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SUPREME COURT RELUCTANTLY CONDUCTS ITS FIRST HEARING IN SECRET

Bank Mellet v H.M.Treasury UKSC2011/0040, and *Global Torch Ltd v Apex Global Management Ltd. and others* [2013] All ER (D) 159 (Feb)

Introduction

The Supreme Court, in *Bank Mellet v H.M.Treasury* UKSC2011/0040, and the Court of Appeal, in *Global Torch Ltd v Apex Global Management Ltd. and others* [2013] All ER (D) 159 (Feb), have recently ruled on the circumstances in which proceedings can be conducted in secret.

Background

Principles

The general principle that court proceedings should be conducted in public is long-standing [*Scott v Scott* [1913] AC 417]. It finds contemporary expression in Article 6.1 of the *ECHR* and in Rule 39.2 of the *CPR*. Reflecting aspects of Article 6, Rule 39.2 (3) nevertheless permits private hearings in certain limited circumstances. These include where such hearings involve matters of national security (Rule 39.2(3)(b)) and where a court considers this necessary in the interests of justice (Rule 39.2(3)(g)).

Bank Mellet

By the *Financial Restrictions (Iran) Order 2009*, (made under Schedule 7 of the *Counter Terrorism Act 2008*), Bank Mellet, 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 Mellet v. European Council* [2013] All ER (D) 182 (Feb), the Bank had successfully appealed against European sanctions of a similar nature. Failing at first instance, the Bank appealed to the Supreme Court. An application was made by the Treasury (Respondent), in the course of that appeal, which called upon the Justices to consider a closed judgment of Mitting J. in the lower court.

Global Torch Ltd v Apex Global Management Ltd and others

Allegations and counter-allegations of wrongdoing and misappropriation were made the by directors and principal shareholders in a joint venture company, two of whom were Saudi Princes. It was argued, on behalf of the Princes, that a public hearing would damage relations between the UK and Saudi Arabia and would amount to interference in their private lives sufficient to breach their rights under Article 8 of the *ECHR* to an unacceptable degree.

Judgments

Refusing to allow a closed hearing in the *Global Torch* case, Morgan J spoke of the need for applicants to adduce 'clear and cogent' evidence of factors sufficient to outweigh the principle of open justice. By contrast, in *Bank Mallet*, the Supreme Court conducted a closed hearing for the first time, citing reasons of national security, though it agreed to do so with the "greatest reluctance" and only by a majority. In a statement the day after the hearing, the President of the Court, Lord Neuberger, went on to annunciate four principles for governing the occurrence and conduct of such hearings:

(i) They are to be resorted to "only where the court is satisfied that …[they are] absolutely necessary to dispose of the appeal justly";

(ii) "The party who is excluded…should be given as much information as possible about the content of the evidence and arguments at any closed hearing and the contents of any closed judgment.";

(iii) "The interests of that party should be protected as far as possible by the full involvement of special advocates at the closed hearing", and;

(iv) When judgment is given, an effort should be made "to avoid placing any reliance on the closed material, and, in so far as it is necessary to do so, to keep any reliance to a minimum and give as much detail about the material to…[the excluded party] and the public" as it properly can.

These principles are likely to carry the greatest persuasive authority in future such cases.

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