance – for judicial scrutiny, not upon a quasi-immunity from judicial review of delegated legislation or rules which have been laid before Parliament." He pointed out that there was no such immunity, and that the Immigration Rules would be reviewable for want of power to make them or for irrationality. Turning to the question whether they were reviewable for procedural unfairness he said this:

> "The real obstacle which I think stands in the appellants' way is the difficulty of propounding a principle which reconciles fairness to an adversely affected class with the principles of public administration that are also part of the common law. These are not based on administrative convenience or potential embarrassment. They arise from the separation of powers and the entitlement of executive government to formulate and reformulate policy, albeit subject to such constraints as the law places upon the process and the product. One set of such constraints in modern public law are the doctrines of legitimate expectation, both procedural and substantive."

I agree with this in the cases to which Sedley LJ was referring, namely those in which delegated legislation was an expression of legislative policy. I think that it represents a more nuanced and accurate statement of the law than the more hard-edged formulations of Maurice Kay LJ and Rimer LJ in the same case.

46. The present case, however, is entirely different. In point of form, a statutory instrument embodying a Schedule 7 direction is legislation. But, as Megarry J observed in *Bates v Lord Hailsham of St. Marylebone* [1972] 1 WLR 1373, the fact that an order takes the form of a statutory instrument is not decisive: "what is

important is not its form but its nature, which is plainly legislative" (page 1378). The Treasury direction designating Bank Mellat under Schedule 7, paragraph 13, was not legislative in nature. There is a difference between the sovereign's legislation and his commands. The one speaks generally and impersonally, the other specifically and to nominate persons. As David Hume pointed out in his *Treatise of Human Nature* (Book III, Part ii, sec 2-6), "all civil laws are general, and regard alone some essential circumstances of the case, without taking into consideration the characters, situations and connexions of the person concerned." The Treasury direction in this case was a command. The relevant legislation and the whole legislative policy on which it was based, were contained in the Act itself. The direction, although made by statutory instrument, involved the application of a discretionary legislative power to Bank Mellat and IRISL and nothing else. It was as good an example as one could find of a measure targeted against identifiable individuals. Moreover, as I have pointed out in dealing with the Bank's substantive complaints, it singled out Bank Mellat from other Iranian banks on account of the Bank's conduct or, in Hume's words, its "characteristics, situations and connexions". It directly affected the Bank's property and business assets. If the direction had not been required to be made by statutory instrument, there would have been every reason in the absence of any practical difficulties to say that the Treasury had a duty to give prior notice to the Bank and to hear what they had to say. In a case like this, is the position any different because a statutory instrument was involved? I think not. That was simply the form which the specific application of this particular legislation was required to take.

47. With a measure such as this one, targeted against "designated persons", it is not possible to say that procedural fairness is sufficiently guaranteed by Parliamentary scrutiny or to suppose that Parliament in enacting the Counter-Terrorism Act ever thought it was. The justification for the direction depends on the particular character and conduct of the designated person, about which Parliament cannot have the same plenitude of information as it is assumed to have about matters of general legislative policy. Many of the essential facts about the particular target will be peculiarly within the designated person's knowledge, and even those known to the Treasury will not necessarily be publicly disclosed.

48. In some cases, the procedure might be regarded as fair even in the case of a targeted measure, and even if the target did not have an opportunity to be heard before the order was made, if he was in a position to make effective representations in the course of the passage of the affirmative resolutions through Parliament. But this was hardly a realistic alternative to prior consultation in the present case. In the first place, the Bank was not in a position to defend itself against the Treasury's allegation that they had had dealings with entities involved in the Iranian weapons programmes until the Treasury identified the entities that they were referring to. They did not identify them in the course of justifying the order in Parliament. They were first identified in correspondence with the Bank's

solicitors on 3 December 2009, after the present proceedings had been begun and a month after the Parliamentary processes were complete. Second, unlike other statutory instruments made under the Counter-Terrorism Act, an order giving effect to a Schedule 7 direction is not laid before Parliament in draft before taking effect. It may and in this case did take effect upon being made and was capable of continuing in effect for up to 28 days in advance of an affirmative resolution. This is quite long enough to achieve substantial damage to the interests of the designated person. Third, Schedule 7, paragraph 14(5), expressly excludes the application of the hybrid instrument procedure to such an order. The hybrid instrument procedure is a procedure under the standing orders of the House of Lords which applies to certain instruments directly affecting private or local interests in a manner different from other persons or interests in the same category. Its effect is to allow the House to receive petitions from parties affected. The result is to exclude any right which a designated person might otherwise have had to make representations by petition as part of the formal Parliamentary process. In my view, these factors underline the value and the importance in the interests of fairness of the Treasury giving the Bank an opportunity to be heard before the order was made.

49. I conclude that the Treasury's direction designating Bank Mellat was unlawful for want of prior notice to them or any procedure enabling them to be heard in advance of the order being made. This makes it unnecessary to consider the more difficult question whether a duty of prior consultation arose by virtue of Article 6 of the European Convention on Human Rights or Article 1 of the First Protocol.

Conclusion

50. I would allow the appeal, set aside the decision of the Treasury to make the direction and quash the order giving effect to it.

LORD REED (dissenting)

Introduction

51. These proceedings are brought by Bank Mellat under section 63(2) of the Counter-Terrorism Act 2008 ("the 2008 Act"). In terms of section 63(1)(c), the section applies to any decision of the Treasury in connection with the exercise of any of their functions under Schedule 7 to the 2008 Act. Section 63(3) provides that in determining whether the decision should be set aside the court is to apply the principles applicable on an application for judicial review. In terms of section

63(5), if the court sets aside the decision of the Treasury to make an order under Schedule 7, it must quash the order.

52. Bank Mellat seeks to have a decision of the Treasury to make an order under Schedule 7 set aside, and the order quashed. Bank Mellat relies on a number of common law grounds of judicial review, including procedural unfairness and unreasonableness, and maintains that the order is also ultra vires since it fails to comply with paragraph 9(6) of Schedule 7, which stipulates that the requirements imposed by a direction under that schedule must be proportionate. Bank Mellat further contends that the making of the order was in any event unlawful by virtue of section 6 of the Human Rights Act 1998. The latter contention is based on the argument that there has been a breach of the procedural standards imposed by article 6 of the Convention and article 1 of Protocol No 1 ("A1P1"), and in addition that the order constitutes a disproportionate interference with Bank Mellat's enjoyment of its possessions, contrary to A1P1.

Procedural fairness

53. In relation to the issues of procedural fairness arising under the common law, there is much in Lord Sumption's judgment with which I respectfully agree. In particular, I agree that the fact that the decision challenged in these proceedings concerned the giving of a direction in the form of a statutory instrument, which had to be approved by Parliament within 28 days in order to remain in force, does not in itself necessarily exclude the application of common law standards of procedural fairness. I also agree that there is no fundamental distinction in principle between the jurisdiction of the court to review the legality of a statutory instrument on procedural and other grounds: see in particular *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 365 per Lord Diplock.

54. I also agree with Lord Sumption that the reason why a statutory instrument lies within the scope of the courts' supervisory jurisdiction, whereas an Act of Parliament does not, is that the making of a statutory instrument is an act of the executive, exercising limited powers. This point was explained by Sir John Donaldson MR in *R v Her Majesty's Treasury, Ex p Smedley* [1985] 1 QB 657, 666-667:

> "Furthermore, whilst Parliament is entirely independent of the courts in its freedom to enact whatever legislation it sees fit, legislation by Order in Council, statutory instrument or other subordinate means is in a quite different category, not being Parliamentary legislation. This subordinate legislation is subject to some degree of judicial

> control in the sense that it is within the province and authority of the courts to hold that particular examples are not authorised by statute, or, as the case may be by the common law, and so are without legal force or effect."

A similar explanation was given by Lord Phillips of Worth Matravers MR in *R (Asif Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789; [2002] QB 129, para 33. Since the executive is acting under powers conferred by Parliament when it makes a statutory instrument, it can only act within the scope of those powers as determined by the courts. The subject-matter of the court's supervision is the lawfulness of the decision taken by the executive: there is no question of judicial supervision of the exercise by Parliament of its power to approve the instrument or to withhold its approval. That distinction is reflected in section 63 of the 2008 Act, which, as I have mentioned, permits an application to be made to set aside the decision of the Treasury. If the court sets aside that decision, it then quashes the resulting order, but it does not review anything done by Parliament.

55. Where I part company with Lord Sumption and the majority of the court is in relation to the application of the common law principles of procedural fairness in the context of Schedule 7 to the 2008 Act. In relation to that matter, I agree with the judgment of Lord Hope, and wish to make only a few additional observations in view of the implications of the contrary approach. I also agree with Lord Hope's judgment in relation to the issues of procedural fairness arising under the Human Rights Act.

56. Lord Hope has described the provisions of Part 4 of Schedule 7 to the 2008 Act. Parliament has laid down in those provisions a detailed scheme for the making of orders such as the order with which this appeal is concerned. That scheme contains no provision entitling the person designated in the order to be given a hearing before the order is made by the Treasury or approved by Parliament. The absence of such provision does not in itself automatically entail that Parliament intended that there should be no such entitlement, but in the context of such detailed procedural provisions it is a pointer towards such an intention: if Parliament had intended that there should be consultation prior to the making of an order, one would expect that also to have been specified in the provisions. The inference that Parliament did not intend that there should be such an entitlement derives support from a number of other considerations.

57. First, it is readily understandable that no such entitlement should be provided, given the subject-matter and the context in which the decision-making function is exercised. Part 1 of Schedule 7 lays down in paragraph 1 the conditions which must be met in relation to a country before the Treasury may give a

direction under that schedule. Put shortly, they are that the Financial Action Task Force ("FATF": an inter-governmental body founded by the G7 countries which sets standards for controls to prevent money-laundering and the financing of terrorism) has advised that measures should be taken in relation to the country because of the risk of terrorist financing or money laundering activities being carried on there or by its government or persons resident or incorporated there (paragraph 1(2)), or the Treasury reasonably believe that there is such a risk (paragraph 1(3)), or the Treasury reasonably believe that the development or production of nuclear, radiological, biological or chemical weapons in the country poses a significant risk to the national interests of the United Kingdom (paragraph 1(4)). In the present case, it is paragraph 1(4) which is relevant. Given the nature of those conditions, prior consultation with the persons who may be affected by a direction, including for example the persons believed to be involved in terrorism, is liable to be inappropriate or impossible: it may, for example, be excluded by a need for action to be taken urgently in the national interest. That factor is reflected in the provision for the order to have effect in advance of Parliamentary approval: paragraph 14(2)(b).

58. The scope for meaningful representations by the designated person is also liable to be limited by the impossibility of disclosing, other than in broad outline, the basis upon which the conditions laid down in paragraphs 1(3) or (4) are considered to be satisfied. That factor is reflected in the provisions of sections 66 to 68 in respect of proceedings under section 63, which allow for closed material procedure. Parliament has made no provision for any analogous procedure before the order has been made or approved.

59. In some circumstances, prior consultation could in addition reduce the practical effectiveness of the requirements imposed under paragraph 13 of Schedule 7, by affording the designated person an opportunity to take avoidance action. This risk is discounted by Lord Sumption, as it was by Mitting J, but I am less confident that it can be entirely disregarded. Part of Bank Mellat's complaint in the present case, for example, is that the effect of the order was to freeze accounts held by it with its UK subsidiary, in which assets of €183m were deposited. Court orders which have the effect of freezing assets are generally granted on an ex parte basis, precisely because they are liable to be ineffective if prior notice is given.

