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# 'TWO STEPS BACKWARD, ONE STEP FORWARD'—THE CAUTIONARY TALE OF *BANK MELLAT (NO 1)*

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## 1 Introduction

Since 27 November 2008, Part 6 of the Counter Terrorism Act 2008 (the 'CTA') has conferred new powers upon UK Courts ('domestic Courts').[1] In particular, subject only to the need to have its decisions properly reviewed,[2] a domestic Court determining financial restrictions proceedings or an appeal thereof,[3] may in certain circumstances now require all or part of the relevant proceedings to take place in the absence of any party[4] with the exception of Treasury Counsel.[5] In addition, such Courts may also prevent the reasons for judicial decisions arising from such proceedings from being publicly disclosed.[6]

In short, Part 6 CTA defines the circumstances in which domestic Courts hearing qualifying cases may adopt a Closed Material Procedure (a 'CMP').[7] Whilst such proceedings were previously open for restricted parties to attend, hear the case against them, bring counter-submissions and ultimately be judged in public, the introduction of the CMP means that this situation is no longer automatically the case.[8] Should the Court consider it necessary to protect the public interest,[9] the State may now argue all or part of its case entirely in private

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[1] Counter Terrorism Act 2008 s 100(2).

[2] Ibid, s 66(2)(a).

[3] Ibid, s 63.

[4] Ibid, s 66(4)(b).

[5] Ibid, s 66(5).

[6] Ibid, s 66(4)(a).

[7] See e.g. *Al-Rawi v Security Services* [2011] UKSC 34 (*'Al-Rawi'*).

[8] See however *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA 65; see also Youth Justice and Criminal Evidence Act 1999.

[9] Above n 1 s 66(2)(b).

with the restricted party being represented only by a special advocate,[10] and also obtain judicial decisions based on such evidence in a 'closed judgment', a document which is entirely inaccessible to others.[11]

On 21 March 2013, the full scope of this power was considered by the Supreme Court in the case of *Bank Mellat (No 1) v HM Treasury* ('*Bank Mellat*').[12] In particular, the Court was asked to determine whether it could itself adopt a CMP despite the relevant provisions in Part 6 CTA explicitly conferring such a power on only the High Court, the Court of Appeal and the Court of Session.[13] By a majority of 6 to 3, the Justices held that it could.[14] This was not however due to Part 6 CTA, but instead a result of powers conferred upon the Court by the Constitutional Reform Act 2005 (the 'CRA') permitting it to hear 'any' appeal from a lower Court.[15] It went on to hold, albeit now by a majority of 5 to 4, that it would exercise this power in this case.[16] For the first time in its history therefore, the Supreme Court thereafter conducted a secret judicial hearing. Bank Mellat, its legal team and the public were all formally excluded from attending.[17]

Notwithstanding its notoriety,[18] the decision of the Court that it could adopt a CMP is regarded as unsatisfactory. Having identified less than twelve months previously in *Al-Rawi v Security Services* 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 the court cannot abrogate it in the exercise of its inherent power',[19] it is difficult to justify the Supreme Court so easily debasing that same right using powers in the CRA which likely concern different issues. In any event, it is paradoxical that such general powers can be used to subvert the effect of specific provisions in Part 6 CTA which explicitly answer the question raised. As Lord Reed has argued, 'If

[10] A special advocate may take instructions from his client prior to viewing any secret evidence but may not do so afterward. For more information see House of Commons Constitutional Affairs Committee, 'The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates' (2004-05) HC 323-I, Ch 4.

[11] See e.g. *Al-Rawi,* above n 7, para 35 (Lord Dyson).

[12] *Bank Mellat v HM Treasury (No 1)* [2013] UKSC 38 ('*Bank Mellat UKSC*').

[13] Above n 1 s 73.

[14] Lords Hope, Kerr and Reed dissenting.

[15] *Bank Mellat UKSC*, above n 12, para 37 (Lord Neuberger); Constitutional Reform Act 2005 s 40(2).

