Trinity Term
[2013] UKSC 39
On appeal from: [2011] EWCA Civ 1

JUDGMENT

Bank Mellat (Appellant) *v* Her Majesty's Treasury (Respondent) (No. 2)

before

Lord Neuberger, President
Lord Hope, Deputy President
Lady Hale
Lord Kerr
Lord Clarke
Lord Dyson
Lord Sumption
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

19 June 2013

Heard on 19, 20 and 21 March 2013

Appellant
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Amy Rogers
Dr Gunnar Beck
(Instructed by Zaiwalla and Co)

Respondent
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Intervener
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LORD SUMPTION (with whom Lady Hale, Lord Kerr, and Lord Clarke agree in whole; Lord Neuberger and Lord Dyson agree only on the procedural grounds, Lord Carnwath only on the substantive grounds)

Introduction

1. This appeal is about measures taken by H.M. Treasury to restrict access to the United Kingdom's financial markets by a major Iranian commercial bank, Bank Mellat, on the account of its alleged connection with Iran's nuclear weapons and ballistic missile programmes.

2. The proliferation of nuclear weapons is an international issue of great importance to the security of the United Kingdom and the international community. For a number of years, Iran has had a major industrial programme which the United Kingdom, along with the rest of the international community, believes to be directed to the development of the technical capability to produce nuclear weapons and to the improvement of its ballistic missile capabilities. Between 2006 and 2008 the United Nations Security Council adopted a number of resolutions under Article 41 of the United Nations Charter, which deals with threats to international peace and security. Security Council Resolution 1737 (2006) called on Iran to suspend various proliferation-sensitive nuclear activities, and called on states to take measures to control the trade in certain critical materials, components, equipment and services. Paragraph 12 of this Resolution also required states to freeze the assets in their national territory of a number of persons or organisations identified in Annex I as being involved in Iran's nuclear and ballistic missile programmes. Resolution 1747 (2007) extended these provisions to a number of additional persons and organisations identified in Annex I to the new resolution. These included entities providing ancillary services to Iran's nuclear and armaments industries, among them two banks. Security Council Resolution 1803 (2008) strengthened the measures required by Resolutions 1737 and 1747. In relation to the provision of banking and other financial services to support Iran's weapons programmes, the new resolution called upon all states to

> "exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad, in order to avoid such activities contributing to the proliferation sensitive nuclear activities, or to the development of nuclear weapon delivery systems."

3. There are two principal legislative instruments available to the United Kingdom government for the purpose of restricting the operations in the United Kingdom of Iranian financial institutions associated with the country's nuclear and ballistic missiles programmes. The first, which is not directly in point in these proceedings but is an important part of the background, is the Iran (Financial Sanctions) Order 2007 SI 2007/281. This is an Order in Council made under section 1 of the United Nations Act 1946, which gives effect to the asset freeze provisions of Security Council Resolutions 1737 and 1747. Article 6 of the Order freezes the assets in the United Kingdom of the entities identified in Annex I of those resolutions.

4. The second, which is the instrument directly relevant to the present appeal, is Section 62 of the Counter-Terrorism Act 2008, which gives effect to Schedule 7. Schedule 7 is not exclusively concerned with Iran or with nuclear proliferation. It empowers the Treasury to make a direction by statutory instrument in situations specified in paragraph 1, involving three categories of "risk" associated with a foreign country outside the European Economic Area. The relevant categories of risk are those arising from terrorist financing, money laundering and nuclear proliferation. The risk of nuclear proliferation is dealt with in paragraph 1(4), which imposes a statutory condition that

> "(4) ...the Treasury reasonably believe that
>
> the development or production of nuclear, radiological, biological or chemical weapons in the country, or
>
> the doing in the country of anything that facilitates the development or production of any such weapons,
>
> poses a significant risk to the national interests of the United Kingdom."