60. Lord Sumption's response to these points is that whether there is a duty of consultation depends on the particular circumstances in which a direction is made. I can see, in principle, that since the requirements of fairness vary from case to case, the need for a particular procedural step can in principle be assessed on a case by case basis. The problem with applying that approach to a statutory scheme however is that it can make it difficult in practice for decision-makers (and individuals affected by decisions) to predict what is required by way of procedure

in particular cases. In a context in which vital national interests are engaged, such as that in which the powers under Schedule 7 have to be exercised, it is of great importance that the Treasury should be in no doubt as to what is required. Lord Sumption addresses that point by distinguishing between targeted and other measures. That distinction draws attention to a factor of undoubted importance, but it is not the only factor relevant to an assessment of what fairness requires: as Lord Sumption acknowledges, other matters, such as the risk of disclosing intelligence material or jeopardising the effectiveness of the measure, are also relevant. I do not consider that Parliament is likely to have intended that the Treasury should have to undertake such an uncertain assessment of what fairness might require in each individual case before they could act, particularly when it would do so at the risk of judicial review (prior to the making of the order) if their conclusion, for example as to the extent of necessary disclosure, were to be challenged. In practice, that approach would leave the Treasury in an impossible position. As Taylor LJ observed in *R v Birmingham City Council, Ex p Ferrero Ltd* [1993] 1 All ER 530, 542, when rejecting a similar argument in relation to consumer protection legislation, if the supposed duty to consult were to depend upon the facts and urgency of each case, enforcement authorities would be faced with a serious dilemma.

61. The direction in paragraph 14(5) that the order is not to proceed in Parliament as a hybrid instrument seems to me, in agreement with Lord Hope, to be a further indication of Parliament's intention, since, as Lord Hope has explained, the practical effect of that direction is to exclude the potential application of procedures under which the designated person can participate in the Parliamentary proceedings. I appreciate that the Parliamentary procedure is distinct from the antecedent procedure under which the order is made. It nevertheless appears to me to have some bearing on the point in issue, in that, if it was intended that the designated person should be entitled to participate in the procedure leading to the making of the order, it would make little sense to enact a provision specifically preventing him from participating in the procedure leading to its approval by Parliament.

62. Finally, the provisions of sections 63 and 65 to 68 create a statutory procedure under which any person affected by a decision taken by the Treasury under Schedule 7 is entitled as of right to apply to the courts to have that decision set aside. Those provisions give such persons greater rights than those enjoyed by the ordinary applicant for judicial review (except in Scotland), insofar as the ordinary applicant has to apply for permission to make such an application. The provisions indicate that Parliament intended to ensure judicial protection of the interests of such persons after the decision had been made.

63. In these circumstances, it appears to me that Parliament has by implication excluded any duty to consult the designated person or to allow an opportunity for

representations to be submitted before the order is made. There is therefore no room for the application of common law requirements of procedural fairness. No doubt, as Lord Sumption points out, a procedure involving consultation could contribute to good administration by making additional information available to the Treasury. It is however apparent that Parliament has given priority to other competing considerations. It is not the function of the courts to re-write the scheme intended by Parliament.

The substantive grounds of challenge

64. I also have the misfortune to differ from the majority of the court in relation to the substantive grounds on which the decision is challenged. I set out the reasons for my dissent more fully than I might otherwise have done in view of the importance of the issues, and the fact that my conclusion on this aspect of the case was also reached by all the judges of the lower courts.

The relevant legal principles

65. I am largely in agreement with Lord Sumption as to the relevant legal principles: other than in relation to the ratio of *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, and the issue discussed in paras 123-124, we differ only in relation to the application of the law to the facts. I wish first however to consider two issues which appear to me to be important and which affect the structure of the analysis to be carried out.

66. The first issue, which caused difficulty in the courts below and remains in dispute before this court, is what the principle of proportionality involves: in particular, whether it is aptly expressed in the well-known dictum of Lord Clyde in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69, 80. It is evident from the difficulties experienced by the lower courts in the present case, and from the differing approaches which they adopted, that some clarification is desirable.

67. The second issue concerns the meaning of paragraph 9(6) of Schedule 7 to the 2008 Act. This issue also caused difficulty in the courts below and was in dispute before this court. The provision stipulates that the requirements imposed by a direction under Schedule 7 must be proportionate having regard to the advice received from the FATF under paragraph 1(2) of Schedule 7 or, as the case may be, the risk mentioned in paragraph 1(3) or (4) to the national interests of the United Kingdom. The question is whether the requirement imposed by paragraph 9(6) is the same as the principle of proportionality as understood in the context of

Convention rights. The latter principle is of course relevant to the question whether the decision of the Treasury was incompatible with A1P1 and therefore unlawful by virtue of section 6(1) of the Human Rights Act.

The concept of proportionality

68. The idea that proportionality is an aspect of justice can be traced back via Aquinas to the *Nicomachean Ethics* and beyond. The development of the concept in modern times as a standard in public law derives from the Enlightenment, when the relationship between citizens and their rulers came to be considered in a new way, reflected in the concepts of the social contract and of natural rights. As Blackstone wrote in his *Commentaries on the Laws of England*, 9th ed (1783), Vol 1, p 125, the concept of civil liberty comprises "natural liberty so far restrained by human laws (and not farther) as is necessary and expedient for the general advantage of the public". The idea that the state should limit natural rights only to the minimum extent necessary developed in Germany into a public law standard known as *Verhältnismäßigkeit*, or proportionality. From its origins in German administrative law, where it forms the basis of a rigorously structured analysis of the validity of legislative and administrative acts, the concept of proportionality came to be adopted in the case law of the European Court of Justice and the European Court of Human Rights. From the latter, it migrated to Canada, where it has received a particularly careful and influential analysis, and from Canada it spread to a number of other common law jurisdictions.

69. Proportionality has become one of the general principles of EU law, and appears in article 5(4) of the Treaty on European Union ("TEU"). The test is expressed in more compressed and general terms than in German or Canadian law, and the relevant jurisprudence is not always clear, at least to a reader from a common law tradition. In *R v Ministry of Agriculture, Fisheries and Food, ex p Fedesa and others* (Case C-331/88) [1990] ECR I-4023, the European Court of Justice stated (para 13):

> "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

The intensity with which the test is applied – that is to say, the degree of weight or respect given to the assessment of the primary decision-maker - depends upon the context.

70. As I have mentioned, proportionality is also a concept applied by the European Court of Human Rights. As the court has often stated, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see eg *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69). The court has described its approach to striking such a balance in different ways in different contexts, and in practice often approaches the matter in a relatively broad-brush way. In cases concerned with A1P1, for example, the court has often asked whether the person concerned had to bear an individual and excessive burden (see eg *James v United Kingdom* (1986) 8 EHRR 123, para 50). The intensity of review varies considerably according to the right in issue and the context in which the question arises. Unsurprisingly, given that it is an international court, its approach to proportionality does not correspond precisely to the various approaches adopted in contracting states.

71. An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle does not however entitle the courts simply to substitute their own assessment for that of the decision-maker. As I have noted, the intensity of review under EU law and the Convention varies according to the nature of the right at stake and the context in which the interference occurs. Those are not however the only relevant factors. One important factor in relation to the Convention is that the Strasbourg court recognises that it may be less well placed than a national court to decide whether an appropriate balance has been struck in the particular national context. For that reason, in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation. That concept does not apply in the same way at the national level, where the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend upon the context, and will in part reflect national traditions and institutional culture. For these reasons, the approach adopted to proportionality at the national level cannot simply mirror that of the Strasbourg court.

72. The approach to proportionality adopted in our domestic case law under the Human Rights Act has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights,

including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982. The three-limb test set out by Lord Clyde in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 has been influential:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

De Freitas was a Privy Council case concerned with fundamental rights under the constitution of Antigua and Barbuda, and the dictum drew on South African, Canadian and Zimbabwean authority. The three criteria have however an affinity to those formulated by the Strasbourg court in cases concerned with the requirement under articles 8 to 11 that an interference with the protected right should be necessary in a democratic society (eg *Jersild v Denmark* (1994) Publications of the ECtHR Series A No 298, para 31), provided the third limb of the test is understood as permitting the primary decision-maker an area within which its judgment will be respected.

73. The *De Freitas* formulation has been applied by the House of Lords and the Supreme Court as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 19 that the formulation was derived from the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, and that a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups. That, it was said, was an aspect which should never be overlooked or discounted. That this aspect constituted a fourth criterion was noted by Lord Wilson, with whom Lord Phillips and Lord Clarke agreed, in *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 45.

74. The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether,

balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in *De Freitas*, and the fourth reflects the additional observation made in *Huang*. I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

75. In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781-782 that the limitation of the protected right must be "one that it was reasonable for the legislature to impose", and that the courts were "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (*Illinois Elections Bd v Socialist Workers Party* (1979) 440 US 173, 188-189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right.

76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four).

Paragraph 9(6) of Schedule 7

77. A direction under Schedule 7 may only be given to a credit or financial institution that is a United Kingdom person or is acting in the course of a business carried on by it in the United Kingdom: paragraphs 3 and 4. The effect of the direction is to impose requirements upon such an institution or institutions. Under paragraph 9(1), the requirements may apply in relation to transactions or business relationships with

> "(a) a person carrying on business in the country [in respect of which the conditions mentioned in paragraph 1 are satisfied];
>
> (b) the government of the country;
>
> (c) a person resident or incorporated in the country."

Under paragraph 9(2), the requirements may be imposed in relation to

> "(a) a particular person within sub-paragraph (1) [known as a "designated person": paragraph 9(3)],
>
> (b) any description of persons within that sub-paragraph, or
>
> (c) all persons within that sub-paragraph."

Under paragraph 9(4), different types of requirement may be imposed upon the institution or institutions: enhanced customer due diligence in relation to transactions or business relationships with a designated person, ongoing monitoring of such relationships, systematic reporting in respect of such transactions or relationships, or limiting or ceasing such transactions or relationships. Under paragraph 9(5), a direction may make different provision in relation to different descriptions of designated person and in relation to different descriptions of transaction or relationship. It is in that context that paragraph 9(6) provides:

> "The requirements imposed by a direction must be proportionate having regard to the advice mentioned in paragraph 1(2) or, as the case may be, the risk mentioned in paragraph 1(3) or (4) to the national interests of the United Kingdom."

78. In the present case, Mitting J proceeded on the basis that the word "proportionate" was used in paragraph 9(6) "in the sense in which it is used in Strasbourg and Luxembourg". He formed that view on the basis that proportionality had been introduced into English law mainly via Luxembourg and Strasbourg, and the 2008 Act would have been intended to be compliant with Convention rights. The Court of Appeal proceeded on the same basis. Lord Sumption proceeds, as I understand his judgment, on the basis that paragraph 9(6) requires there to be a relationship between the requirements imposed by the

direction and the risk which justifies the making of the direction which is "rational and proportionate", the latter term importing the test of proportionality set out in *De Freitas*, as subsequently developed in *Huang*. I agree with that interpretation, but think it worth spending a moment to explain why.

79. Paragraph 9(6) does not appear to me to be concerned with either EU law or the Convention. There is no necessity for Parliament to have replicated the requirements of EU law in so far as they might be relevant, bearing in mind that the power to give a direction is not exercisable in relation to an EEA state: paragraph 1(5). To the extent that the requirements of a direction might interfere with the exercise of a freedom protected by EU law, the EU rights of the person affected would in any event be directly effective. Nor is there any reason for Parliament to have singled out and replicated the proportionality element of the test of compatibility with Convention rights. That element would in any event apply along with the other elements of the test, in the event that a direction interfered with Convention rights, by virtue of the Human Rights Act.

80. As Lord Sumption has explained, paragraph 9(6) appears from its terms to be concerned with the relationship between the requirements imposed by a direction, on the one hand, and the risk to the national interests of the United Kingdom, on the other hand. The issue is whether the requirements are proportionate to the risk. That is consistent with the context in which the provision appears: the remainder of paragraph 9 sets out the various types of requirement which can be imposed upon the person to whom a direction is given, some more onerous than others. The focus of paragraph 9(6) is therefore not upon the relationship between the requirements and their effect upon the designated person's Convention rights. So, in the present case, the central question arising under paragraph 9(6) is whether the requirements imposed on the United Kingdom financial sector are proportionate having regard to the risk posed to the United Kingdom's national interests by nuclear proliferation in Iran.