[16] Lords Hope, Kerr, Dyson and Reed dissenting.

[17] See UKSC, '*Further Update on Proceedings*' UKSC website, 21 March 2013, <http://www.supreme-court.gov.uk/news/bank-mellat-v-hm-treasury.html> [accessed 16 March 2014].

[18] The decision must surely be included alongside decisions such as *A v Secretary of State for the Home Department* [2004] UKHL 56; *Pepper v Hart* [1993] AC 593; *R v Secretary of State for Transport: Ex Parte Factortame Ltd (No 2)* [1991] 1 AC 603 as amongst the most famous in English law.

[19] Above n 7, para 35 (Lord Dyson). See also *R v Davis* [2008] UKHL 36.

Parliament had intended the same procedures [CMP] to be applied in this court, it would surely have said so.'[20] The minority view, set out by Lords Hope, Kerr and Reed, is therefore identified as preferable.

Despite disagreeing with the decision itself however, the long-term impact of *Bank Mellat* may nonetheless be more positive than first appears. Given that the Justice and Security Act 2013 has since expressly amended Part 6 CTA to confer the power to adopt a CMP upon the Supreme Court[21] and significantly expanded its potential use to include all civil hearings,[22] the lasting legacy of the decision is instead more likely to be found in the rules set out by the Court concerning the future judicial use of CMP.[23] This guidance, undoubtedly reflecting wider judicial disquiet with the procedure as a whole,[24] is highly restrictive, both in terms of how the procedure is to operate in practice and when it should be adopted at all. Whilst legally therefore, the decision in *Bank Mellat* widens the categories of domestic Courts that can adopt a CMP, in practice it will inevitably lead to its reduced use by such Courts hereafter.

# 2 Bank Mellat–Background

## 2.1 Factual Overview

Bank Mellat was a large commercial bank with over 1800 branches and 20 million customers. Although it operated primarily in Iran, around 25 per cent of its business was in the UK.[25] In October 2009, following concerns that the Bank was involved in the financing of nuclear proliferation activities by the Iranian Government, the UK passed the Financial Restrictions (Iran) Order 2009.[26] This required that from 12 October 2009,[27] no relevant person, in particular any person operating in the financial sector,[28] could enter into, or continue to participate in, any transaction or business relationship with Bank Mellat or its representatives.[29] The effect of the Order was, in essence, to shut down the UK

[20] *Bank Mellat*, above n 12, para 134 (Lord Reed).
[21] See Justice and Security Act 2013 s 6(11)(d).
[22] Ibid s 6(1).
[23] Above n 12, paras 67–4 (Lord Neuberger), see also paras 89–97 (Lord Hope).
[24] Ibid, para 51 (Lord Neuberger).
[25] Ibid, para 12 (Lord Neuberger).
[26] Financial Restrictions (Iran) Order 2009/2725.
[27] Ibid, Art 1.
[28] Ibid, Art 2; Counter Terrorism Act 2008 Schedule 7 Paras 4 and 6.
[29] Financial Restrictions (Iran) Order 2009/2725, Art 4.

based operations of the Bank. It also 'damaged the Bank's reputation and goodwill both in this country and abroad'.[30]

## 2.2 The case before the lower courts

### 2.2.1 *The High Court*

Given its impact upon its business activities, Bank Mellat immediately challenged the validity of the Order before the High Court.[31] It submitted that the Order breached rules of natural justice as well as Article 6 and also Article 1 Protocol 1 ECHR.[32] During the hearing, the Government argued 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.'[33] Mitting J therefore adopted a CMP so as to allow such evidence to be adduced. The challenge to the Order was ultimately dismissed on all grounds. Whilst a closed judgment was produced, it was indicated that the evidence considered within the CMP had not been determinative,[34] with Mitting J referring to its contents at least twice in his open judgment.[35]