5. If the conditions in paragraph 1 as to the existence of a relevant risk are satisfied, the Treasury may give a direction to one or more persons "operating in the financial sector" (essentially credit and financial institutions) regulating their dealings with any "designated person". A "designated person" includes any person carrying on business in or resident or incorporated in the foreign country in question: see paragraph 9(1). The direction may require the financial institutions to whom it is addressed to exercise an enhanced customer due diligence so as to obtain information about the designated person and those of its activities which contribute to the risk (paragraph 10). It may require enhanced monitoring

(paragraph 11) or systematic reporting (paragraph 12) to the same end. But the most draconian provision is paragraph 13, which provides that the direction may require those to whom it is addressed "not to enter into or continue to participate in... any transaction or business relationship with a designated person." Under paragraph 16(4), any direction made in the exercise of these powers expires a year after it is made. A direction made under Schedule 7 must be contained in an order: see paragraph 14(1). By section 96, any order under the Act must be made by statutory instrument.

6. It will be apparent that for designated persons with a substantial business in the United Kingdom, especially if they are banks, the exercise of the power conferred by paragraph 13 will have extremely serious and possibly irreversible consequences. The Act provides three relevant safeguards against the unwarranted use of this power. First, under Schedule 7, paragraph 14(2), if the direction contains requirements of a kind mentioned in paragraph 13 of Schedule 7 (limiting or ceasing business with a designated person) it must be laid before Parliament after being made and unless approved by affirmative resolution within 28 days will cease to have effect at the end of that period. Second, Schedule 7, paragraph 9(6) provides that the requirements imposed by a direction must be proportionate having regard, in the case within paragraph 1(4) to the risk referred to in that paragraph. This means the risk to the national interests of the United Kingdom presented by the development of nuclear weapons, radiological, biological or chemical weapons in the foreign country. Third, section 63 of the Act provides a special procedure by which a person affected by any "decision" of the Treasury, including a decision under Schedule 7, may apply to the High Court to set it aside, applying the principles applicable on an application for judicial review.

7. On 9 October 2009 the Treasury made an order, the Financial Restrictions (Iran) Order 2009 SI 2009/2725, which came into force three days later on 12 October. It was made under Schedule 7, paragraph 13 of the Act and required all persons operating in the financial sector not to enter into or to continue to participate in any transaction or business relationship with Bank Mellat or any of its branches or with a shipping line called IRISL. The direction was laid before Parliament on 12 October 2009. It was approved by the Delegated Legislation Committee of the House of Commons on 28 October and by the Grand Committee of the House of Lords on 2 November.

8. Under Schedule 7, paragraph 16(4), the direction expired automatically after a year, on 8 October 2010. By that time it had been effectively superseded by the extension to Bank Mellat of a general asset freeze under EU legislation, which occurred on 26 July 2010. On 29 January 2013, however, the application of the EU measures to Bank Mellat was annulled by the General Court, primarily on the ground of the insufficiency of the stated reasons for it. This decision is currently under appeal to the Court of Justice of the European Union and is suspended

pending that appeal. Subject to that, there are no restrictions on Bank Mellat's business currently in force.

9. The object of the direction, as the Treasury acknowledges, was to shut the Bank out of the UK financial sector, and that has been its effect. Before the direction, the Bank had a substantial international business, much of it international trade finance transacted through London. In the year to March 2009, it issued letters of credit with an aggregate value of about US$11 billion, of which about a quarter represents letters of credit in respect of business transacted through the United Kingdom. The Bank's own estimate of its revenue losses is about US$25 million a year. In addition, the Bank has been prevented from drawing on 183 million euros of call and time deposits with its part-owned subsidiary in London. Important banking relationships have been lost to other banks. The judge found that since the direction, the bank has been unable to make profitable use of the goodwill which it had established in the United Kingdom, which was a "possession" for the purpose of article 1 of the First Protocol to the European Convention on Human Rights. He held that "on any view the effect has been substantial, and suffices to require all of the Bank's challenges to the Order to be addressed and determined." This much is not in dispute.

The present proceedings

10. On 20 November 2009, Bank Mellat applied in the High Court under section 63 of the Counter-Terrorism Act 2008 to have the direction set aside on grounds which fall under two heads. In the courts below, these were called the procedural and the substantive grounds. The procedural ground is that the Treasury failed to give the bank an opportunity to make representations before making the order. The Bank had no express statutory right to such an opportunity, but it contends that such an opportunity was required at common law and by article 6 and article 1, Protocol 1 of the European Convention on Human Rights. The substantive grounds are that the decision was irrational, disproportionate and discriminatory, that the Treasury failed to give adequate reasons for making it, and that their reasons were vitiated by irrelevant considerations or mistakes of fact. In the High Court, Mitting J dismissed the bank's application under both heads. The Court of Appeal (Maurice Kay, Elias and Pitchford L.JJ) dismissed the appeal, unanimously in the case of the substantive grounds, by a majority (Elias LJ dissenting) in the case of the procedural ground.