81. If there were otherwise any doubt about the problem which paragraph 9(6) was intended to address, the Parliamentary history appears to me to resolve it. When the provisions in Schedule 7 were introduced, at Report Stage in the House of Lords, there was no provision in the form of paragraph 9(6). Concern was expressed about the financial cost of compliance with requirements which would be incurred by United Kingdom businesses to which directions were given (Hansard (HL Debates), 11 November 2008, col 585). The Financial Secretary to the Treasury responded to that concern at the end of the debate by stating that Ministers would seek to balance the need to take effective action against the potential impact on United Kingdom business, and gave an undertaking that the Government would table an amendment at Third Reading to include a provision giving effect to that approach (col 593). Paragraph 9(6) was subsequently tabled in accordance with that undertaking (Hansard (HL Debates), 17 November 2008,

col 933). The potential problem that paragraph 9(6) was intended to guard against therefore had nothing to do with European law.

82. In stipulating that the requirements must be proportionate having regard to the risk, paragraph 9(6) reflects a principle which has roots in the common law: there are a number of cases where administrative acts of an oppressive or penal character have been quashed as being disproportionate, a well-known example being *R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052. In the context of legislation enacted in 2008, however, it seems to me that Parliament can be taken to have been aware of the development of a more structured approach to proportionality by United Kingdom courts, in particular following *De Freitas*, and to have intended that that approach should be applied. I would therefore interpret paragraph 9(6) as stipulating that the requirements must be proportionate to the risk in the sense that they meet the second, third and fourth criteria listed in para 74 (it being implicit in the legislation itself that the first criterion is met).

Applying the proportionality test

83. There is no doubt that the objective of the order – to reduce access by entities involved in Iran's nuclear weapons programme to the UK financial sector, and thereby inhibit the development of nuclear weapons by Iran and the consequent risk to the national interests of this country – is sufficiently important to justify an interference with Bank Mellat's enjoyment of its possessions. The question under paragraph 9(6) of Schedule 7, and under the Human Rights Act, is whether the remaining three criteria of proportionality are satisfied. Lord Sumption identifies the central issue as being whether the singling out of Bank Mellat has been justified, and considers that issue in the context of the second and, more briefly, the third and fourth criteria: whether the measure is rationally connected to its objective, whether a less intrusive measure would have been equally effective, and whether the measure is proportionate having regard to its effects upon Bank Mellat's rights. I shall proceed on the same basis. Before considering these issues, it may however be helpful to recall some aspects of the relevant background.

The background

84. On 23 December 2006 the UN Security Council adopted Resolution 1737, which imposed a range of sanctions targeted at Iran's nuclear and ballistic missile programmes. These included, in paragraph 12, a requirement that all States should freeze the funds owned or controlled by designated persons and entities and of other persons and entities subsequently designated as being involved in Iran's nuclear or ballistic missile activities, and ensure that funds and financial assets

were prevented from being made available by persons or entities within their territories to or for the benefit of those persons or entities. The UK gave effect to the resolution by the Iran (Financial Sanctions) Order 2007 (SI 2007/281) and directions made under that order.

85. On 24 March 2007 the Security Council adopted Resolution 1747, which designated Novin Energy Company ("Novin"), Bank Sepah and its subsidiary Bank Sepah International plc as such entities. The resolution stated in particular that Novin operated within the Atomic Energy Organisation of Iran ("AEOI") and had transferred funds on its behalf to entities associated with Iran's nuclear programme. Bank Sepah and Bank Sepah International were said to provide support for Iran's Aerospace Industries Organisation ("AIO") and its subordinates, two of which had been designated under Resolution 1737.

86. On 19 April 2007 the EC Council adopted Regulation 423/2007/EC (OJ L 103/1) concerning restrictive measures against Iran. Article 7(1) required all funds and economic resources held or controlled by persons designated under Resolution 1737 to be frozen. Those persons were listed in Annex IV. Article 7(2) imposed a similar requirement in respect of persons listed in Annex V to the regulation. The regulation was amended the following day, by Regulation 441/2007/EC (OJ L 104/28) to add a number of entities, including Novin, Bank Sepah and Bank Sepah International, to those listed in Annex IV.

87. On 25 October 2007 the assets of Bank Mellat and its subsidiaries in the United States were frozen, and US persons were prohibited from engaging in transactions with them, as the result of a designation by the US Treasury Department's Office of Foreign Assets Control. The designation was made on the basis that Bank Mellat provided banking services in support of Iran's nuclear programme.

88. On 3 March 2008 the Security Council adopted Resolution 1803, paragraph 10 of which called upon all states to exercise vigilance over the activities of financial institutions in their territories with banks domiciled in Iran, and in particular with Bank Melli and Bank Saderat and their subsidiaries.

89. On 23 June 2008 the EC Council adopted Decision 2008/475/EC (OJ L 163/29), which added a number of persons to those listed in Annex V of Regulation 423/2007. They included Bank Melli and its subsidiaries, including Melli Bank plc. The reason given was that these entities had been providing or attempting to provide financial support for companies which were involved in, or procured goods for, Iran's nuclear and missile programmes, including Novin. In

particular, Bank Melli was said to have provided a range of financial services to such companies, including opening letters of credit and maintaining accounts.

90. On 10 November 2008 the EC Council adopted Regulation 1110/2008/EC (OJ L 300/1), which imposed obligations, including requirements of vigilance and reporting requirements, upon financial institutions in the EC in relation to their activities with financial institutions domiciled in Iran, and in particular with Bank Saderat. Similar obligations, backed by criminal penalties, were also imposed upon Bank Saderat branches and subsidiaries in the EC.

91. The provisions of the 2008 Act concerned with financial restrictions, including Schedule 7, were introduced during the passage of the Bill following a statement issued by the FATF on 16 October 2008, which called on its members, and urged all jurisdictions, to strengthen preventive measures to protect their financial sectors from risks posed by Iran, as a result of its failure to introduce measures to address the risk of terrorist financing. As I have explained, Regulation 1110/2008/EC was adopted at about the same time.

Rational connection

92. In *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211, 291 Wilson J observed:

> "The *Oakes* inquiry into 'rational connection' between objectives and means to attain them requires nothing more than showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt."

The words "furthered by" point towards a causal test: a measure is rationally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective. The manner in which the courts should determine whether that test is satisfied requires careful consideration.

93. Legislation may be based on an evaluation of complex facts, or considerations (for example, of economic or social policy, or national security) which are contestable and may be controversial. In such situations, the court has to allow room for the exercise of judgment by the executive and legislative branches of government, which bear democratic responsibility for these decisions. The making of government and legislative policy cannot be turned into a judicial process. In the Canadian case of *RJR-MacDonald Inc v Canada* [1995] 3 SCR

199, for example, concerned with a legislative ban on tobacco advertising, expert evidence was led at a lengthy trial, following which the trial judge concluded that there was no reliable evidence to support the policy of banning advertising, and that there was therefore no rational connection between the ban and its objective. That conclusion was however overturned by the Supreme Court. McLachlin J, giving the judgment of the majority, stated (at para 153) that in order to establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic." She added (at para 154) that, where legislation was directed at changing human behaviour, the court had been prepared to find a causal connection on the basis of reason or logic, without insisting on proof of a relationship between the infringing measure and the legislative objective. La Forest J, giving the other principal judgment, considered that a common sense connection was sufficient to satisfy the requirement that there be a rational connection (para 86).

94. These observations found an echo, in a not dissimilar context, in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437; [2012] QB 394, concerned with a ban on the sale of tobacco from vending machines. It was argued, in the context of the proportionality of the restriction on the free movement of goods under EU law, that the ban was not suitable to achieve the objective of reducing tobacco consumption, since tobacco products could still be bought over the counter. All the members of the Court of Appeal emphasised the responsibility of elected government for the protection of public health, and the consequent need to allow a broad margin of appreciation to the decision-maker. Lord Neuberger of Abbotsbury MR observed that, in considering whether the aim of the ban was achieved, "at least arguably and to some extent", the court should be careful to avoid substituting itself for the decision-maker or being over-particular about the reasoning or evidence relied on by the decision-maker (paras 232-233). He commented that the evidence and analysis in the explanatory memorandum and impact assessment which had been laid before Parliament with the draft regulations were neither very convincing nor very telling, not least because of the absence of any evidence to suggest that the ban would have any effect (para 236). Nevertheless, the Secretary of State's assessment or belief that the ban would lead to some reduction in smoking did not seem unreasonable:

> "The unsatisfactory basis for the figures and analysis in the [impact assessment] does not, in the absence of any other factor, justify concluding that the ban is disproportionate, given the wide margin of appreciation to be accorded. If one takes away one source of cigarettes, particularly one that involves no control over the identity of the purchaser, it is scarcely unreasonable to conclude that it will reduce consumption of cigarettes to some extent, although … that conclusion is not one which necessarily follows ineluctably."

Like La Forest and McLachlin JJ in the *RJR-MacDonald* case, Lord Neuberger MR treated "common sense" and "logic" (paras 238, 242 and 244) as a sufficient basis for finding that the ban was rational. In the parallel litigation in the Court of Session, the court also referred to common sense as a basis for concluding that the legislation was apt to achieve its objective (*Sinclair Collis Ltd v Lord Advocate* 2013 SLT 100, para 62).

95. A more problematical case is that of *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68: a case which is particularly relevant to the decision of the majority in the present case, as appears from Lord Sumption's judgment. The issue was whether a derogation from article 5(1) of the Convention, so as to permit legislation providing for the indefinite detention without trial of foreign terrorist suspects, was "strictly required" by the public emergency represented by the threat of terrorist attacks in the United Kingdom. A majority of the House of Lords found that the derogation was not strictly required, since the legislation was disproportionate and was in addition discriminatory, contrary to article 14 of the Convention. The latter finding need not be considered in the present context, but the finding in relation to proportionality is of importance.

96. Lord Bingham of Cornhill identified the central problem (at para 43) as being:

> "that the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom."

Lord Bingham did not explicitly apply the three *De Freitas* criteria or the fuller *Oakes* analysis (to which he referred at para 30), but in the passage cited appears to balance the severity of the effects on the rights of the persons detained against the importance of the objective: that is to say, step four in the analysis. Lord Hope of Craighead focused on the question whether there was some other way of dealing with the emergency which would not be incompatible with the Convention rights (para 124): in other words, a test of necessity. Lord Scott of Foscote also considered that the legislation failed to meet the necessity test, since it had not been shown that monitoring arrangements or movement restrictions would not suffice (para 155). That was also the approach adopted by Lord Rodger of Earlsferry, who stated that, proceeding on the same basis as the Government and

Parliament, that detention of the British suspects was not strictly required to meet the threat that they posed to the life of the nation, the detention of the foreign suspects could not be strictly required either to meet the comparable threat that they posed (para 189). Baroness Hale of Richmond also focused on the question of necessity, observing that if it was not necessary to lock up the nationals it could not be necessary to lock up the foreigners (para 231). Lord Carswell agreed with Lord Bingham.

97. I have spent some time considering the basis of the decision in *A v Secretary of State for the Home Department* in order to clarify what the case did not decide. First, it did not decide that the legislation lacked a rational connection to its objective because it would be only partially effective. As in *Sinclair Collis,* the legislation would have made a contribution to the achievement of its objective. Secondly, the case did not decide that the legislation lacked a rational connection to its objective because it was discriminatory. The difference in treatment of British and foreign suspects was relevant to proportionality because it bore on the question whether the interference with the rights of the foreign suspects had been shown to be necessary.