### 2.2.2 *The Court of Appeal*

The case was subsequently appealed to the Court of Appeal and heard before Elias, Pitchford and Kay LJJ.[36] Although largely conducted in open Court, a short closed hearing was again held, this time to enable the Court to consider the closed judgment of Mitting J.[37] The appeal was also dismissed on all grounds, albeit with Elias LJ dissenting in part. In contrast to the High Court however, the Court of Appeal did not issue a closed judgment. Kay LJ stated that although the Court had 'held a brief closed hearing in the course of the appeal, [it was not] necessary to refer to it or to the closed judgment of Mitting J.'[38]

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[30] *Bank Mellat UKSC*, above n 12, para 12 (Lord Neuberger).
[31] *Bank Mellat v HM Treasury* [2010] EWHC 1332 ('*Bank Mellat EWHC*').
[32] *European Convention on Human Rights and Fundamental Freedoms 1950*, opened for signature 4th November 1950, 213 *UNTS* 221, entered into force 3 September 1953.
[33] *Bank Mellat UKSC*, above n 12, para 13 (Lord Neuberger).
[34] Ibid, para 66 (Lord Neuberger.
[35] See *Bank Mellat EWHC*, above n 31, para 16 (Mitting J).
[36] *Bank Mellat v HM Treasury* [2011] EWCA 1 ('*Bank Mellat EWCA*').
[37] *Bank Mellat UKSC*, above n 12, para 13 (Lord Neuberger).
[38] *Bank Mellat EWCA*, above n 36, para 83 (Kay LJ).

# 3 Bank Mellat before the Supreme Court–'Two Steps Backward'

As a result of the failure of Bank Mellat to have the Order invalidated before the lower domestic Courts, the Bank finally appealed the case to the Supreme Court. Heard between 21 and 24 March 2013, the first day of argument was devoted exclusively to considering whether the Supreme Court could and if so, whether it should, adopt a CMP in order to consider the closed judgment of Mitting J. By a majority of 6 to 3, the Court determined that it could indeed adopt a CMP.[39] It thereafter went on to hold, albeit now only by a majority of 5 to 4, that it would in fact do so in this case.[40] The appeal against the Order was ultimately allowed. The Court was however clear that evidence considered during the CMP did not influence this outcome and it did not itself produce a closed judgment. As Lord Neuberger explained,

> 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.[41]

## 3.1 The majority approach—An appeal lies to the Court from 'any' order or judgment of the Court of Appeal

The majority judgment of the Supreme Court in this case was given by Lord Neuberger, with whom Lady Hale, Lord Clarke, Lord Sumption and Lord Carnwath all agreed. In their view, the question of whether the Supreme Court could adopt a CMP could be decided simply on the basis that an 'appeal lies to the Court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings'.[42] Since the Court was also empowered to 'determine any question necessary … for the purposes of doing justice'[43] and to ensure that it was 'accessible, fair and efficient',[44] it followed that the Supreme Court must be able to adopt a CMP at least in cases in which it was required to consider closed

[39] Lords Hope, Kerr and Reed dissenting.
[40] Lords Hope, Kerr, Dyson and Reed dissenting.
[41] Above n 12, para 66 (Lord Neuberger).
[42] Constitutional Reform Act 2005 s 40(2).
[43] Ibid s 40(5).
[44] Ibid s 45(3).

judgments from lower Courts in order to adequately consider the information contained within.[45]

### 3.2 The minority approach—If Parliament had intended the CMP to be adopted by the Supreme Court it would have said so

By contrast, three Justices, in particular Lords Hope, Kerr, and Reed, dissented. In their view, since a CMP clearly interfered with the right to a fair trial, explicit statutory authorisation was required to enable its adoption by the Supreme Court. Lord Kerr for example affirmed the approach of the Court in the recent decision in *Al-Rawi,* which had held 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 the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that'.[46] Similarly, Lord Reed affirmed the general presumption that Parliament does not generally intend to abrogate fundamental rights.[47] Since Part 6 CTA did not contain provision for the Court to adopt a CMP and the CRA was passed without contemplation of CMP at all, such authorisation did not exist. As Lord Reed succinctly remarked, 'If Parliament had intended the same procedures [CMP] to be applied in this court, it would surely have said so.'[48]

