JUDICIAL REVIEW AND CLOSED MATERIAL PROCEDURE IN THE SUPREME COURT

THE Counter-Terrorism Act 2008 confers powers on the Treasury to act against the proliferation of nuclear weapons. In 2009 the Treasury suspected that Bank Mellat was funding Iran's nuclear missile programme. Consequently the Treasury issued an order directing those in the financial sector to refuse to participate in transactions with the bank (Financial Restrictions (Iran) Order 2009). This closed down the bank's UK operations. The bank appealed, claiming that the order was unlawful. The Treasury denied the claims and supported its argument by disclosing evidence to the courts but not to the bank. In the *Bank Mellat* proceedings the Supreme Court had to decide whether the Court could consider the closed evidence, and whether the order was lawful. *Bank Mellat v HM Treasury (No.1)* [2013] UKSC 38 deals with disclosure, and *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39 concerns the legality of the order.

Turning first to the disclosure of evidence, amongst the fundamental principles of the civil process it is established that proceedings should be held in public and that each party should disclose their evidence to their opponents. Closed Material Procedure ("CMP") deviates from that position; it is a method of disclosing evidence to courts without disclosing it to one's opponents. Parliament has legislated to authorise CMP in financial restriction proceedings in the Counter-Terrorism Act 2008. In the High Court Mitting J. used CMP and dismissed the appeal. The Court of Appeal also rejected the appeal. The bank then appealed to the Supreme Court. Here the use of CMP became more complicated, because whilst the 2008 Act provides that the lower courts can use CMP, the Act is silent as to the Supreme Court. Thus the question before the Supreme Court was whether it had the power to adopt CMP.

For those familiar with CMP this may seem surprising as it was only last year that the Supreme Court held that it could not expand the use of CMP beyond what Parliament had legislated, see *Al Rawi v Security Services* [2012] 1 A.C. 531 (noted [2012] C.L.J. 21). Indeed Lord Dyson declared that the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that only Parliament can abrogate that right. Thus on the face of it Lord Dyson had already answered the question, and had done so in the negative. Yet, in *Bank Mellat (No.1)* [2013] UKSC 38 the Supreme Court found that it could adopt CMP.

The difference between *Al Rawi* and *Bank Mellat (No.1)* was the location of the source of the power. In *Al Rawi* the Supreme Court determined that it did not have an inherent judicial power to expand

CMP, whereas in *Bank Mellat (No.1)* the majority thought that there was a statutory power. The problem in *Bank Mellat* was that not all of the Lords were convinced that there was a statutory basis.

A majority of six to three decided that it is possible for the Supreme Court to use CMP, and a majority of five to four held that CMP should be used in this appeal. Lord Neuberger gave the majority judgment which was based on an interpretation of the Constitutional Reform Act 2005, s. 40(2), (5). Those provisions state that an appeal lies to the Supreme Court against "any" judgment of the Court of Appeal. The majority found that "any" judgment included closed judgments, and in order for that material to be heard proceedings in the Supreme Court would have to involve CMP. Moreover, the majority thought that if Parliament had intended to exclude the Supreme Court this would have been expressly stated, especially in the light of the 2005 Act.

Lords Hope, Kerr, and Reed dissented. In their view express statutory authority was required and was lacking. Lord Hope and Lord Kerr echoed Lord Dyson's analysis in *Al Rawi* that the erosion of fundamental common law principles necessitates express Parliamentary approval. The 2005 Act did not support the majority's analysis, as Parliament had not contemplated CMP when passing the legislation. Moreover, Lord Hope queried whether the use of CMP by the court of last resort was compatible with fundamental principles; this confirmed his view that such a step should only be taken by Parliament. Lord Kerr grounded his argument in statutory interpretation. His argument was as follows. The majority's argument involves implying into the 2005 Act a power that did not exist between the enactment of the 2005 and 2008 Acts. In 2008 when Parliament authorised the lower courts to use CMP it put in place a structure with safeguards and it was inconceivable that Parliament should have intended the Supreme Court to carry out CMP without such a framework.

Two particular points should be considered. The first concerns the use of CMP in the court of last resort and the second relates to statutory interpretation. In relation to the first issue, it should be noted that Lord Neuberger was satisfied that the Supreme Court would always be able to deliver an effective judgment even if CMP were used. But surely this depends on the extent and significance of the evidence advanced under CMP, something of which the Supreme Court is yet to have full experience. *Bank Mellat* was the first time that the Supreme Court used CMP, and as CMP had no impact it offers limited insight. Moreover, even in *Bank Mellat (No.1)* the Court succumbed to the pressure to use CMP. Thus one can foresee that in cases where CMP is genuinely needed counsel may seek to expand its scope. The courts may also come under pressure to restrict the content of open judgments. On this issue

see the problems that were experienced, albeit in a different context, in the lower courts in *R. (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2973 (Admin) and [2010] EWCA Civ 158 (noted [2010] C.L.J. 430). The guidance issued in *Bank Mellat (No.1)* will assist with these issues (see [68]–[71] and [89]–[97]), but the Lords will need to be vigilant.