The Treasury's reasons

11. Bank Mellat is the only Iranian bank to have been designated under Schedule 7 of the Act. It is, however, only part of the Iranian banking sector. According to a staff report of the International Monetary Fund put before us by the

Treasury, Iran has a comparatively large banking sector. It comprises 26 banks, including eight large general commercial banks, four of which are publicly owned and the other four (among them Bank Mellat) relatively recently privatised. The Treasury's evidence is that it is difficult for Iranian banks to access the United Kingdom's financial markets directly, because few banks in the United Kingdom are willing to deal with them or hold correspondent accounts for them in view of the risks involved. It is easier for Iranian banks to do business in the United Kingdom through UK incorporated subsidiaries, which do not present the same risks for their counterparties. Five of the eight general commercial banks in Iran have wholly or partly owned subsidiaries in the United Kingdom. They are Bank Mellat, Bank Melli, Bank Sepah, Bank Saderat and Bank Tejarat. Of these, Bank Melli, Bank Sepah and Bank Saderat had wholly owned banking subsidiaries in the United Kingdom. Bank Mellat and Bank Tejarat had a jointly owned banking subsidiary, Persia International Bank Plc ("PIB"), through which they transacted most if not all of their United Kingdom business. At the time of the Treasury direction, some of the Iranian banks with banking subsidiaries in the United Kingdom were restricted under other legislation. Bank Sepah and its UK subsidiary Bank Sepah International Plc were included in Annex I to Security Council Resolution 1747, and were accordingly covered by the asset freeze imposed under the Iran (Financial Sanctions) Order 2007. Bank Melli and its UK subsidiary Bank Melli Plc were subject to a similar asset freeze under EU legislation. On 27 July 2010, some time after the direction relating to Bank Mellat was made, the EU asset freeze was extended to Bank Mellat and PIB as well as to Bank Saderat and its UK subsidiary Bank Saderat Plc which had previously been subject to reporting obligations only. At the same time the EU asset freeze was extended to three other Iranian banks which did not have UK branches or subsidiaries. That left, among banks with a UK presence, only Bank Tejarat, which was finally brought within the EU asset freeze on 24 January 2012.

12. It is abundantly clear from statements made to Parliament when the direction was laid before it that the reason for singling out Bank Mellat from other Iranian banks was that it had been identified as having assisted Iran's weapons programmes by providing banking and financial services to entities involved with them. The explanatory memorandum which accompanied the direction explained it as follows:

> "These restrictions are being imposed in respect of these entities because of their provision of services for Iran's ballistic missile and nuclear programmes. It is considered that a direction to cease business with these entities will contribute to addressing the risk to the UK national interests posed by Iran's proliferation activities."

This was expanded in a written ministerial statement. After explaining why the Treasury considered that the Iranian nuclear programme posed significant risks for the national interests of the United Kingdom, the document continued:

> "We cannot and will not ignore specific activities undertaken by Iranian companies which we know to be facilitating activity identified by the UN as being of concern, particularly where such activities have the potential to affect the UK' s interests.
>
> Of the particular entities in question ... Bank Mellat has provided banking services to a UN listed organisation connected to Iran's proliferation sensitive activities, and been involved in transactions related to financing Iran's nuclear and ballistic missile programme.
>
> The direction to cease business will therefore reduce the risk of the UK financial sector being used, unknowingly or otherwise, to facilitate Iran's proliferation sensitive activities."

In response to a request from the Bank's solicitors for further information about the contents of this statement, the Treasury wrote on 27 October 2009:

> "Iran's nuclear and ballistic missile programmes clearly require financing mechanisms to underpin them, and access to the international banking system remains essential for transactions with foreign suppliers. As set out in the Written Ministerial Statement Bank Mellat has provided banking services to a UN listed organisation connected to Iran's proliferation sensitive activities, and been involved in transactions related to financing Iran's nuclear and ballistic missile programme. The direction prevents Bank Mellat from conducting transactions or business relationships with persons operating in the UK financial sector and therefore restricts the financing mechanisms available to entities involved in lran's nuclear programme and its missile programme. It also protects the UK financial sector from being unknowingly implicated in financing Iran's nuclear programme through transactions with Bank Mellat."