98. In the present case, it is apparent that any judicial assessment of the rationality of a direction under Schedule 7 must recognise the need to allow the Treasury a wide margin of appreciation, for the reasons explained by Lord Sumption at para 21.

99. Lord Sumption identifies two flaws in the reasoning which led the courts below to conclude that the requirements imposed by the direction were rational and proportionate: first, their conclusion did not explain, let alone justify, the singling out of Bank Mellat; and secondly, the justification which they found was not the one which Ministers advanced before Parliament, and was in some respects inconsistent with it.

The justification for making the order

100. Subject to one qualification, Mitting J accepted the Treasury's explanation of why the order had been made, as set out in paras 73 to 75 of a witness statement made by Mr James Robertson, who had been since December 2008 the head of the Financial Crime Team in the International Finance Directorate of the Treasury.

101. In his statement, Mr Robertson explained that, in exercising their functions under Schedule 7 of the 2008 Act, the Treasury worked in close collaboration with a number of government departments and agencies, including in particular those

concerned with intelligence. He explained the serious risk to UK national interests which would result from Iran's development of nuclear weapons: the consequent destabilising effect upon a region where the UK has personnel and installations, the potential disruption of global oil and gas supplies, the economic consequences of such disruption, the possibility of an attack on Iran, and the potential implications of such an attack.

102. Mr Robertson also explained that it was considered that Iran's banking system provided many of the financial services which underpinned its nuclear and ballistic missile programmes. Iran's banking system lacked the controls which existed in most other countries to prevent money-laundering and the financing of terrorism, and which would also serve to identify transactions related to Iran's nuclear and ballistic missile programmes. As a consequence, Iranian financial institutions were vulnerable to being used to channel illicit finance. This had been highlighted in several reports by the FATF. As a result, UK financial institutions dealing with Iranian entities could not rely on such checks having taken place in Iran. This problem was reflected in the targeting of Iranian banks in the Security Council resolutions and in the EU legislation.

103. In relation to the decision to make the order in question, Mr Robertson explained that, following the coming into force of the 2008 Act, the Treasury commissioned work on the role of Iranian banks in financing Iran's nuclear and ballistic missile programmes. That work highlighted concerns about the role of Bank Mellat, and identified three particular areas of concern. First, it had provided banking services to Novin, and had maintained accounts for the AEOI, mainly through Novin, since 2003. It had managed accounts and facilitated money transfers for Novin after Novin had been designated under Resolution 1747. Secondly, senior officials of the AIO, the parent of entities which were involved in Iran's ballistic missile sector and designated under Security Council Resolution 1737, had used Bank Mellat's services during 2007 and 2008 to conduct business connected with Iran's ballistic missile programme. Thirdly, between 2007 and 2009 Bank Mellat had provided banking services for Doostan International ("Doostan"), a company linked to the ballistic missile programme.

104. Mr Robertson summarised the case for making the order as follows (para 73):

> "The Treasury was satisfied that Bank Mellat has provided financial services to companies engaged in Iran's nuclear and ballistic missile programmes. A direction to cease business with Bank Mellat would restrict the financial services available to entities involved in Iran's nuclear and ballistic missile programmes by denying them access to the UK financial sector through Bank Mellat. This would have the

> maximum possible adverse impact on the nuclear and ballistic missile programmes of the measures available under Schedule 7 in relation to Bank Mellat. If Bank Mellat wished to continue its activities in support of those programmes it would need to seek other sources of financial services, assuming such alternatives were actually available to it. There was also the possibility that as a bank subject to restrictions in the United Kingdom, Bank Mellat would not be in a position to access the global financial system as effectively in order to seek substitute arrangements for those no longer available to it in the UK. At the very least, this would impede the Iranian nuclear and ballistic missile programmes by imposing additional costs and delays on the programmes."

105. Mr Robertson explained at para 74 that it had been recognised that entities connected with the nuclear and missile programmes which wished to route transactions through the UK could do so by using another Iranian bank. A potential effect of the order was however that the UK financial sector would decide to wind down business with Iran more generally, which would reduce the risk of business being routed through another Iranian bank. Even if that did not occur, the order would make transactions involving the UK more difficult. Iranian banks generally experienced difficulties in dealing with UK banks as a result of the international sanctions. A small number of Iranian banks had access to the UK via their British subsidiaries. The action taken against Bank Mellat, which had a British subsidiary, narrowed access to the UK financial sector and further restricted the options available to Iranian banks.

106. Finally, Mr Robertson said at para 75 that the order would also increase pressure on the Iranian Government to comply with its international obligations. Applying such a restriction to one of Iran's largest banks would reduce the financial services available to the Iranian Government. In relation to that aspect, Mr Robertson stated that the Iranian Government still controlled a significant amount of the shares in Bank Mellat, following its privatisation in February 2009: 20% of the shares were officially owned by the Government, another 20% were held by Government social security organisations for the benefit of their employees, and a further 40% were allocated to low-income shareholders whose voting rights were exercised by the Government.

107. Mitting J accepted the Treasury's reasons for making the order as stated at paras 73-75 of Mr Robertson's statement. The only qualification was that, in relation to para 75, Mitting J accepted evidence that the Iranian Government only exercised voting rights over its 20% shareholding in Bank Mellat. That qualification was not considered to be of any materiality.

108. Lord Sumption states that Mitting J did not accept the part of Mr Robertson's statement which described the problems relating to Bank Mellat, which I have summarised at para 103. It appears to me however that what was said in that connection by Mr Robertson was substantially accepted, other than the allegation relating to senior officials of AIO, which Bank Mellat said it was unable to investigate without additional information. Mitting J stated that it was common ground that Bank Mellat had provided trade finance or banking facilities for an importer of materials used in the production of nuclear weapons, namely Novin. He accepted that Novin was an AEOI financial conduit and had facilitated Iran's nuclear programme. He also accepted that Bank Mellat had provided banking facilities to Doostan and its managing director, Mr Shabani, who had each played a part in Iran's nuclear weapons programme.

109. It is true that Mitting J accepted that, once Novin had been designated by the Security Council under Resolution 1747, Bank Mellat ran down and "eventually" ceased its relationship with Novin, and that it had in place a mechanism, which it operated conscientiously, to ensure that it did not provide banking facilities to entities or persons designated by the Security Council. Mitting J also accepted that Bank Mellat had investigated the accounts held by Doostan and Mr Shabani, in response to the Treasury's allegations in these proceedings, and had found nothing unusual or suspicious. Mitting J nevertheless found that Doostan and Mr Shabani had played a part in Iran's nuclear programme, and rejected Mr Shabani's evidence to the contrary.

110. Lord Sumption's statement that Mitting J found that Bank Mellat's provision of banking services to entities involved in the Iranian nuclear weapons and ballistic missile programmes, namely Novin and Doostan, had happened "in spite of their conscientiously operated procedures to avoid doing so", appears to me, with respect, to convey a different impression from Mitting J's judgment. It was no answer to the Treasury's concerns in relation to Novin that procedures were initiated after it had been designated by the Security Council: procedures triggered by a Security Council Resolution did not sufficiently address the risk, since they operated long after objectionable banking activities had already taken place. In relation to Doostan, it was only in the course of the proceedings that Bank Mellat carried out the investigations referred to. The value of those investigations can be judged from the fact that on 9 June 2010, after the hearing before Mitting J, Doostan was designated by Security Council Resolution 1929 as an entity involved in Iranian ballistic missile activities, and was subjected to the asset freezing regime established by Resolution 1737. It was only following that designation that Bank Mellat's procedures would have been applicable. In the circumstances, I am unable to agree with Lord Sumption's statement that Mitting J's finding about Bank Mellat's procedures "suggests that they were satisfactory, at any rate in relation to the weapons programmes".

111. Far from regarding the foregoing matters as undermining the Treasury's case, Mitting J treated them as being essentially beside the point:

> "The Treasury's case is not that the bank has knowingly assisted Security Council designated entities after designation, or even that it has knowingly assisted entities liable to be designated, but which have not yet been, by providing banking facilities to them, but that it has the capacity to do so, has in one instance done so and is likely to do so in the future. The fundamental justification for the order is that, even as an unknowing and unwilling actor, the bank is, by reason of its international reach, well placed to assist entities to facilitate the development of nuclear weapons, by providing them with banking facilities, in particular trade finance."

It was on that basis that Mitting J commented that Bank Mellat's dealings with Doostan and Mr Shabani did not greatly matter.

112. Lord Sumption's criticism of the rationality of the connection between the direction and its objective is that "the direction made no attempt to prevent every Iranian bank with an international reach from facilitating Iran's weapons programme, but only one of them". It is said that "the distinction [drawn] between Bank Mellat and other Iranian banks … was an arbitrary and irrational distinction".

113. I am unable to agree with this criticism. It is true that the problems in relation to the lack of adequate controls within Iran's banking system, identified by the FATF and mentioned by Mr Robertson in his statement, were not unique to Bank Mellat. It followed that UK financial institutions were at risk when dealing with Iranian entities in general, as Mr Robertson explained. The response of the UN Security Council and the EC Council had not however been to impose restrictions in respect of all Iranian banks, but in respect of particular banks where there was evidence of their involvement in the financing of Iran's nuclear weapons programme: notably Bank Sepah, Bank Sepah International, Bank Melli, Bank Saderat and their subsidiaries. The Treasury followed the same approach when it obtained evidence of Bank Mellat's involvement.

114. Lord Sumption states that other Iranian banks were as likely as Bank Mellat to number entities involved in Iran's nuclear and ballistic missile programmes amongst their clients. As I have explained, Mr Robertson acknowledged at para 74 of his statement that entities involved in Iran's nuclear weapons programme could in principle use other Iranian banks. He pointed out however that the order might lead the UK banking sector to wind down business with Iran generally, and that

the order would in any event make transactions involving the UK more difficult. That was because it was difficult for Iranian banks to access UK financial markets directly, since UK banks were reluctant to deal with them. The exceptions were the small number of Iranian banks which had UK subsidiaries. Those were Bank Melli, Bank Sepah, Bank Saderat and Bank Mellat. As I have explained, the UK subsidiaries of Bank Melli and Bank Sepah were already subject to asset freezing orders. The order under challenge applied to Persia International Bank plc ("PIB"), which was the UK subsidiary of Bank Mellat. The UK subsidiary of the remaining Iranian bank with such a subsidiary, Bank Saderat, was subject at the time to systematic reporting requirements under Regulation 1110/2008, as I have explained. Subsequent to the making of the order under challenge, it was subjected to an asset freeze.

115. In these circumstances, an order directed specifically against Bank Mellat and its UK subsidiary was far from being pointless or arbitrary. One effect of the order was to prevent the only UK subsidiary of an Iranian bank which was not already subject to controls, namely PIB, from dealing with its parent, Bank Mellat. Lord Sumption notes that PIB was not prevented from dealing with its minority shareholder, Bank Tejarat. There is however nothing to indicate that Bank Tejarat had any involvement with entities involved in the Iranian nuclear weapons programme. If information indicating such involvement were to emerge, no doubt action would be taken. In the event, PIB's assets were subsequently frozen by Council Regulation (EU) 668/2010, made on 26 July 2010. Although Iranian banks, or Iranian entities involved in the nuclear weapons programme, could in principle seek to use non-Iranian international banks, those could be expected to have compliance mechanisms in place: it was only in relation to Iran that the absence of such mechanisms had caused the FATF to call for preventive measures.

116. It is of course true that the direction would not of itself prevent the development of nuclear weapons in Iran. It could however reasonably be expected to realise the objective of hindering their development at least to some extent (to adopt the phrase used by Lord Neuberger MR in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437; [2012] QB 394). That is sufficient to establish a rational connection between the direction and its objective.