### 3.3 *Analysis*

The majority approach in *Bank Mellat* is clearly built on ideas of pragmatism rather than of principle.[49] As Lord Neuberger was quick to note, '[t]he strength of [the majority approach] is reinforced when one considers the possible outcomes if the Supreme Court cannot consider a closed judgment (or the closed part of a judgment) under a closed material procedure.'[50] In particular, four possibilities were considered. Firstly, the appeal could not be heard at all which would directly conflict with s40(2) CRA. Secondly, the appeal could be heard but entirely in open Court which would undermine the goal of Part 6 CTA. Thirdly, the appeal could be heard but in the absence of closed material which would be impossible in cases

[45] Above n 12, para 37 (Lord Neuberger).
[46] Ibid, paras 102–104 (Lord Kerr).
[47] Ibid, para 135 (Lord Reed).
[48] Ibid, para 134 (Lord Reed).
[49] K Hughes, 'Judicial review and closed material procedure in the Supreme Court' (2013) 72(3) *Cambridge Law Journal* 491, 493.
[50] *Bank Mellat,* above n 12, para 38 (Lord Neuberger).

in which most or all of a lower Court judgment was closed. Finally, the Court could be obliged to either automatically dismiss or to automatically allow the appeal without hearing argument. In the view of Lord Neuberger, each of these approaches was inherently unsatisfactory.[51]

Whilst it would at least arguably be odd as a matter of practice to adopt any of these courses, not least since CMP is clearly available in other domestic Courts, a number of distinct but inevitably inter-related factors mean that the minority approach is (at least) legally preferable. Most importantly, by simply providing 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', it is difficult to see that s40(2) CRA contains the power the majority prescribe to it. At best, s40(2) CRA simply provides that it must be possible to hear an appellate case in the Supreme Court. It is by contrast silent (at least on face value) as to what form such a hearing should take.

Since no words expressly authorising the Court to adopt a CMP can be found in s40(2) CRA, any such power can only be conferred upon it as a result of judicial implication. As Lord Hutton has previously noted in *B v DPP*, in order for such a result to occur, such implication must be necessary and not merely reasonable.[52] This threshold is a very difficult standard to satisfy. As Lord Hobhouse subsequently explained in *Morgan Grenfell*,

> 'A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.'[53]

Two main reasons explain why no such implication should be understood as arising in this context. Firstly, the precise question of which Courts can make 'rules of Court' in order to adopt a CMP is specifically and explicitly set out in

[51] Ibid, paras 39-42 (Lord Neuberger).

[52] *B v Director of Public Prosecutions* [2000] 2 AC 428, 481 (Lord Hutton).

[53] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, para 45 (Lord Hobhouse); see also *Al-Rawi v Security Services,* above n 7, para 35 (Lord Dyson); *R v Secretary of State, Ex p Simms* [2000] 2 AC 115, 132 (Lord Hoffmann).

detail in Part 6 CTA. In particular, such a power is explicitly stated to be available only to the High Court, the Court of Appeal and the Court of Session.[54] Since it is a general canon of statutory interpretation that specific law prevails over the general, it is difficult to see how the effect of a collection of what even Lord Neuberger concedes are 'detailed procedures'[55] in Part 6 CTA concerning the very issue at hand can be impliedly subverted by a 'general'[56] provision found in s40(2) CRA.