Finally, on 17 December 2009, the Exchequer Secretary to the Treasury answered a number of questions relating to the order in the House of Commons. She said:

> "The first question was on how the Government assess the impact on Iran's proliferation activities. International finance services underpin

> the actions of Bank Mellat and IRISL. Restricting their access to UK financial services will lock them out of a key financial centre, which will make their contribution to Iran's nuclear programme more difficult. Obviously, our action applies to the UK. The Hon Member for Fareham used the word "sanction", but the order is not a sanction on Iran, but a direction for financial institutions in the UK."

And later in the same debate:

> "The restriction targets Bank Mellat and IRISL transactions. Other Iranian banks are not subject to the restrictions. As long as all financial sanctions and relevant risk warnings are complied with, alternative banks may be used, otherwise an application for a licence of exemption may be made to the Treasury."

13. In response to Bank Mellat's proceedings, Mr James Robertson, a senior civil servant at the Treasury, made a witness statement which in its original form was dated 18 December 2009. His statement was subsequently re-served with additional material, after Mitting J had required the Treasury to disclose certain material which they had initially sought to rely on as closed material. In his statement, Mr Robertson provided some of the detail behind the general allegations in the written ministerial statement about Bank Mellat's dealings with a "UN listed organisation connected to Iran's proliferation sensitive activities", and the "transactions related to financing Iran's nuclear and ballistic missile programme". It came down to three points:

(1) The "UN listed organisation" was Novin Energy Company, which had been identified in Annex I of Resolution 1747 as a company which "operates within AEOI and has transferred funds on behalf of AEOI to entities associated with Iran's nuclear programme." AEOI is the Atomic Energy Organisation of Iran. It is an umbrella organisation concerned with the coordination of the programme. It is listed in Annex I of Resolution 1737. Mr Robertson's evidence was that Bank Mellat had "serviced and maintained AEOI accounts mainly through AEOI's financial conduit Novin Energy."

(2) Bank Mellat was said to have provided banking services to senior officials of Iran's "Aerospace Industries Organisation" (or "AIO"), including a Mr Taghizadeh and a Mr Esbati. AIO is not an organisation listed in the Annexes to the Security Council resolutions, but it is the parent of four entities which are listed. Mr Robertson alleged that "senior AIO officials concerned with Iran's ballistic missile programme", by inference including Mr Taghizadeh and Mr Esbati, had

in 2007 and 2008 "used Bank Mellat services to conduct business with companies associated with Iranian procurement attempts".

(3) Between autumn 2007 and spring 2009 the Bank had a banking relationship with a company called Doostan International, which was said to be an intermediary company that had in the past been used by subsidiary organisations of AIO listed in the Security Council resolutions, and which was linked to Iran's nuclear programme.

14. In addition, Mr. Robertson said that the Treasury had been influenced by two wider considerations not directly related to Bank Mellat's alleged role in providing banking services to entities involved in Iran's weapons programmes. One was that it might encourage the United Kingdom financial sector to wind down business with Iran more generally. The other was that it would increase pressure on the Iranian government to comply with its international obligations, by restricting the financial services available to it for procuring material required for its weapons programmes. In this context, Mr Robertson said that it was important to note that although Bank Mellat had been privatised, the government of Iran still directly controlled 20% of its shares and indirectly controlled another 60%.

15. In his open judgment Mitting J made the following findings, which represent at best a very partial acceptance of the Treasury's case on the facts:

(1) Bank Mellat "has in place a mechanism, which it operates conscientiously, to ensure that it does not provide banking services to Security Council designated entities and individuals." This finding reflected the Bank's evidence, which described its due diligence procedures.

(2) Novin Energy Company was a "financial conduit" for AEOI and did facilitate Iran's nuclear weapons programme. But once it was designated in Security Council Resolution 1747, the Bank ran down and eventually terminated its relationship with it.

(3) Doostan International had played a part in the Iranian nuclear weapons programme. The Bank holds accounts for Doostan and for its managing director Mr Shabani, but the Bank had investigated the position in good faith and found nothing unusual or suspicious. Mitting J considered that the position with regard to Doostan "does not greatly matter".