117. In the light of the foregoing, Mitting J was entitled to accept that there was a rational connection between the requirements imposed by the order and its objective, on the basis that, as he found, "a direction to cease business with Bank Mellat would restrict the financial services available to entities involved in [Iran's nuclear and ballistic missile] programme by denying them access to the UK financial sector through the bank"; "suspect entities would find it difficult to replace existing arrangements through the bank"; and "some pressure would be brought to bear on the Iranian Government" to comply with its international obligations. Mitting J was therefore entitled to hold that he was "satisfied that the

requirements imposed by the order are rationally connected to the objective of inhibiting the development of nuclear weapons in Iran and, so, the risk to the national interests of the United Kingdom". Those findings were affirmed by the Court of Appeal, which commented that "a contrary conclusion would resonate with naïveté".

A different justification from that given to Parliament

118. A separate point made by Lord Sumption is that the justification for the making of the order which was accepted by Mitting J was not the one which Ministers advanced when laying the order before Parliament, and was in some respects inconsistent with it: indeed, it is said that the Treasury's argument underwent a radical shift.

119. This point does not appear to me to be well-founded in fact. It does not in any event appear to me to affect the question whether the requirements imposed by the order were rationally connected to its objective.

120. Considering first the factual position, a written Ministerial statement was made on 12 October 2009, three days after the order had been made. It stated:

> "Iran continues to pursue its proliferation sensitive nuclear and ballistic missile activities in defiance of five UN Security Council Resolutions. We cannot and will not ignore specific activities undertaken by Iranian companies which we know to be facilitating activity identified by the UN as being of concern, particularly where such activities have the potential to affect the UK's interests.
>
> On the particular entities in question, vessels of the Islamic Republic of Iran Shipping Lines (IRISL) have transported goods for both Iran's ballistic missile and nuclear programmes.
>
> Similarly, Bank Mellat has provided banking services to a UN listed organisation connected to Iran's proliferation sensitive activities, and been involved in transactions related to financing Iran's nuclear and ballistic missile programme.
>
> The direction to cease business will therefore reduce the risk of the UK financial sector being used, knowingly or otherwise, to facilitate Iran's nuclear proliferation sensitive activities."

121. An explanatory memorandum to the order was also laid before Parliament the same day. Under the heading "What is being done and why", the memorandum stated:

> "These restrictions are being imposed in respect of these two entities because of their provision of services for Iran's ballistic missile and nuclear programmes. It is considered that a direction to cease business with these entities will contribute to addressing the risk to the UK national interests posed by Iran's nuclear proliferation sensitive activities."

Similar explanations of the thinking behind the order were also provided by Ministers during the Parliamentary proceedings leading to the approval of the order.

122. The Treasury did not in these documents and statements accuse Bank Mellat of being knowingly involved in Iran's nuclear and ballistic missile programme: what was said was that it had provided banking services to a UN listed organisation, and that it had been involved in transactions related to financing that programme. Those were statements of objective fact. The objective of the order was explained as being to reduce the risk of the UK financial sector being used, unknowingly or otherwise, to facilitate Iran's proliferation sensitive activities. That explanation appears to me to be consistent with the more detailed account of the Treasury's reasoning provided by Mr Robertson. As Mitting J found, the statements made to Parliament gave an adequate summary.

123. Proceeding however on the hypothesis that the reasons given to Parliament were inconsistent with the reasons put forward by Mr Robertson in his statement, that difference has no evident bearing on the answer to the question whether the measure is rationally connected to its objective. As I have explained at paras 92-94, that question poses an objective test concerned with the capacity of the measure to realise its objective, based on common sense or logic. If Parliament approved the measure on the basis of a given justification, that might affect the credibility of evidence subsequently putting forward a different justification; but that is not an issue which arises on this appeal. It could also affect the weight which the court might give to Parliamentary approval of the measure when considering its proportionality; but that is not a factor which has been taken into account in considering the question of rational connection.

124. This objective approach to the criterion of rational connection is consistent with what was said, in relation to proportionality more generally, in *Huang v*

Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167, para 11:

> "The task … on an appeal on a Convention ground against a decision of the primary decision-maker … is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety."

To similar effect, Lord Hoffmann noted in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, para 68:

> "Article 9 of the Convention is concerned with substance, not procedure. It confers no right to have the decision made in any particular way. What matters is the result."

In this respect, there is no difference between article 9 and other Convention rights.

Less intrusive means

125. Lord Sumption concludes that the direction also fails the proportionality test at the third stage of the analysis, on the basis that it cannot be necessary to require UK financial institutions to cease dealing with Bank Mellat if less drastic measures are considered to provide sufficient protection in relation to other Iranian banks. For the reasons I have given, I do not consider that the Iranian banks in question (that is to say, the smaller banks without UK subsidiaries) are truly in a comparable position to Bank Mellat. Like the Court of Appeal, I attach importance to the evidence of Mr Robertson that the Treasury considered but rejected less intrusive measures, for reasons which he explained. In a matter of this kind, great weight must be given to the considered judgment of the Treasury. Against that background, I accept Mitting J's conclusion that there is no other reasonably practicable means of ensuring that the facilities of an Iranian bank with international reach will not be used in the UK for the purpose of facilitating the development of nuclear weapons by Iran.

Proportionate effect

126. If, as I would hold, (1) the Government's objective was sufficiently important to justify limiting the rights of Bank Mellat, (2) the requirements imposed by the direction were rationally connected to that objective and (3) no less intrusive measure would have been equally effective in achieving the objective, the question remains whether (4) having regard to the severity of its effect on Bank Mellat's rights, the direction was justified by the importance of the objective. Lord Sumption concludes that it was not, given that, in his view, the direction would make little if any contribution to the achievement of its objective. For the reasons I have explained, I do not agree with that assessment. On the basis that the direction would make a worthwhile contribution to the achievement of the Government's objective, I agree with Mitting J that its impact upon the rights of Bank Mellat is proportionate.

127. In that connection, I would make three observations. The first is that the effects upon Bank Mellat's business cannot in my opinion be considered disproportionate to a significant reduction in the risk of very great harm to the UK's vital national interests. The Bank claims that it has suffered a revenue loss of US$25m a year, that it was prevented for the duration of the order from drawing on deposits of €183m, and that its reputation and goodwill have been damaged. The severity of those effects has however to be considered in the context of the very substantial scale of the business conducted by the Bank, illustrated by its evidence that it holds some 33 million accounts for over 19 million customers, has almost 2000 branches, and issued letters of credit in 2009 to the value of $11bn. If the contribution made by the direction towards the achievement of the Government's objective was limited, the impact upon the Bank was also limited.

128. The second is that the right in issue, under A1P1, is not of the most sensitive character; the person affected, a major international bank, does not fall into a vulnerable or marginalised category; and the order is temporary in nature.

129. The third is that the court does not possess expertise or experience in international relations, national security or financial regulation. The risks to our national interests, if the wrong judgment is made in relation to nuclear proliferation, could hardly be more serious. Democratic responsibility and accountability for protecting the citizens of this country from those risks rest upon the Government, not upon the courts. In a complex situation of this kind, where the stakes are so high, the court has to attach considerable weight to the Government's assessment that the requirements are necessary and proportionate to the risk.

Conclusion

130. For these reasons, and those given by Lord Hope in relation to procedural fairness, I would dismiss the appeal.

LORD HOPE (DISSENTING)

131. I find myself unable, with respect, to agree with the conclusions that the majority have reached on both the substantive and the procedural issues in this case. I, for my part, would dismiss the appeal.

The substantive issues

132. I agree with Lord Reed and Lord Sumption about the formulation of the test that should be applied to the question raised by Bank Mellat's objections to the direction. The more difficult issue is as to the result when that test is applied to the facts. I was inclined at the end of the argument to think that the making of the Financial Restrictions (Iran) Order 2009 (SI 2009/2725) ("the Order") was disproportionate because the Bank had been singled out for special treatment, and because the distinction that was drawn between it and other Iranian banks in that respect appeared to be arbitrary and irrational. There seemed to me to be force in the arguments that Lord Sumption has given for thinking that the effect of the Order on the commercial dealings of the Bank was out of proportion to any contribution that the directions were likely to make to the statutory purpose that it was designed to serve.

133. I have however been persuaded by Lord Reed's careful analysis of the explanation that was given on the Treasury's behalf by Mr Robertson that the reasons that Mitting J and the Court of Appeal gave for coming to the contrary conclusion were sound. In matters of this kind a wide margin of appreciation must be given to the Treasury, and I am satisfied that sufficient grounds were shown for finding that an order directed only against the Bank and its UK subsidiary was rationally connected to the objective of inhibiting the development of nuclear weapons in Iran and that it was proportionate. There were good reasons for not involving all the other Iranian banks, and the facts as a whole show that the choice that was made was not arbitrary. The problem that the Order was designed to address was restricted to a small number of Iranian banks with UK subsidiaries, and the Bank was not being "singled out" in the pejorative sense that those words convey. I also agree with Lord Reed that the question whether the directions in the Order were rationally connected to its purpose does not depend on whether the justification that the courts below found established was the same as that which

was given in the statement when the Order was laid before Parliament. Like him I would hold that the objective was sufficiently important to justify restricting the Bank's activities, that the requirements imposed by the direction were rationally connected to that objective and that Mitting J was entitled to hold that there were no other reasonably practicable means of achieving it.

The procedural issues

134. The question to which these issues are directed is whether there was a duty to consult the Bank before the Order was made under section 62 of the Counter-Terrorism Act 2008. The powers conferred on the Treasury for the making of such a direction are set out in Schedule 7 to the Act. The procedures that are to be followed are in Part 4 of that Schedule. Paragraphs 14(1) and (2) provide that a direction is to be contained in an order made by the Treasury, that the order must be laid before Parliament after being made and that it ceases to have effect if not approved by a resolution of both Houses of Parliament within 28 days. Paragraph 14(5) states that, if apart from that sub-paragraph an order under paragraph 14 would be treated for the purposes of the standing orders of either House of Parliament as a hybrid instrument, it is to proceed in that House as if it were not such an instrument. Hybrid instruments are subject to a special procedure in the House of Lords which gives those who are specially and directly affected by the instrument to present their arguments to a select committee for consideration on their merits before the instrument can be approved by either House.

135. Paragraph 15 of Schedule 7 provides that, where a direction is given to a particular person, the Treasury must give notice of the direction to that person. The direction in this case was given not to the Bank or to any other particular person, but to a description of persons operating in the financial sector in the United Kingdom: see paragraph 14(1)(a). They were directed by the Order not to enter into, or to continue to participate in, any transaction or business relationship with the Bank. The sequence in which these paragraphs appear in Part 4, as in the case of paragraph 16 which deals with publication, indicates that the direction will have already have been made by the time when notice is given under paragraph 15. Its purpose is to alert the person concerned so that steps can be taken at once to comply with the direction.

136. Here, then, is a provision which excludes the procedure which allows those directly affected to ask for an examination of the direction on its merits before the instrument is approved under paragraph 14(2). And there is another provision which provides for notice to be given, but only to a particular person to whom the direction is given and only after the making of the direction. Is it nevertheless open to the court to require the Treasury to consult with a body which will be affected by a direction which is to be given to others before the order is made, as the Bank

maintains? This is a step which finds no place in the procedure which has been provided for by Parliament. Is a procedure for delegated legislation which has been approved by Parliament open to scrutiny by the courts with a view to the imposition of additional procedural safeguards?

137. The Bank submits that the Treasury were required both by domestic law and by the procedural requirements of article 6(1) of the European Convention on Human Rights and article 1 of the First Protocol to give the Bank an opportunity to make representations before they made the direction. It points to the fact that the direction imposed the most extreme form of sanction that was available to the Treasury in the exercise of these powers. It bound the entirety of the United Kingdom's financial sector and the Bank, and all its branches were designated persons with whom the financial sector was directed to cease doing business. Yet the procedure in the 2008 Act under which the Order which contained the direction was made gave no opportunity for affected persons to make representations before it was made and then laid before Parliament.