Nor can any assistance in this regard be derived from the Supreme Court Rules.[57] It is true, as Lord Neuberger argues, that at the time the CTA was being drafted its authors would 'have known that the Supreme Court Rules had yet to be promulgated, and could have assumed that they would provide for a closed material procedure—as indeed they do in Supreme Court Rule 27(2).'[58] Despite this, as he also notes, '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.'[59] As Lord Hope argued therefore, '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.'[60]

Secondly, even if s40(2) CRA is prima facie capable of conferring the power suggested by the majority, it is difficult to see that it is capable of providing sufficient authorisation to override the fundamental right to confront one's own accusers. To this end, it is important to consider the statutory gymnastics utilised in the majority approach. In particular, a 'general'[61] power to hear appeals from lower Courts in s40(2) CRA which is silent as to the form such appeals can take and likely did not even consider CMP when drafted must prevail over 'a fundamental element of the common law right to a fair trial'[62] and a 'basic principle of justice'.[63] It is hard to see therefore how this can satisfy the 'basic principle that fundamental rights can only be overridden by a statutory provision through express words or by necessary implication'.[64]

[54] Counter Terrorism Act 2008 s73.
[55] *Bank Mellat UKSC,* above n 12, para 58 (Lord Neuberger).
[56] Ibid, para 135 (Lord Reed).
[57] The Supreme Court Rules 2009/1603.
[58] *Bank Mellat UKSC,* above n 12, para 57 (Lord Neuberger).
[59] Ibid, para 45 (Lord Neuberger).
[60] Ibid, para 85 (Lord Hope).
[61] Ibid, para 135 (Lord Reed).
[62] *Al-Rawi*, above n 7, para 35 (Lord Dyson).
[63] *Bank Mellat UKSC,* above n 12, para 133 (Lord Reed).
[64] Ibid, para 55 (Lord Neuberger).

The correctness of this view is further clarified if it is considered that contrary to the approach adopted by the majority, there are in fact many ways in which the Supreme Court could hear and consider cases involving sensitive evidence without utilising CMP and therefore restrict the right to a fair trial in a less fundamental manner. As Lord Reed notes for example, this includes simply allowing the Court to 'examine the material for itself, without its being canvassed during the hearing'[65] or determining the appeal based only on the publicly available material as it has done in previous cases of this kind.[66] Similarly, it also ignores that such information can in any event be adduced before any domestic Court with a significant degree of protection of both its sources and content utilising Public Interest immunity ('PII') and special measures procedures.[67] It can hardly be necessary therefore to imply such a power into s40(2) CRA.

## 4 Bank Mellat in the Future–'One Step Forward'

Despite disagreeing with the decision itself, it is nonetheless argued that the long-term impact of the decision in *Bank Mellat* may be more positive than first appears. In particular, given that the Justice and Security Act 2013 has both amended Part 6 CTA to expressly include the Supreme Court in the list of domestic Courts upon which the power to adopt a CMP has been conferred[68] and expanded its potential use to all civil hearings,[69] its lasting legacy is instead more likely to be the guidelines set out by the Court on the future use of CMP.[70] This guidance, undoubtedly reflecting judicial disquiet over the power as a whole,[71] is highly restrictive, both in terms how a CMP is to be conducted in practice and when it should be adopted at all. Accordingly, whilst legally the decision in *Bank Mellat* widens the categories of domestic Courts that can adopt a CMP, it will inevitably lead to its reduced use in practice hereafter.

[65] Ibid, para 137 (Lord Reed).
[66] *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10.
[67] See e.g. Youth Justice and Criminal Evidence Act 1999.
[68] See Justice and Security Act 2013 ss6(11)d.
[69] See Justice and Security Act 2013 ss6(1).
[70] *Bank Mellat UKSC,* above n 12, paras 67-74 (Lord Neuberger), see also paras 89-97 (Lord Hope).
[71] Ibid, para 51 (Lord Neuberger).