(4) Mitting J was not satisfied on the information available to him that the Bank had provided banking services to the two individuals said to be senior officials of the AIO. Their names are very common in Iran and it had not proved possible to identify them in the Bank's records.

(5) Bank Mellat is not controlled by the Iranian government, which exercises voting rights only in respect of the 20% of the shares which it owns. Nonetheless some pressure would be brought to bear on the Iranian government by the direction.

16. In substance, therefore, Mitting J found that while the Bank had provided banking services to two entities, Novin and Doostan, which were involved in the Iranian nuclear weapons and ballistic missiles programmes, this had happened without their knowledge and in spite of their conscientiously operated procedures to avoid doing so. The judge nevertheless dismissed the Bank's substantive grounds of application because these very facts demonstrated "the risk that is in any event obvious, that however careful the bank may be, the bank's facilities are open to use by entities participating in Iran's nuclear weapons programme." The judge put the point in this way at para 16:

> "The Treasury's case is not that the bank has knowingly assisted Security Council designated entities after designation, or even that it has knowingly assisted entities liable to be designated, but which have not yet been, by providing banking facilities to them, but that it has the capacity to do so, has in one instance done so and is likely to do so in the future. The fundamental justification for the Order *is* that, even as an unknowing and unwilling actor, the bank is, by reason of its international reach, well placed to assist entities to facilitate the development of nuclear weapons, by providing them with banking facilities, in particular trade finance. Concealment of the true nature of imported goods paid for by a letter of credit is straight forward: all that an issuing bank sees are documents. On presentation of compliant documents describing innocent goods, the bank must pay, whatever the nature of the goods in fact imported. Access to the international financial system is, as the Financial Action Task Force reported on 18 June 2008, essential for what it describes as "proliferators". I accept Mr Robertson's conclusion, in paragraph 57 of his statement, that Iran's banking system provides many of the financial services which underpin procurement of the raw materials and components needed for its nuclear and ballistic missile programmes."

17. In addition to his open judgment, Mitting J delivered a closed judgment, which we have read. It contains nothing which alters or supplements the findings in his open judgment in any respect relevant to the present appeal.

18. The judge's findings of fact were not challenged before the Court of Appeal, which endorsed his conclusions about them.

The Bank's substantive grounds

19. The bank now accepts, at least for the purpose of this litigation, that the statutory prerequisites in Schedule 1, paragraph 1 of the Act for the making of the direction were satisfied. In other words, the Treasury reasonably believed that Iran's nuclear and ballistic missiles programmes posed a significant risk to the national interests of the United Kingdom. But that is not enough to justify the order. This is because unlike the Iran (Financial Sanctions) Order 2007, a Schedule 7 direction is not a sanctions regime. Its purpose is directly to restrict the availability of financial services which contribute to the relevant risk. Directions made under it are essentially preventative and remedial rather than punitive or deterrent. Thus Schedule 7 applies in the same way to the risk of terrorist financing and money-laundering associated with a foreign country as it does to the risk of nuclear proliferation. All of the specific directions for which Schedule 7 provides are addressed to the particular risks whose existence has given rise to the direction. They require things to be done by the financial institutions to whom they are addressed with a view to directly restricting the contribution which the designated person may make to that risk, whether it be by gathering or reporting of information relating to its activities or, as in the present case, by wholly ceasing business dealings with him. Critically, paragraph 19(6) of Schedule 7 posits a functional relationship between the conduct which may be required by the direction and the particular risk which justified the making of it in the first place. It follows that the essential question raised by the Bank's substantive objections to the direction is whether the interruption of commercial dealings with Bank Mellat in the United Kingdom's financial markets bore some rational and proportionate relationship to the statutory purpose of hindering the pursuit by Iran of its weapons programmes.

20. The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law, notably *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends

on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective. Lord Reed, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68-76) which I would disagree with.