138. This challenge was dismissed by Mitting J. He said that it was readily understandable why no provision was made for affected persons to be given such an opportunity: [2010] EWHC 1332 (QB), para 5.

> "Although in this case I am only concerned with a direction made in the circumstances set out in paragraph 1(4) of Schedule 7 in respect of a bank, there are many other circumstances in which directions could be made when Parliament cannot have intended that there should be an opportunity for affected persons to make representations. They include individuals engaged in terrorist financing or money laundering activities (paragraphs 1(3)(c) and 9(1)(c)); and governments reasonably believed to be engaged in the development or production of nuclear etc weapons (paragraphs 1(4)(a) and 9(1)(b); and the manifold persons in the UK financial sector to whom the direction is given (paragraph 3(1))."

He also pointed out that a duty to permit prior representations where there was no reason to believe that avoiding action would be taken by an affected person would be judge-made. Where Parliament had conferred a rule-making power on the executive subject to Parliamentary control, it was not generally for the courts to superimpose additional procedural safeguards: *R (Bapio) v Secretary of State for the Home Department* [2007] EWCA Civ 1139.

139. In paras 6-8 the judge rejected the challenge under A1P1 on the ground that section 63 was the means by which the Bank was afforded a reasonable

opportunity of effectively challenging the measures contained in the Order: *Jokela v Finland* (2002) 37 EHRR 581, para 45. He also rejected the challenge under article 6(1) on the ground that there was no dispute over a civil right at the time when the Order was made: *Micallef v Malta* (2009) 50 EHRR 920, para 74. In any event a hybrid procedure, consisting of an executive decision affirmed by Parliament which was subject to a later challenge before a court, was compatible with the article. He added that there was no claim for a declaration of incompatibility under section 4 of the Human Rights Act 1998.

140. In the Court of Appeal Maurice Kay and Pitchford LJJ rejected the Bank's procedural challenge on similar grounds: [2011] EWCA Civ 1. But Elias LJ held that the Treasury had failed to comply with the common law principles of fairness and that it was also in breach of A1P1 and article 6(1). He said that the Order was of a qualitatively different character to that with which the court was concerned in the *Bapio* case. It was not laying down rules which affected a broad and amorphous class or classes of person. It was specifically directed at the Bank and the Treasury knew that the action of implementing the Order would damage its rights, as was its purpose. He was not persuaded that Parliament in formulating the procedures in Schedule 7 must have intended to exclude any rights to natural justice. The judge's analysis of the challenge under article 6(1) that there was no dispute when the Order was made was inconsistent with the decision in *R (Wright) v Secretary of State for Health* [2009] 1 AC 739. As the Treasury had conceded that there was insufficient urgency to justify a failure to allow the Bank to seek to answer the allegations against it before the Order was made, the only proper conclusion was that the failure to give a hearing infringed article 6(1). It followed that the subsequent procedure was not sufficient to comply with A1P1.

(a) the common law challenge

141. The Order which the Treasury made under Schedule 7 to the 2008 Act was a statutory instrument within the meaning of section 1(1) of the Statutory Instruments Act 1946. It was made in the exercise of a power to make a direction under paragraph 1(1) of the Schedule which was required by paragraph 14(1) to be given by means of an order that was to be laid before Parliament. Section 96(1) of the 2008 Act provides that orders under the Act must be made by statutory instrument. For the purposes of the definition in section 1 of the 1946 Act, a power to make, confirm or approve orders that is conferred on the Treasury is deemed to be conferred on the Minister of the Crown in charge of that department: 1946 Act, section 11(1).

142. The procedure that is laid down for Parliamentary approval of an order under Part 4 of Schedule 7 which contains a direction of the kind that was given in this case provides that the order is to be laid before Parliament before it is made,

and that it ceases to have effect if not approved by a resolution of each House within 28 days: paragraph 14(2). Erskine May, *Treatise on the Law, Privileges, Proceedings and Usages of Parliament* (24th ed, 2011) states at p 676 that this type of affirmative procedure is frequently resorted to when delegated legislation must come into force immediately on being made without any prior consultation. It appears from that comment that it is standard practice for orders to be made under this procedure without prior consultation with those who are likely to be affected by them. Paragraph 14(5) states that, if apart from that sub-paragraph it would be treated for the purposes of the standing orders of either House as a hybrid instrument, it is to proceed in that House as if it were not such an instrument.

143. Under the hybrid instrument procedure the instrument is subject to a procedure which enables those who are affected by the instrument to present arguments against it to a select committee which reports on its merits and recommends whether or not it should be approved: Erskine May, p 684. The disapplication of this procedure by an express provision of this kind is said to be relatively common in recent times: Craies *on Legislation* (10th ed, 2012), para 6.2.2.3. Nevertheless it is feature of the procedure under Part 4 of the Schedule that it has expressly excluded the possibility of consultation before the order is made. It excludes the possibility of presenting arguments against the order prior to its receiving approval in either House.

144. Part 4 of Schedule 7 must be read together with sections 63 and 65-68 of the Act. These sections provide for the making of an application to set aside any decision of the Treasury in connection with the exercise of their functions under Schedule 7 to the Act, with the same relief as may be made or given in proceedings for judicial review. Permission is not required for the making of an application under section 63, and there is no time limit. Provisions of the kind that appear in this group of sections are unusual. They must be taken to have been included in the Act as a counterweight to the absence of any procedure for prior consultation with affected persons or the making of representations by them at any earlier stage. The provision for a closed material procedure indicates that Parliament was aware that some at least of the reasoning for the making of a direction would be likely to require to be withheld from affected persons.

145. These provisions reinforce the impression conveyed by the provisions of paragraph 14 of Schedule 7 that Parliament cannot have intended that there should be an opportunity for representations before the decision was made or as part of the Parliamentary process. A ministerial statement was issued on the making of the order on 12 October 2012 in accordance with a prior commitment to do so by the Minister when the Bill was passing through Parliament. By this means the Treasury's reasons for making the Order were placed before each House before it was approved.

146. The question then is whether the Bank had a common law right to be consulted before the making of the decision contained in the Order that was laid before Parliament. I readily acknowledge that the duty to give advance notice before a statutory power that may affect the subject adversely is exercised, whether by statutory instrument or otherwise, is deeply rooted in the common law. But, as Lord Sumption says in para 31 above, whether there is such a duty where the enabling statute does not deal with the point expressly must depend on the circumstances. The Bank accepts there is no authority that is on all fours with this case. Cases such as *R v Secretary of State for Health, Ex p United States Tobacco International Inc* [1992] QB 353, where it was held that the Secretary of State had a duty to give the applicants an opportunity to make representations on the expert advice he had received before making regulations banning oral snuff in view of the history of his dealings with them as well as the effect on their business, are far removed from the facts of this case.

147. The closest analogy is the *Bapio* case, where the provisions in question were alterations by the Home Secretary to the Immigration Rules and advice given to NHS employers by the Department of Health. Elias LJ was right to draw attention to the fact that the Order in this case was of a different character as it was specifically directed at the Bank. But the reasons given by the Court of Appeal for rejecting the proposition that there was duty to consult in that case seems to me to be capable of being applied more widely and to be just as much in point here as in *Bapio*.

148. First, there is the point made by Sedley LJ in para 44 that, if the Bank is right, its argument raises serious and very troublesome questions as to its implications. What limits, if any are to be placed on those to whom the duty is owed? As Mitting J pointed out in para 5 of his judgment, the conditions for the making of a direction in paragraph 1 of Schedule 7 and the requirements that may be imposed under paragraph 9 include various circumstances in which Parliament cannot have intended that there should be an opportunity to make prior representations. They include, for example, cases falling within the second condition described in paragraph 1(3) of Schedule 7, which applies where terrorist financing or money-laundering activities "are being carried on" by persons resident or incorporated in the country which pose a significant risk to the national interests of the United Kingdom. Is the duty to notify the persons affected to apply in those cases too? The urgency that the Treasury saw in the Bank's case was not as extreme as it might be in that situation, but its case must not be considered in isolation. A decision in its favour on this point will have far-reaching consequences for the application of Schedule 7 generally. It will also call into question the practice referred to by Erskine May for the affirmative resolution procedure to be resorted to when delegated legislation must come into force immediately on being made without any prior consultation: see para 140. Are the majority to be understood as saying that this must never happen?

149. If an opportunity to make prior representations is to be given, how is the exercise to be carried out, and under what conditions and subject what safeguards to ensure that any responses are properly taken into account? What information must be given to the affected party to ensure that its representations are effective? How is material that it would not be in the public interest to disclose to the affected party to be dealt with? There is also the possibility that the affected party may seek a judicial review of the way the process is being conducted before the direction is given: see *R v Secretary of State for the Environment, Ex p Brent London Borough Council* [1982] QB 593. This too would raise issues about the disclosure of material that in the public interest ought not to be disclosed. It could also significantly delay the whole process if, as Lord Sumption acknowledges in para 37 above, an application of the kind envisaged by section 63 would be unlikely to be determined within three months. I do not think that these questions can be ignored or left unanswered. Clear and precise guidance is needed if the procedure that the majority say must be implied into Schedule 7 is to be workable. I do not know where that guidance is to be found.

150. Then there are the points made by Maurice Kay LJ in para 58, with whose reasons Pitchford LJ agreed in para 65. He doubted whether, as a matter of principle, a duty to consult can generally be superimposed on a statutory rule-making procedure which required the intended rules to be laid before Parliament and subjected to the negative resolution procedure. And he attached some significance to the fact that the primary legislation had not provided an express duty of prior consultation as it had on many other occasions. Those points have added force in this case in view of the point made by Erskine May at p 676, as the paragraph 14 procedure requires the order to be made before it is laid and that it be approved by an affirmative resolution of each House of Parliament.

151. The disapplication of the hybrid instrument procedure is a further factor, as is the provision in paragraph 15 for the giving of notice of the direction to a particular person after the order has been laid and the opportunity that sections 63 and 65-68 give for an application to be made to set it aside, subject to rules designed to secure that disclosures of information are not made when they would be contrary to the public interest. The structure of the legislation, the scope for its application and the sensitive nature of the information on which decisions in this area of activity are likely to have been based all point in the same direction. They indicate that there was here a deliberate decision by Parliament not to subject the Treasury to a duty to consult before making the direction. This is readily understandable, in view of the nature of the risks to the national interest that the legislation was intended to deal with.

152. I would hold therefore that the Bank did not have a common law right to be consulted before the direction was given. Elias LJ said in para 97 that in his judgment the preconditions for supplementing the procedure to secure a right to

natural justice that were identified by Lord Reid in *Wiseman v Borneman* [1971] AC 297, 308 were met in this case, as the statutory procedure was insufficient to achieve justice and it was not contended that complying with the basic elements of natural justice would frustrate the purpose of the legislation. But Lord Reid did not go so far as to say that the court must always intervene whenever those preconditions were satisfied. Whether it would be right for the court to do this must always depend on the circumstances.

153. I would, for my part, respect the evident intention of Parliament that the Treasury should have power to make orders of the kind contemplated by paragraphs 1 and 9 of Schedule 7 without prior consultation, and that the basic elements of natural justice were to be met in the manner prescribed by sections 63 and 65-68. For the court to insist upon a prior duty to consult at common law would be inconsistent with the purpose of the legislation, which is to protect the national interests of the United Kingdom in circumstances where there is a significant risk to those interests, and it would contradict what I would understand to have been the will of Parliament. I do not think that it is open to this court to take that course. I would reject the challenge that is made at common law.

(b) the Convention rights challenge

154. The gravamen of this challenge is that, as the making of the direction was incompatible with the Convention rights on which the Bank founds, it was unlawful for the Treasury to make the direction: Human Rights Act 1998, section 6(1). Counsel for the Treasury did not seek to argue that this was a case to which section 6(1) did not apply because the primary legislation could not be read or given effect in a way which was compatible with the Convention rights and it was acting so as to give effect to those provisions: section 6(2)(b).