## 4.1 Advice for Trial Courts

The first part of the guidance set out by the Supreme Court is aimed at Trial Courts, most notably their production of closed judgments. In essence, it requires that Trial Judges give as much information about the closed material as possible in their open judgment, documents which must clearly identify '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'.[72] As Carnwath LJ stated in *AT v Home Secretary* for example, '[t]he open judgment must stand on its own merits. Where reliance is placed on closed material to determine an issue of significance, that needs to be made clear in the judgment, and the judge needs to satisfy himself that the subject has had adequate notice of the points against him.'[73]

## 4.2 Advice for Appellate Courts

The second part of the guidance set out by the Supreme Court is aimed at Appellate Courts. In particular, it is made clear that although a closed hearing should occur 'if it is strictly necessary to fairly determine the appeal',[74] Courts are 'under a duty to avoid a CMP if that can be achieved.'[75] In this regard, it is important to note that in the view of the Court 'the onus [i]s on the Treasury to show that this [(i.e. the adoption of a CMP)] was necessary'[76] and that this burden represents 'a high standard'[77] that will need to be specifically satisfied in each case.

## 4.3 Advice for parties and their legal representatives

The final part of the guidance set out by the Supreme Court is aimed at the parties in cases in which CMP's are adopted, their legal representatives and any special advocate appointed to act on their behalf. In particular, counsel in such cases are reminded not to push for the adoption of a CMP unnecessarily and that the opinion of the special advocate will be given 'close attention'[78] on this issue. Similarly, the points at issue in any CMP should be narrowed down as far

[72] Ibid, para 68 (Lord Neuberger).
[73] *AT v Secretary of State for the Home Department* [2012] EWCA Civ 42, para 51 (LJ Carnwath).
[74] *Bank Mellat UKSC,* above n 12, para 70 (Lord Neuberger).
[75] Ibid.
[76] Ibid, para 89 (Lord Hope).
[77] Ibid, para 90 (Lord Hope).
[78] Ibid, para 92 (Lord Hope).

as possible beforehand in order to reduce the amount of time the Court must spend in a secret hearing.[79] Finally, a basic gist of any evidence adduced (either in Court or in a closed judgment) should be provided to all restricted parties in so far as this is possible.[80]

### 4.4 *Analysis*

The guidance set out by the Supreme Court in *Bank Mellat* is undoubtedly restrictive and will underpin the reduced adoption of a CMP by domestic Courts in the future. This will help to ensure that such cases are 'exceptional [and not] …routine'[81] and permit a more effective protection of the right to a fair trial in the vast majority of cases. Where a CMP is in fact adopted, it will also likely lead to more careful consideration of which evidence is adduced before domestic Courts in such circumstances and which is placed by Judges in a closed but not an open judgment. As a consequence of this development, cases involving the adoption of a CMP will therefore inevitably be more open and transparent, with more proceedings ultimately heard and judged in front of both all the relevant parties and the public at large.

In addition, the guidance provided will also likely aid such values indirectly, most notably by allowing appellate Judges to determine whether or not 'convincing reasons … as to why closed material should be looked at'[82] exist in the first place. In *Bank Mellat* for example, minimal information was provided to the Supreme Court concerning the contents or relevance of the closed judgment prior to a CMP actually being adopted. It was therefore virtually impossible for the Court to determine if such recourse was actually needed in the given case. As Lord Hope explained, 'It seemed reasonable to ask how looking at the closed judgment would assist … but the court was provided with no answer as to how it might do so.'[83] On any analysis, this situation is unsatisfactory. Its future reduction must therefore be a positive development.

The true effect of the guidance will of course ultimately turn, at least in part, based on its interpretation by the Judges and advocates in cases in which a CMP may potentially be adopted. Whilst to some extent this constitutes an unknown quantity, the general tone of the guidance suggests wider disquiet

[79] Ibid, para 72 (Lord Neuberger).
[80] Ibid.
[81] Ibid, para 145 (Lord Dyson).
[82] Ibid.
[83] Ibid, para 95 (Lord Hope).

with the procedure, as does wider comment on this issue by both Judges and advocates.[84] Taken together, this suggests that a CMP will in fact be adopted on a more restricted basis hereafter. At a judicial level, a clear example of this can be seen in the statement issued by the Supreme Court in *Bank Mellat* once it had decided that it would adopt a CMP in this specific case. It stated that;

