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## Crossing the Rubicon: Closed hearings in the Supreme Court

*Bank Mellat v Her Majesty's Treasury (No.1)*<sup>1</sup> deals with an eventuality which inevitably follows from the spread of closed material procedures (CMPs) since their introduction in the Special Immigration Appeals Commission Act 1997: the use of CMP in the Supreme Court. Two questions fell to be decided: was it possible for the Supreme Court to adopt such a procedure? And, if so, was it appropriate for the court to adopt one in this particular case, regarding an application for the court to set aside an order under the Counter-Terrorism Act 2008? The order in question had prohibited financial institutions from carrying out business with Bank Mellat, an Iranian institution accused of transferring funds for the development of nuclear weapons, effectively preventing it from doing business in the United Kingdom. That these questions fell to be decided in the shadow of the Supreme Court's robust defence of the principle of open justice in *Al Rawi v The Security Service*,<sup>2</sup> where it was held the courts possessed no power at common law to order a CMP, makes the acquiescence of the majority on both counts troubling. Nevertheless, examination of the decision shows that its legacy for open justice is more mixed than this headline account might suggest.

### A. PROCEDURAL HISTORY

In the High Court, a CMP had been employed and Mitting J handed down two judgments – an open judgment dismissing the Bank's application and a closed one to which he made two references in the open judgment, relating to points not at issue before the Supreme Court.<sup>3</sup> In the Court of Appeal the High Court's closed judgment was considered in a closed hearing, but in dismissing the appeal, no reference was made either to that hearing or to the closed judgment.<sup>4</sup> On appeal to the Supreme Court, the first day was devoted to argument as to whether a CMP was possible in the Supreme Court. Having decided that it was, and that such a procedure should be adopted in the present case, the court later went into closed session. This judgment, giving the reasons for which the request was acceded to, both as a general proposition and in the particular circumstances of this case, was handed down alongside a second judgment in which the substantive appeal was allowed and the order against the bank quashed.<sup>5</sup>

### B. THE SUPREME COURT'S ANALYSIS

The 2008 Act contains provisions requiring that the 'rules of court' have regard to the "need to secure" that "decisions that are the subject of the proceedings are properly reviewed" and to ensure that no disclosure of information takes place where it would be "contrary to the public interest."<sup>6</sup> CMP must, in short, be made available. 'Rules of court' are defined as "rules for regulating the

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<sup>1</sup> [2013] UKSC 38.

<sup>2</sup> [2011] UKSC 34, [2012] 1 AC 531.

<sup>3</sup> [2010] EWHC 1332 (QB).

<sup>4</sup> [2011] EWCA Civ 1.

<sup>5</sup> *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] UKSC 39, [2013] 3 WLR 179.

<sup>6</sup> s 66 (2) (a) and (b).

practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session.”<sup>7</sup> As such, the Civil Procedure Rules were amended to include a rule permitting the use of CMP in proceedings under the 2008 Act. Proceedings in the Supreme Court, however, are governed by a separate set of rules, the Supreme Court Rules (SCR), which came into force only in 2009 and which make no reference to CMP. They provide only that all appeals are to be heard in open court except where “it is necessary in the interests of justice or in the public interest” for hearings to take place in private.<sup>8</sup> Any party excluded must have a special advocate, appointed to represent his or her interests, present in the hearing.<sup>9</sup> These facts leave a lacuna into which the majority (Lord Neuberger giving judgment, attracting the agreement of Lady Hale and Lords Clarke, Sumption and Carnwath) poured a bare consequentialist analysis, starting from the provision in the Constitutional Reform Act 2005 (CRA) giving the court power to “determine any question necessary... for the purposes of doing justice.”<sup>10</sup> Lord Neuberger argued, by *reductio ad absurdum*, that none of the possible consequences of a decision that the Supreme Court had no power to employ a CMP were tenable and so, barring an over-riding argument to the contrary, pragmatism could justify the Supreme Court’s use of such a procedure.<sup>11</sup> Each candidate for such an argument was dismissed. To the claim that the principle of legality required express words if a departure from natural justice was to be effected, it was replied that the ‘purpose and context’ of the provision was in fact to permit all decisions of the Court of Appeal to be appealed to the Supreme Court, in keeping with the plain meaning of the ‘any question’ provision.<sup>12</sup> To the point that the 2008 Act made no mention of the Supreme Court Rules, it was pointed out that these had not yet been promulgated at the time of its enactment.<sup>13</sup> Had there been a specific intention to exclude the Supreme Court from the possible reach of CMPs, Parliament would have said so explicitly, explaining what was to happen to otherwise untriable appeals.<sup>14</sup> The claim that the Supreme Court is of such constitutional importance as to be incapable of employing a CMP was similarly rejected, though with palpable discomfort at the acknowledgment that employing a CMP would eventually mean going beyond what was done in the present case and issuing a closed judgment.<sup>15</sup>