155. It is convenient to examine the argument that was directed to article 6(1) first, as the A1P1 argument too is about the absence of a procedural protection for the Bank's rights. In *Jokela v Finland* (2002) 37 EHRR 581, para 45 the Strasbourg court said that, in considering whether a person was afforded a reasonable opportunity of putting his case to the responsible authorities for the purposes of A1P1, a comprehensive view must be taken of the applicable procedures. The procedural challenge in both cases rests on essentially the same grounds.

156. The Bank submitted that the Treasury's decision to make the Order was a determination of the Bank's civil rights within the meaning of article 6(1), and that their failure to allow the Bank any opportunity to make representations was a plain breach of that article. It was also submitted that its case is indistinguishable from *R*

(Wright) v Secretary of State for Health [2009] UKHL 3, [2009] AC 739, where the provisional listing of persons considered to be unsuitable to work with vulnerable adults was held to be unlawful because the workers were denied an opportunity to answer the allegations that were made against them before they were listed.

157. As Baroness Hale of Richmond said in *Wright* at para 19, the article 6(1) issue raises two questions. The first is whether the case is concerned with a civil right at all. The second is whether the making of the direction amounted to a "determination" of a civil right. The first question is easily answered. It is not disputed that the Bank's right to carry on its business was a civil right and that the effect of the direction was greatly to impede the exercise of that right. The difficult issue is whether the making of a direction amounted to a determination of the Bank's civil right, given that an opportunity for the determination by an independent and impartial tribunal of its right to carry on its business unimpeded by the direction was afforded by the right to make an application to the court under section 63 after the direction was made.

158. It is well established that decisions which determine civil rights and obligations may be made by the administrative authorities, provided that there is then access to an independent and impartial tribunal which is in a position to exercise full jurisdiction as to the issues involved: *Bryan v United Kingdom* (1995) 21 EHRR 342; *Wright*, para 23. For the provisions of article 6(1) about the determination of a civil right to be applicable there must be a dispute over a civil right which can be said, at least on arguable grounds, to be recognised under domestic law: *Micallef v Malta* (2010) 50 EHRR 37, para 74. The Strasbourg court also concluded that for article 6(1) to apply the result of the proceedings must be directly decisive for the right in question. As Baroness Hale said in *Wright*, para 21:

> "It is one thing temporarily to freeze a person's assets, so that he cannot divest himself of them before an issue is tried; it is another thing to deprive someone of their employment by operation of law."

159. The Order in this case was not simply an asset-freezing order, but I agree with Maurice Kay LJ, para 76, that there are similarities. It can be seen, as Pitchford LJ said in para 126, as an interim preventive measure taken in a situation which, on the Treasury's view of the matter, was of some urgency. At the stage when the decision was taken there was, in my view, no directly decisive determination of the Bank's civil rights. The Treasury were in no position to carry out an article 6(1) compliant determination at that stage, and they could not do so anyway as they were not an independent or impartial tribunal. But the procedure for the making of an application under section 63 was available as soon as the

person could claim to be affected by the decision: section 63(2). There was then an issue about the Bank's civil rights which could be determined in a manner that was compatible with article 6(1). It was, no doubt, for this purpose, that section 63 was enacted. As there was then an opportunity for the Order to be set aside without delay on an application of judicial review principles, I think that it was unnecessary for an opportunity to be provided for the Bank to be consulted before the Order was made in order to satisfy the requirements of the article.

160. For these reasons, together with the further reasons given by Lord Reed, I would reject the Bank's contention that the way in which the Order was made was incompatible with article 6(1) because it was not given an opportunity to make representations. On a comprehensive view of the applicable procedures, I would for the same reasons reject the Bank's challenge to the making of the Order under A1P1.

LORD NEUBERGER (dissenting in part)

Introductory

161. Bank Mellat seeks to challenge the Financial Restrictions (Iran) Order 2009, SI 2009/2725 ("the Order") on two grounds. The first is substantive, namely that the reasons for which Her Majesty's Treasury ("the Treasury") decided to give the direction ("the Direction"), which resulted in the Order, were fundamentally flawed. The second ground of challenge is procedural, namely that, before giving the Direction, the Treasury should have given the Bank an opportunity to make representations.

162. I have reached the conclusion that (i) in agreement with Lord Reed, the substantive challenge fails, but (ii) in agreement with Lord Sumption, the procedural challenge succeeds.

The substantive ground of challenge

163. The prevention of nuclear proliferation ("proliferation"), including impairing its funding, is an issue which is not just very important. It is an issue which has diplomatic, national security, and financial market dimensions, and which presents the executive with enormous technical and practical difficulties. Further, any attempts to prevent proliferation will almost inevitably have substantial repercussions for third parties, innocent as well as guilty. It should therefore cause no surprise that decisions and actions which are aimed by the

executive at preventing proliferation throw into sharp focus the delicacy of the balance between the court's duty to uphold the rule of law and the court's duty not to trespass into areas which are properly left to the executive.

164. Judges have no more important function than that of protecting individuals and organisations from abuse or misuse by the executive of its considerable and extensive powers – even, as is almost always the case, when such abuse or misuse does not involve bad faith. The substantial adverse financial consequences for Bank Mellat of the giving of the Direction in this case provide a good example of the importance of this function. On the other hand, the judiciary's power to review decisions of the executive must be exercised bearing in mind that responsibility for the decision lies with the executive, not the judiciary, and judges do not have the relevant expertise or experience of those responsible for the decision. In the present case, the importance and relevance of expertise and experience in international relations, national security and financial regulation, is self-evident.

165. Accordingly, while the court has to apply well-established legal principles when deciding whether the Direction can be substantively justified, I agree with Lord Sumption when he says in para 21 that the Treasury must be allowed "a large margin of judgment", or, as Lord Reed puts it in para 92, "a wide margin of appreciation", when taking steps to prevent proliferation internationally, through the means of giving a direction under Schedule 7 to the Counter-Terrorism Act 2008 ("the 2008 Act").

166. Indeed, there is very little between Lord Sumption and Lord Reed as to the principles to be applied when addressing a challenge to such a direction, or to an order made pursuant to it. I agree with Lord Reed's general and far-ranging observations about proportionality in his paras 69-78, and what he says in paras 79-84 about the word "proportionate" in para 9(6) of Schedule 7 to the 2008 Act ("Schedule 7"). I also agree with his observations about "rational connection" in paras 86-90.

167. As Lord Reed implies in para 65, there is very little difference between what he says in those 21 paragraphs and what Lord Sumption says in paras 20, 21, 25 and 26. The only real difference arises from their interpretation of the grounds upon which the House of Lords decided *A v Secretary of State for the Home Department* [2005] 2 AC 68. On that issue, while there are passages in some of the opinions which support the rather wider ratio suggested by Lord Sumption in para 25, I agree with what Lord Reed says in para 95-97.

168. The explanation for the fact that Lord Sumption and Lord Reed have reached opposing conclusions on Bank Mellat's substantive challenge to the

Direction largely lies in the difference between their respective analyses of the facts. Essentially, Lord Sumption concludes that the Treasury's decision to make the Direction was legally flawed for two main reasons, which he summarises in para 22. First, that there was no reason to single out Bank Mellat, as "the problem [which the Treasury relies on] is a general problem of international banking"; secondly, that the ground now advanced by the Treasury for the Direction is different from that advanced by Government ministers when the Order was placed before Parliament.

169. I have concluded that, while those two points each have some force in a qualified form, neither of them amounts to a sufficiently justified criticism of the Direction to justify quashing the Order. I agree with Lord Reed's analysis in relation to the first point in paras 105-117, and, in relation to the second point, paras 119-124. However, because the issue is finely balanced, as evidenced by the division of opinion in this Court, I will briefly summarise my reasons.

170. As to the first point, it seems to me that the Treasury considered that it was appropriate to make a direction under Schedule 7 against Bank Mellat for a combination of grounds. In summary, those grounds were (i) Bank Mellat was an Iranian bank, and Iran's banking system lacked the controls to prevent the funding of proliferation, which most other countries had, (ii) Bank Mellat had, as a matter of fact, provided banking services to businesses connected with Iran's nuclear weapons programme ("the programme"), (iii) other Iranian banks with branches or subsidiaries in London, who had helped finance the programme, were subject to asset-freezing orders or to a systematic reporting requirement, and (iv) although other Iranian banks could be used for the purpose, the Order would represent a severe constraint on Iran's ability to obtain banking services for the purpose of funding the programme. Ground (iii) and, to some extent, ground (iv) are defensive rather than inherently justificatory.

171. Ground (i) is, I accept, weakened by the fact that it is very difficult for any bank or national banking system to identify the ultimate purpose for which facilities are being provided, especially where the customer wishes to conceal that purpose. Nonetheless, that does not wholly undermine ground (i), especially in relation to an Iranian bank which has supported entities connected with the programme. As to ground (ii), it is true that Bank Mellat conscientiously took steps to sever its relationship with the entities which had been involved with the programme, but that was only after UN Security Council resolution 1747 in 2007, and, even then, facilities were being provided to one such entity even after these proceedings had been initiated. Despite ground (iii), there may have been some Iranian banks which had access to the London market, but they were few and small, and there was no evidence that they were funding entities which supported the programme. Ground (iv) on its own would not be impressive, but it is, in my

view, a reasonable additional factor which helps underpin the decision to give the Direction.

172. I do not find it easy to resolve the question of whether Bank Mellat's substantive challenge to the Direction should succeed. As the brief summary in the preceding two paragraphs suggests, and as is also apparent from the much fuller analysis proffered by Lord Reed, the arguments raised by the Treasury to justify the Direction are not particularly strong, and the financial consequences of the Direction and subsequent Order against the Bank, which is not suggested to have intentionally supported the programme, are very grave. The Treasury's case is further weakened by the fact that, when it gave the Direction and promulgated the Order, it believed that the great majority of the shares in Bank Mellat were owned by the Iranian government, which is, and at all material times, was not the case. It is not a major point, but it does have a little traction, given that the grounds for the Direction are not particularly strong, and that this mistake does have some bearing on the Treasury's ground (iv) in para 10.

173. All in all, while the four grounds summarised in para 170 above, even when taken together, are not overwhelming, I have reached the conclusion that they are strong enough to justify the Treasury's contention that, despite the very serious financial consequences for Bank Mellat, the Direction was given on grounds which were unassailable as a matter of law. The Direction was in an area, and related to an issue, in respect of which the courts should accord the executive a wide margin of appreciation, and, while the grounds advanced by the Treasury for giving the Direction do not appear very strong on examination, they are rational and they have some force. In those circumstances, were it not for the grave effect of the Direction on the Bank, I would fairly readily have concluded that the Treasury had acted lawfully in giving it.

174. However, I entertain real doubt as to whether the Direction was justifiable once one weighs the benefits it was likely to achieve, in the light of the relative weakness of the grounds, against the inevitable and substantial harm it would cause to Bank Mellat. However, in the end, I am not persuaded that a court can properly conclude that the benefit of the Direction must have been so slight that the Treasury could not reasonably have concluded that it was right to give it, notwithstanding the harm the Bank would thereby suffer..

175. On my view of the facts on the second reason identified in para 168 above, it is unnecessary to decide the further question of principle which divides Lord Sumption and Lord Reed, which the latter discusses in paras 123-124. I prefer to leave that question open.

176. If the Treasury's justification for giving the Direction, and Ministers' explanation for it to Parliament, had been that Bank Mellat knew that it was funding entities which supported the programme, which the Treasury now accepts would not have been right, a not unfamiliar question would arise. That question is the extent to which the court should uphold a decision of the executive which was justified by one reason when it was made, but when the matter comes to court, the reason is abandoned and the decision is sought to be justified by a different reason. It is an issue on which there are a number of judicial observations in a domestic judicial review context, most famously perhaps that of Megarry J in an oft-quoted passage in *John v Rees* [1970] Ch 345, at p 402, cited with qualified approval on a number of occasions, eg in *Secretary of State for the Home Department v AF* [2010] 2 AC 269, paras 61-2 and 73.