> 'No judge can face with equanimity the prospect of a hearing, or any part of a hearing, which is not only in private, but involves one of the parties not being present or represented at the hearing and not even knowing what is said either at the hearing or in a judgment in so far as it discusses what was said or produced by way of evidence at the closed hearing.'[85]

A similar approach can also be seen amongst advocates. In response to the proposed expansion of the CMP by the (then) Justice and Security Bill for example, a collection of special advocates, the very persons who are pivotal to the actual use of CMP, forcefully argued that;

> 'We remain of the view we expressed in our response to the consultation (and endorsed by the Joint Committee on Human Rights): that CMPs are inherently unfair and contrary to the common law tradition; that the Government would have to show the most compelling reasons to justify their introduction; that no such reasons have been advanced; and that, in our view, none exists.'[86]

## 5 Conclusion

The majority approach in *Bank Mellat (No 1)* is undoubtedly understandable given the general circumstances of the case and the view of Lord Neuberger that no other way of hearing the case exists. Nonetheless, it is dubious whether the relevant statutory authorisation necessary is in fact present. The general language of s40(2) CRA likely concerns a different point to that at issue and in any event,

[84] See e.g. Al-Rawi v Security Services [2010] EWCA Civ 482, para 30 (Lord Neuberger).

[85] UKSC, '*Further Update on Proceedings*' (2013) available at http://www.supremecourt.gov.uk/news/bank-mellat-v-hm-treasury.html.

[86] Joint Committee on Human Rights, '*Special Advocates Memorandum on the Justice and Security Bill*' (2012), para 3.

the existence of an alternative specific and detailed statutory regime in Part 6 CTA which answers the precise question considered by the Court must be taken to provide at least the primary rules concerning the scope of the CMP. For this reason alone, the minority approach of Lords Hope, Kerr and Reed on this issue is undoubtedly to be preferred.

Even if s40(2) CRA is prima-facie capable of conferring such a power, the majority are also undoubtedly too quick to obviate 'a fundamental element of the common law right to a fair trial'[87] and a 'basic principle of justice'[88] on the basis of a 'general'[89] power to hear appeals from lower Courts which likely did not even consider CMP when being drafted on the basis of practical efficiency. This suggests an overly relaxed attitude within the Supreme Court to the protection of fundamental civil liberties, not least given the array of less intrusive possibilities available to hear cases of this kind, a number of which the Court has used previously. *Bank Mellat* must therefore be considered unsatisfactory. As Hughes has noted, the case sadly sets 'a deeply troubling precedent for construing a power to erode constitutional principles of openness in court proceedings from pragmatic need and statutory omission.'[90]

Despite this, the long-term impact of the *Bank Mellat* case will nonetheless likely be more positive than first appears. In particular, given that the Justice and Security Act 2013 has both amended Part 6 CTA to expressly include the Supreme Court in the list of domestic Courts upon which the power to adopt a CMP has been conferred[91] and expanded its potential use to all civil hearings,[92] the lasting legacy of the decision is instead more likely to be the guidelines set out by the Court on CMP's future use.[93] This guidance, reflecting judicial disquiet over the procedure as a whole,[94] is highly restrictive, both in terms how a CMP is to be conducted in practice and when it should be adopted at all. Whilst legally therefore the decision widens the categories of domestic Courts that can adopt a CMP, in practice it will inevitably lead to a reduced use of the power by such Courts hereafter, undoubtedly a positive result for all.

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[87] *Al-Rawi,* above n 7, para 35 (Lord Dyson).
[88] *Bank Mellat UKSC*, above n 12, para 133 (Lord Reed).
[89] Ibid, para 135 (Lord Reed).
[90] Hughes, above n 49, 493.
[91] Justice and Security Act 2013 ss6(11)d.
[92] Justice and Security Act 2013 ss6(1).
[93] *Bank Mellat UKSC*, above n 12, paras 67-74 (Lord Neuberger), see also paras 89-97 (Lord Hope).
[94] Ibid, para 51 (Lord Neuberger).