21. None of this means that the court is to take over the function of the decision-maker, least of all in a case like this one. As Maurice Kay LJ observed in the Court of Appeal, this case lies in the area of foreign policy and national security which would once have been regarded as unsuitable for judicial scrutiny. The measures have been opened up to judicial scrutiny by the express terms of the Act because they may engage the rights of designated persons or others under the European Human Rights Convention. Even so, any assessment of the rationality and proportionality of a Schedule 7 direction must recognise that the nature of the issue requires the Treasury to be allowed a large margin of judgment. It is difficult to think of a public interest as important as nuclear non-proliferation. The potential consequences of nuclear proliferation are quite serious enough to justify a precautionary approach. In addition, the question whether some measure is apt to limit the risk posed for the national interest by nuclear proliferation in a foreign country, depends on an experienced judgment of the international implications of a wide range of information, some of which may be secret. This is pre-eminently a matter for the executive. For my part, I wholly endorse the view of Lord Reed that "the making of government and legislative policy cannot be turned into a judicial process."

22. Nonetheless there are, as it seems to me, two serious difficulties about the conclusion which both Mitting J and the Court of Appeal reached in the present case. The first is that it does not explain, let alone justify, the singling out of Bank Mellat, if as both courts below agreed the problem is a general problem of international banking. The second is that the justification for the direction which

they have found was not the one which ministers advanced when laying the direction before Parliament, and was in some respects inconsistent with it.

23. As I have pointed out, by reference to the various statements of Treasury ministers, the justification for the measure which was given to Parliament was that there was a particular problem about Bank Mellat which did not apply to the generality of Iranian banks. As the Exchequer Secretary pointed out on 17 December 2009, the direction was a targeted measure which did not apply to transactions with other banks. That must mean, and would certainly have conveyed to Parliament, either (i) that Bank Mellat was knowingly collaborating in transactions related to the Iranian programmes, or at least turning a blind eye to them, or else (ii) that Bank Mellat, even on the footing that it was acting in good faith had unacceptably low standards of customer due diligence, which made it especially liable to let through such transactions. The existence of special problems at Bank Mellat was also a substantial part of the justification put forward in the more detailed explanation given in Mr Robertson in his witness statement. Unfortunately, it was the part which the judge did not accept. The judge has found that Bank Mellat had a conscientiously applied policy of not providing banking facilities and banking services to entities identified in the United Nations list as being connected to the Iranian weapons programmes. He has found that it wound down and then terminated its relationship with Novin once it had been added to the list, and that an investigation into Doostan had thrown up nothing unusual or suspicious. When (after the hearing before Mitting J) Doostan was added to the list of entities connected with the Iranian weapons programmes by the United Nations Security Council, the relationship with them was terminated as it had been in Novin's case. The judge made no finding about the inadequacy of Bank Mellat's controls. Neither the Treasury ministers when justifying the measure to Parliament nor Mr Robertson when explaining it to the court suggested that they were particularly lax. Mr Robertson did say that in general Iranian standards of due diligence were low. This, he said, made them vulnerable to being used to channel illicit finance, and meant that UK financial institutions dealing with them could not assume that they would necessarily have procedures in place to screen out transactions of concern. Mr Robertson did not, however, suggest that Bank Mellat was especially deficient in this respect and the judge's finding about their procedures suggests that they were satisfactory, at any rate in relation to the weapons programmes. Against this background, the emphasis of the Treasury's argument underwent a radical shift after the order was challenged towards a justification based on the risk that Bank Mellat might be the "unwitting and unwilling" channel by which the entities directly involved in the Iranian weapons programmes financed their importation of materials, services and equipment.

24. Mitting J and the Court of Appeal accepted this argument. They considered that the justification for the direction was to be found not in any problem specific to Bank Mellat but in the general problem for the banking industry of preventing

their facilities from being used for purposes connected with the Iranian weapons programmes. As the judge pointed out, concealment of the true nature of the imported goods paid for by letters of credit is straightforward. "However careful a bank may be," he said, "the bank's facilities are open to use by entities participating in Iran's nuclear weapons programme." For this reason, he thought that the direction represented the only "reasonably practicable means of ensuring reliably that the facilities of an Iranian bank with international reach will not be used for the purpose of facilitating the development of nuclear weapons by Iran." However, the direction made no attempt to prevent every Iranian bank with an international reach from facilitating Iran's weapons programmes, but only one of them. Indeed, by emphasising that it remained open to international traders to use other banks, the Exchequer Secretary apparently invited them to use instead channels of trade finance many, perhaps all of which would be affected by precisely the same inherent problems as Bank Mellat.