The second point to consider is statutory interpretation. Unfortunately pragmatism displaced principle in *Bank Mellat (No.1)* and the dissenters were right to express concern. The case sets a deeply troubling precedent for construing a power to erode constitutional principles of openness in court proceedings from pragmatic need and statutory omission. The rationale for this is difficult to comprehend, as surely the whole point of constitutional principles is that they should not be displaced by pragmatic whims. Unfortunately, only time will tell whether this pragmatic approach will gain traction. In hindsight it is particularly unfortunate that this exception was made in a case where CMP added nothing to the proceedings. Furthermore, the need for this statutory interpretation was short-lived, as the Justice and Security Act 2013, which came into force six days after the *Bank Mellat* judgments, expressly provides for CMP in the Supreme Court in any relevant civil proceedings.

Bank Mellat (No.2) also offers insight into statutory interpretation and the relationship between parliamentary intention and constitutional principles. Here the Supreme Court allowed the bank's appeal on both substantive and procedural grounds. The substantive ground was that the 2009 order was discriminatory, arbitrary, irrational and disproportionate to the objective. There is no real difference of principle between the majority and the dissenting judges' analysis of the principles underlying the proportionality test: as acknowledged by both Lords Sumption and Reed), the majority and minority Justices differed in relation to the application of the test on the facts. The legality of the order hinged on explaining why Bank Mellat had been singled out. Whereas the majority found that there was no ground for targeting Bank Mellat, the minority held that there was a clear basis.

Where there was a difference of principle was in the analysis of the procedural claim. The majority found that the process was flawed, as the bank had not been given an opportunity to make representations prior to the order. They held that unless a statute expressly or impliedly excludes prior consultation, or consultation is impractical, or it would frustrate the purpose of the order, then fairness and good administration require that there should be an opportunity to make representations. Lords Reed, Hope and Carnwath dissented, arguing that if Parliament had intended consultation this would have been set out in the legislation. Moreover, whilst the majority thought that the

need for consultation could be addressed case by case, the dissenting judges thought this was not appropriate in the context of a statutory scheme where national interests are at stake. In their view Parliament could not have intended the Treasury to undertake such an uncertain assessment in each case. Thus they concluded that Parliament had impliedly excluded any requirement for consultation and there was no room for rewriting the scheme.

Underlying both decisions are key questions concerning statutory interpretation and fundamental principles. The decisions themselves point in different directions. Whilst *Bank Mellat (No.1)* reads in a power to erode constitutional principles, in *Bank Mellat (No.2)* the Court refused to read out principles of fairness and good administration. The differences perhaps reflect the strong protection of principles such as fairness and good administration in administrative law, and a sense that the disclosure principle has already been swept away by Parliament. This may mean that the approach in *Bank Mellat (No.1)* may be isolated to its particular facts. Nevertheless, the broader issues concerning the rationale for reading constitutional principles in or out of statutes requires serious reflection. On that front it is hoped that there will be a quick return to principle and that the whims of pragmatism will be short-lived.

KIRSTY HUGHES

REVIEWING BRITAIN'S TRIBUNAL SYSTEM

WEATHER was poor in the early days of 2005. Snow was falling. Workers had to toil round the clock in order to keep roads passable. In the small hours of 18 January, Mr Jones was operating a gritter near the Dartford River Crossing. Nearby, a Mr Hughes suddenly ran out in front of an articulated lorry, intending to commit suicide. The driver of the lorry braked, but could not avoid a collision with Mr Hughes, who was killed instantly. Worse was to follow as the lorry spun out of control and collided with the gritter. Mr Jones was thrown onto the road and suffered catastrophic injuries.

The resulting case, *Jones (by Caldwell) (Respondent) v First Tier Tribunal* [2013] UKSC 19, [2013] 2 A.C. 48, illuminates some important areas of modern law: the tribunal system; and the allocation of authority between tribunals and the superior courts. *Jones* sheds light on the route cases take through the tribunal system. It also spotlights the appropriate judicial response to allegations that the tribunal system has committed serious errors. *Jones* is a strong statement that reviewing courts are to approach tribunal decisions with a