Six of the nine judges were thus willing to countenance the abstract possibility of adopting a CMP in the highest court, Lord Dyson being in agreement with Lord Neuberger’s decision on this point. Three dissented. Lord Hope stuck closely to the position staked out in *Al-Rawi* – the ‘fundamental’

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<sup>7</sup> s 73.

<sup>8</sup> Rule 27 (1).

<sup>9</sup> Rule 27 (2).

<sup>10</sup> s 40 (5).

<sup>11</sup> Para 37-43, per Lord Neuberger.

<sup>12</sup> Para 55-56.

<sup>13</sup> Para 57.

<sup>14</sup> Para 59.

<sup>15</sup> Para 60.

nature of the issue was to be insisted upon and meant that any departure could never rest upon mere implication, but would require specific statutory authority.<sup>16</sup> In dissenting for this same reason, Lord Reed emphasised the status of the Supreme Court, questioning whether “secret justice *at this level* is appropriate,”<sup>17</sup> and offering other workarounds, including one – the court examining the material without it being the subject of oral argument – which did not feature in Lord Neuberger’s consideration of the possible routes were CMP unavailable. Lord Kerr’s dissent on this point again makes the argument that, after Al-Rawi, departure from a fundamental right requires clear authority but adds that the implication of the Treasury’s argument is that the CRA did not authorise a CMP prior to the 2008 Act, but that this power was somehow activated by it.<sup>18</sup>

### C. A CLOSED HEARING IN THIS CASE?

Notwithstanding the robust defence of natural justice against attempts to have the courts employ CMPs without statutory authority in Al-Rawi, the majority here was willing to permit its employment here on tenuous such authority. The general question caused, however, less difficulty than the particular one, which was the source of seemingly significant anguish even for the five judges who accepted the use of CMP in Bank Mellat’s Supreme Court hearing. Lord Neuberger emphasises that the panel was ‘openly sceptical’ about the need to do so;<sup>19</sup> that those in the majority had ‘real misgivings’ about it.<sup>20</sup> And well they might have had: the majority and dissentients alike are clear that, with hindsight, there was no benefit to having seen the closed judgment – there was “nothing in it which could have affected [their] reasoning in relation to the substantive appeal, let alone which could have influenced the outcome of the appeal.”<sup>21</sup> Having looked at the closed material, it was “abundantly clear that it was quite unnecessary to have done so.”<sup>22</sup> So why was it?

The Supreme Court employed a CMP for the first (but presumably not last) time, and against the advice of the Special Advocates, in order to consider a document of no value to the case at hand. It did so largely because counsel for the Treasury refused to answer questions as to why the Treasury desired the court to examine the closed judgment and so frustrated the court’s attempts to accurately determine the necessity of doing so. By refusing to provide context, the Treasury forced the court to err on the side of caution and take an action the judges seem to regret. Lord Hope is plain in his assessment of this tactic, which was “as unattractive as it was unconvincing,” but it was, of course, successful.<sup>23</sup> Though he labels it a “misuse of the procedure,” this does not matter.<sup>24</sup>

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<sup>16</sup> Para 84-87.

<sup>17</sup> Para 137, emphasis added.

<sup>18</sup> Para 116.

<sup>19</sup> Para 19.

<sup>20</sup> Para 64.

<sup>21</sup> Para 66, per Lord Neuberger.

<sup>22</sup> Para 130, per Lord Kerr.

<sup>23</sup> Para 96.

<sup>24</sup> Para 100.