25. A measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification. The classic illustration is *A v Secretary of State for the Home Department* [2005] 2 AC 68, another case in which the executive was entitled to a wide margin of judgment for reasons very similar to those which I have acknowledged apply in the present case. The House of Lords was concerned with a derogation from the Convention permitting the detention of non-nationals whose presence in the United Kingdom was considered by the Home Secretary to be a risk to national security and who could not be deported. The House held that this was not a proportionate response to the terrorist threat which provoked it: see in particular paras 31, 43-44 (Lord Bingham of Cornhill), 132 (Lord Hope of Craighead), and 228 (Baroness Hale of Richmond). No one disputed that the executive had been entitled to regard the applicants as a threat to national security. Plainly, therefore, the legislation in question contributed something to the statutory purpose of protecting the United Kingdom against terrorism, if only by keeping some potential terrorists in prison. It was nevertheless disproportionate, principally because it applied only to foreign nationals. That was relevant for two reasons. One was that the distinction was arbitrary, because the threat posed by comparable UK nationals, to whom the legislation did not apply, was qualitatively similar, although quantitatively smaller. The other was that it substantially reduced the contribution which the legislation could make to the control of terrorism, and made it difficult to suggest that the measure was necessary. This was because if (as the Committee assumed) the threat from UK nationals could be adequately addressed without depriving them of their liberty, no reason was shown why the same should not be true of foreign nationals. As Lord Hope put it at para 132, "the distinction raises an issue of discrimination, ... but as the distinction is irrational, it goes to the heart of the issue about proportionality also."

26. Every case turns on its own facts, and analogies with other decided cases can be misleading. The suppression of terrorism and the prevention of nuclear proliferation are comparable public interests, but the individual right to liberty engaged in *A v Secretary of State for the Home Department* can fairly be regarded as the most fundamental of all human rights other than the right to life and limb. The right to the peaceful enjoyment of business assets protected by article 1 of the First Protocol, is not in the same category of human values. But the principle is not fundamentally different.

27. I would not go so far as to say that the Schedule 7 direction in this case had no rational connection with the objective of frustrating as far as possible Iran's weapons programmes. On the footing that a precautionary approach is justified, the elimination of any Iranian bank from the United Kingdom's financial markets may well have added something to Iran's practical problem in financing transactions associated with those programmes, just as the incarceration of some potential terrorists under Part IV of the Crime and Security Act 2001 may have made some difference to the reduction of terrorism. But I think that the distinction between Bank Mellat and other Iranian banks which was at the heart of the case put to Parliament by ministers was an arbitrary and irrational distinction and that the measure as a whole was disproportionate. This is because once it is found that the problem is not specific to Bank Mellat but an inherent risk of banking, the risk posed by Bank Mellat's access to those markets is no different from that posed by the access which comparable banks continued to enjoy. Moreover, the discriminatory character of the direction must drastically reduce its effectiveness as a means of impeding the Iranian weapons programmes. As the Exchequer Secretary herself pointed out, "as long as all financial sanctions and relevant risk warnings are complied with, alternative banks may be used." Nothing in the Treasury's case explains why we should accept that it is necessary to eliminate Bank Mellat's business in London in order to achieve the objective of the statute, if the same objective can be sufficiently achieved in the case of comparable banks by requiring them to observe financial sanctions and relevant risk warnings. It may well be that other Iranian banks have not been found to number among their clients entities involved in Iran's nuclear and ballistic missile programmes. But it follows from the fact that this is a problem inherent in the conduct of international banking business that they are as likely to do so as Bank Mellat. The direction was irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make to its objective. I conclude that that it was unlawful.

The Bank's procedural grounds

28. I also consider that the Bank is entitled to succeed on the ground that it received no notice of the Treasury's intention to make the direction, and therefore had no opportunity to make representations.

29. The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. In *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180, the Defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. "I apprehend", said Willes J at 190, "that a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, and that rule is of universal application an founded upon the plainest principles of justice."

