

## **UK SUPREME COURT STRIKES DOWN SANCTIONS AGAINST IRANIAN BANK**

*Bank Mellat v H.M.Treasury* [2013] UKSC 38 and *Bank Mellat v H.M.Treasury* [2013] UKSC 39

### **Introduction**

In *Bank Mellat v H.M.Treasury* [2013] UKSC 38 and *Bank Mellat v H.M.Treasury* [2013] UKSC 39, the Supreme Court delivered two majority judgments, the first, approving the conduct of closed hearings under certain circumstances and the second, striking down restrictive measures imposed by HM Treasury under the *Counter Terrorism Act 2008*.

### **Background**

By the *Financial Restrictions (Iran) Order 2009*, (“2009 Order”) (made under Schedule 7 of the *Counter Terrorism Act 2008*), Bank Mellat, one of the largest commercial banks in Iran, was prevented from doing business with members of the UK financial sector. It subsequently brought proceedings to have this effective blacklisting removed, arguing it was both unfair and unlawful. Already, in *Bank Mellat v. European Council* [2013] All ER (D) 182 (Feb), the Bank had successfully appealed against European sanctions of a similar nature. Failing both at first instance and in the Court of Appeal, the Bank appealed to the Supreme Court.

A further application was made by the Treasury (Respondent), in the course of that appeal, which called upon the Justices to conduct a closed material procedure (“CMP”) so as to consider the closed judgment of Mitting J. delivered at first instance. A CMP involves the production of material which is so confidential and classified that it requires the Court not only to sit in private, but to sit in a closed hearing.

Before the Supreme Court, the Bank’s appeal was divided into two. The first hearing concerned the CMP. The second concerned the terms of the 2009 Order.

In respect of the CMP, the Court had to decide, first, if it was permitted to conduct a CMP at all given the fact that explicit statutory authorisation existed only in relation to the conduct of CMPs by the High Court and the Court of Appeal. Secondly, if it was so permitted, the Court had to decide whether grounds existed for conducting a CMP in the present circumstances.

In respect of the underlying dispute, the Court had to consider Bank Mellat’s application to have the 2009 Order set aside both on procedural and on substantive grounds.

### **The First Judgment (“CMP”)**

In the first of its two resulting judgments, the Supreme Court decided by a majority of six to three (Lords Hope, Kerr and Reed dissenting) that it could indeed conduct a CMP. This was the necessary implication of section 40(2) of the *Constitutional Reform Act 2005* which provides for appeal to the Supreme Court against *any* judgment of the Court of Appeal, including from a closed judgment.

By a majority of five to four (Lords Hope, Kerr, Dyson and Reed dissenting) the Supreme Court further held that it was appropriate to conduct a CMP in the context of the present appeal since without seeing the closed judgment of the High Court and hearing submissions on it, the Supreme Court could not be sure whether the closed judgment would have any effect on the outcome of the appeal. In the event, the Justices found nothing in the closed judgment which could have affected its reasoning on the substantive appeal.

### **The Second Judgment (“2009 Order”)**

The Supreme Court allowed Bank Mellat’s appeal by a majority of six to three (Lords Hope, Reed and Cranworth dissenting) on the procedural ground that Bank Mellat received no notice of the Treasury’s intention to make a direction under Schedule 7 of the *Counter-Terrorism Act 2008* and therefore had no opportunity to make representations before it was made. Lord Sumption (for the majority) went on to state that unless a statute expressly excluded a duty of consultation in such circumstances, or the consultation in the particular case would be impractical or frustrate the purpose of the order, a person specifically targeted by such an order must be given a chance to make representations.

By a majority of five to four (Lords Neuberger, Hope, Dyson and Reed dissenting) the Supreme Court also allowed Bank Mellat’s appeal on the substantive grounds that the direction both failed to justify its singling out of Bank Mellat, and that it was justified on a different, partially inconsistent, basis by ministers in Parliament before whom it was required to be laid and ratified.

For access to the judgments, see:

<http://www.bailii.org/uk/cases/UKSC/2013/38.html>

<http://www.bailii.org/uk/cases/UKSC/2013/39.html>

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