What matters is that the procedure was used at all. One is left with the strong impression that the Supreme Court was, if not quite tricked, then certainly denied, deliberately and cynically, sufficient context as to permit it to be confident that nothing in the closed judgment would influence its decision, and so no injustice done by deciding the appeal without seeing it. Unattractive though the Treasury's conduct may have been, it bore fruit. The executive can now point to a clear decision of the Supreme Court establishing the permissibility of a CMP in that court, rather than a series of persuasive but nevertheless obiter remarks on the topic, which is all that this case would have provided had the court decided that there was no need to use a CMP and so no need to decide the abstract question of whether one might be permitted at all. The Rubicon has been crossed, and for no good reason.<sup>25</sup>

#### D. BANK MELLAT'S LEGACY FOR OPEN JUSTICE

This precedent does not exhaust the significance of Bank Mellat (No.1), and fortunately the case's other legacy is a more auspicious one. Indeed, what significance it might have beyond the obvious derives from Lord Neuberger's attempt to mitigate the effect of the court's decision here. Having been 'fooled' once, he seems to seek to ensure that such a significant departure from open justice would not happen again so unnecessarily, providing guidance as to how and when CMPs should be used – in general, and not merely in proceedings under the 2008 Act.<sup>26</sup> Had the guidance – which, *inter alia*, instructs appellate courts to be “robust about acceding to applications to go into closed session” – been followed in the present case, there would have been no CMP in the Supreme Court.<sup>27</sup> Its status in general is intriguing. The many situations in which CMPs are used can be divided into those engaging the subject's right to liberty, in which a 'gist' of the allegations must be provided so as to permit the individual to give effective instruction to counsel, and those in which, the right to liberty not being engaged, there is no such requirement.<sup>28</sup> The Bank Mellat guidance would seem, however, to lay down requirements regarding closed judgments which equal, and might in some cases surpass, that 'gist' minimum, even in circumstance in which the ECHR has not hitherto required a 'gist'. Though couched in context-sensitive language, addressed to what is possible in the specific circumstances of a case in which CMP is sought or used, it may transpire that Lord Neuberger's judgment eventually renders Bank Mellat a more important decision for the promotion of open justice than was *Al-Rawi* itself, given that it applies even where Parliament has provided explicit statutory authority for the use of CMP.

The guidance in this sense works against the strong initial impression of Bank Mellat (No. 1) as an exercise in futility: the relatively minor futility of considering the closed judgment and the far more consequential futility of establishing, in order to permit such consideration, a precedent which dilutes the stand taken in *Al-Rawi*. This does not mean, however, that the decision will need to shoulder the blame for all future use of the CMP in the Supreme Court: it resolves the question of such use on the authority of the CRA, but elsewhere explicit provision is made. The Justice and

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<sup>25</sup> Para 88, per Lord Hope.

<sup>26</sup> Para 67-74.

<sup>27</sup> Para 74.

<sup>28</sup> *Home Office v Tariq* [2011] UKSC 35.

Security Act 2013, which received the Royal Assent in the period between argument and decision in *Bank Mellat*, includes the Supreme Court amongst those in which 'relevant civil proceedings' might take place and for which the relevant rules of court are therefore required to provide for the opportunity to secure a CMP.<sup>29</sup> Even the decision in *Bank Mellat* had gone the other way, therefore, it would have represented a more lasting victory for the principle of legality than for the principle of open justice, upon which legislative developments continue to trample. Parliament would have had to pay the political price for the continued expansion of infringements of open justice but that price, it seems, is not a high one. From the Scottish perspective, the question is settled. The 2013 Act, like the 2008 Act before it, applies unambiguously to proceedings in the Court of Session and the Rules of the Court of Session have been amended in order permit the use of CMP in proceedings under the 2008 Act.<sup>30</sup>

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<sup>29</sup> s 6 (11). The Terrorism Prevention and Investigation Measures Act 2011, on the other hand, does not make specific reference to the Supreme Court: s 30 (1) and Schedule 4, para 1

<sup>30</sup> Chapter 96, inserted by the Act of Sederunt (Rules of the Court of Session Amendment No. 6) (Counter-Terrorism Act 2008) 2008.