177. I would have thought that there was room for argument as to how such a question should be approached in the present context, following the introduction of the European Convention on Human Rights into UK law, especially as this is a case where the Convention is engaged (through Article 1 of the First Protocol), where proportionality is referred to in the empowering statute, and where the decision has been put before, and approved by, Parliament.

The procedural ground of challenge

178. As Lord Sumption says in paras 29-30, where the executive intends to exercise a statutory power to a person's substantial detriment, it is well established that, in the absence of special facts, the common law imposes a duty on the executive to give notice to that person of its intention, and to give that person an opportunity to be heard before the power is so exercised. While this has been described as a "rule of universal application … founded upon the plainest principles of justice" (per Willes J in *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180, 190), it has more recently been expressed in somewhat more measured terms. In *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560, Lord Mustill said that "fairness" will "very often require that a person who may be adversely affected by the decision will have an opportunity to make representations … either before the decision is taken …; or after it is taken, with a view to procuring its modification".

179. In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or

pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute.

180. For the reasons given by Lord Sumption in paras 28-49, I consider that the Direction in this case was invalid owing to the failure of the Treasury to afford Bank Mellat the opportunity of making representations prior to its being made. Because of the division of opinion on this issue, I will attempt to summarise my reasons

181. On the face of it at least, this was a paradigm case for the giving of prior notice. (i) The Direction was targeted at just two entities, one of which was the Bank; (ii) the consequences of giving the Direction and the making of the Order would clearly be drastic so far as the Bank was concerned; (iii) there was no need for secrecy or great haste in giving the Direction; (iv) the Direction would come into effect virtually at once; (v) the reasons for the Direction and Order were all based on the Bank's dealings and ownership, so there could have been little doubt but that the Bank would have had relevant things to say about the proposed direction. On this last point, the Bank's knowledge of its customers' activities, the Bank's ability to deal with the problem of unknowingly assisting the programme, and the ownership of the Bank are all points on which the Bank would have made strong and relevant representations if it had been given the chance to do so.

182. Despite this, Bank Mellat was given no notice of the Treasury's intention to give the Direction against it or to put the Order before Parliament, and therefore it had no opportunity to put its case as to why such a direction should not be made. The Treasury raised a number of arguments as to why it was entitled not to give notice to the Bank of its intention to give the Direction. Some of those arguments were based on provisions of the 2008 Act; others were based on impracticality.

183. I have no hesitation in rejecting the arguments based on impracticality, namely that (i) notice would have given the Bank the opportunity to re-arrange its relationships, (ii) notice would have been ineffective or difficult because of the Treasury's reliance on secret material, (iii) notice would have to have been given to all those who dealt with the Bank, which would not have been realistic. As to those arguments, I have nothing to add to what Lord Sumption says at paras 31-32.

184. I turn then to the Treasury's arguments based on the terms of the 2008 Act. There is nothing in the express terms of the statute which assists the Treasury, and it therefore has to rely on implication. In that connection, two arguments are raised as to why no consultation was required, namely (i) the fact that the Order had to be approved by affirmative resolution in both Houses of Parliament, and (ii) section

63 of the 2008 Act ("section 63") entitled Bank Mellat to challenge any direction, and thus any consequential order, after it was made, and, when taken together with other provisions of Schedule 7, it is clear that there was no duty to have prior consultation.

185. I would reject the contention that the fact that the Direction is enshrined in, or approved by, the Order means that its validity cannot be considered by the court. I agree with what is said by Lord Sumption in paras 40-45 and by Lord Reed in para 54. The fact that the Order in the present case was confirmed by Parliament does not detract from the applicability of the rule, in so far as it applies to the actions of the executive, i.e. the Treasury decision to make the Direction, as opposed to the legislative decision to confirm the consequent Order. Consequently, if the administrative decision to make the Direction was legally flawed for failure to consult the Bank, then the consequential Order should be quashed. There is no question of such a decision of this court in any way impinging on the sovereignty of Parliament.

186. Lord Reed, however, relies in para 61 on para 14(5) of Schedule 7, which provides that if an order under Schedule 7 "would be treated for the purposes of the standing orders of either House of Parliament as a hybrid instrument, it is to proceed in that House as if it were not such an instrument". In my view, the provision takes the matter no further, as it relates to the characterisation of, and Parliamentary processes relating to the making of, an order. I do not, with respect, see how it can impinge on the lawfulness of the Treasury's processes when deciding to make the antecedent direction. If anything, the exclusion of Bank Mellat from the Parliamentary process, as illuminatingly explained by Lord Hope, seems to me to support the argument that the Bank ought to have been consulted earlier.

187. As to the Treasury's second argument, it may be that, in some cases, the fact that the statute granting the power in question gives a specific right of challenge subsequent to its exercise can be enough to dispense with any prior obligation to consult. However, in my view, it is by no means a sufficient answer in many cases. As a matter of logic, the two rights are a long way away from being mutually inconsistent or even duplicative. Indeed, if it were otherwise, the right to be consulted would be very rare, because, as Lord Sumption points out in para 37, there is almost always a right to challenge a decision of the executive as a matter of public law.

188. A right to be consulted before a power is exercised is very different in its nature and in its potential effect from a right to challenge it after it has been exercised. The former involves representations to the intending exerciser of the power in relatively informal and flexible circumstances with a variety of possible

outcomes, whereas the latter involves arguing against the exerciser in a formal, forensic context, where the court's powers are relatively constrained. In an era where mediation is increasingly supported, not least by the executive, the desirability of prior consultation, even where subsequent challenge through the courts is possible, is at least as great as it ever was.

189. As between the two rights, the present case provides a very good demonstration of the difference between them in terms of their effect. The right to challenge a direction under Schedule 7 has many drawbacks compared with a right to be consulted before the direction is given. Particularly as the Direction has virtually immediate effect, the time it may take to challenge any subsequent order, coupled with the uncertainty while such challenge is under way, and the costs involved in such a challenge, mean that a subsequent right of challenge would be much less valuable than a right to make representations in advance. Further, there must be a real risk of a significant adverse effect on a bank's reputation if a direction is made, even if it is subsequently quashed. Ignoring the subsequent appeals, well over seven months elapsed between the giving of the Direction in this case and Mitting J's decision as to its validity. Seven months is a very long time from the Bank's perspective, and, even viewed objectively, it is a long time given that the Direction was only to last for twelve months.

190. I am unimpressed by the Treasury's reliance on section 63. It purports to grant little, if anything, more than a specific statutory right to persons against whom a direction is made than they would be accorded by public law. That is clear from subsection (3) which provides that, on any challenge to a direction "the court shall apply the principles applicable on an application for judicial review". Unlike Lord Reed in para 62, I do not see section 63 as giving greater rights to a person against whom a direction is made than they would enjoy under public law; nor do I consider that sections 65-68 of the 2008 Act suggest otherwise. Those sections were included, in my view, to deal with the need to protect confidential material in any proceedings under section 63. Indeed, I suspect that section 63 was included in the Act because it was more sensible in drafting terms to link those procedures to proceedings specified in the 2008 Act.

191. Lord Reed identifies a number of other factors in paras 58-62 of his judgment which, when taken together with sections 63, and 65-8, of the 2008 Act, persuade him that the normal duty to consult has been abrogated. I do not agree. At a high level, I consider that, while the right to be consulted in advance about the exercise of a statutory power which will cause significant harm can be abrogated by implication in the statute, the right is so important that the implication must be very clear. More specifically, I am unimpressed with the various other factors which weigh with Lord Reed. The difficulty of consulting because of the need for confidentiality does not impress me for the reason given by Lord Sumption in para 31. It may be that, where the Treasury was proposing to make a direction against

another bank or banks in different circumstances, it may not be practicable to give it or them to give an opportunity to comment, but such a point must be assessed on a case by case basis and in this case it fails for the reasons given by Lord Sumption in paras 31-33.

192. As already explained, I do not consider that para 14(5) of Schedule 7 assists. Nor do I find para 15 of Schedule 7 of much help. The 2008 Act clearly had to specify the date from which a direction took effect, and where the direction concerned a specific person, as in this case, it was obviously sensible to provide that it took effect on the date on which it was served on that person. I find it impossible to think of any other way of ensuring both clarity and fairness.

Conclusion

193. In my view, therefore, Bank Mellat's appeal should be allowed, the direction made by the Treasury should be set aside, and the Order quashed.

194. I end by pointing out that the two grounds of challenge to the Direction in this case are not entirely unrelated either in principle or in fact. The uniting principle which applies both to the Bank's substantive challenge and to its procedural challenge is the fundamental public law rule that the executive must exercise a statutorily conferred power fairly. When it comes to giving a direction under Schedule 7 which will foreseeably and substantially harm an entity, fairness requires the Treasury to have good enough reasons for giving the direction. It equally requires the Treasury to give the entity notice of the intention to give the direction, so that the entity can make representations about it in advance.

195. So far as the facts are concerned, I have explained in paras 170-174 above why there is in my view considerable force in the Bank's substantive challenge to the giving of the Direction, The fact that the justification for the Direction was not very strong, coupled with the more specific facts that the Treasury was wrong about the ownership of Bank Mellat and could usefully have discovered what steps the Bank was taking to avoid inadvertently supporting the programme, provide specific and practical support for the conclusion that the Bank should have been given an opportunity to make representations before the Direction was given.

LORD DYSON (dissenting in part)

196. I agree, for the reasons given by Lord Sumption, that the appeal should be allowed on the procedural issue.

197. I was at first persuaded by Lord Sumption's judgment that the appeal should also be allowed on the substantive issue. But, like Lord Hope and Lord Neuberger, I find Lord Reed's analysis at paras 102 to 117 and 118 to 122 more convincing. Like Lord Neuberger, I express no view on paras 123 and 124 of Lord Reed's judgment.

198. The Treasury has explained why Bank Mellat was singled out. The explanation is summarised at paras 103 to 106 and 113 of Lord Reed's judgment. Lord Sumption accepts (para 27) that the Schedule 7 direction may well have added something to Iran's practical problem in financing transactions associated with its weapons programmes. But he concludes that the direction was irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make to its objective.

199. This conclusion is based on (i) making an assessment of what effect the direction would have on Iran's ability to finance the weapons programme and (ii) conducting a proportionality exercise by balancing that effect against the undoubtedly grave consequences that the direction would have for Bank Mellat.

200. As Lord Sumption acknowledges at para 21, any assessment of the rationality and proportionality of the direction must recognise that the nature of the issue requires that the Treasury be allowed a large area of judgment or margin of appreciation. The court is in a poor position to weigh the effectiveness of a measure whose object is to reduce (if not eliminate) Iran's ability to fund its weapons programmes. This is not an area in which the court has any expertise. Accordingly, it should only hold that such a measure is irrational or disproportionate if it is confident that this has been clearly demonstrated. For the reasons given by Lord Reed, I am not confident that this has been done in the present case.

201. I would therefore dismiss the appeal on the substantive issue.

LORD CARNWATH (dissenting in part)

202. Like the other partial dissentients my views on the substantive issue have wavered. In the end however I am persuaded by Lord Sumption that the appeal should succeed on that issue for the reasons he gives (his paras 19-27). Notwithstanding the force of Lord Reed's alternative analysis, and the other judgments in support, I do not propose to add anything of my own. It seems better that Lord Sumption's reasoning should stand as the single majority judgment on this crucial issue. On the procedural point, by contrast, I find myself clearly on the

side of the minority, agreeing wholly with the reasoning of Lord Hope on what I regard as a point of considerable general importance (paras 134-159).