30. In *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560, Lord Mustill, with the agreement of the rest of the Committee of the House of Lords, summarised the case-law as follows:

> "My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

31. It follows that, unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each direction is made. Some directions that might be made under Schedule 7 of the Act could not reasonably give rise to an obligation on the Treasury's part to consult the targeted entity, for

example because there was a real problem about the implicit or explicit disclosure of secret intelligence or because prior consultation might frustrate the object of the direction by enabling the targeted entity to evade its operation, notably in a case involving money-laundering or terrorism. In this case, the Treasury has raised only two practical difficulties about consulting the Bank in advance of the direction. The first was the difficulty raised by Mr Robertson that "it would not have been appropriate to have notified Bank Mellat of the Treasury's intention to make the direction contained in the 2009 Order before 12 October 2009, because this would have provided it with the opportunity to rearrange business relationships or transactions with the UK financial sector to ensure (for example) that they were indirect and so not caught by the prohibitions." The judge rejected this, pointing out that the Bank could just as easily do that after the direction as before. That conclusion, which seems inescapable, has not been challenged on appeal. The second practical difficulty was raised by way of submission in the Court of Appeal and dealt with in the judgment of Maurice Kay LJ, who thought that it had "some force". This was the supposed practical difficulty of permitting representations in a situation where there is closed material. I have to say that for my part I am not impressed by this difficulty. In justifying the direction in the course of these proceedings, the Treasury disclosed the gist of the closed material including the provision of banking facilities to Novin and Doostan and their alleged provision to Mr Taghizadeh and Mr Esbati. I cannot see why they should have had any greater difficulty in disclosing before the making of the direction the material that they were quite properly required to disclose afterwards.

32. In my opinion, unless the Act expressly or impliedly excluded any relevant duty of consultation, it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made. In the first place, although in point of form directed to other financial institutions in the United Kingdom, this was in fact a targeted measure directed at two specific companies, Bank Mellat and IRISL. It deprived Bank Mellat of the effective use of the goodwill of their English business and of the free disposal of substantial deposits in London. It had, and was intended to have, a serious effect on their business, which might well be irreversible at any rate for a considerable period of time. Secondly, it came into effect almost immediately. The direction was made on a Friday and came into force at 10.30 a.m. on the following Monday. It had effect for up to 28 days before being approved by Parliament. Third, for the reasons which I have given, there were no practical difficulties in the way of an effective consultation exercise. While the courts will not usually require decision-makers to consult substantial categories of people liable to be affected by a proposed measure, the number of people to be consulted in this case was just one, Bank Mellat, and possibly also IRISL depending on the circumstances of their case. I cannot agree with the view of Maurice Kay LJ that it might have been difficult to deny the same advance consultation to the generality of financial institutions in the United Kingdom, who were required to cease dealings with Bank Mellat. They were the addressees of the direction, but not its targets. Their

interests were not engaged in the same way or to the same extent as Bank Mellat's. Fourth, the direction was not based on general policy considerations, but on specific factual allegations of a kind plainly capable of being refuted, being for the most part within the special knowledge of the Bank. For these reasons, I think that consultation was required as a matter of fairness. But the principle which required it is more than a principle of fairness. It is also a principle of good administration. The Treasury made some significant factual mistakes in the course of deciding whether to make the direction, and subsequently in justifying it to Parliament. They believed that Bank Mellat was controlled by the Iranian state, which it was not. They were aware of a number of cases in which Bank Mellat had provided banking services to entities involved in the Iranian weapons programmes, but did not know the circumstances, which became apparent only when the Bank began these proceedings and served their evidence. The quality of the decision-making processes at every stage would have been higher if the Treasury had had the opportunity before making the direction to consider the facts which Mitting J ultimately found.

33. In these circumstances, the only ground on which it could be said that the Treasury was not obliged to consult Bank Mellat in advance, was that such a duty, although it would otherwise have arisen at common law in the particular circumstances of this case, was excluded by the Act in cases such as the present one. It was certainly not expressly excluded. But the submission is that it was impliedly excluded on two overlapping grounds: (i) that the statutory right of recourse to the courts after the making of the direction, which is provided by section 63 of the Act, is enough to satisfy any duty of fairness, or at least must have been intended by Parliament to be enough; and (ii) that consultation is not in law required before the making of subordinate legislation, especially when it is subject to the affirmative resolution procedure. Mitting J and the majority of the Court of Appeal rejected the Bank's procedural case on both grounds.

34. I shall deal first with the implications of the statutory right of recourse to the courts.

35. The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise. As Byles J observed in *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB(NS) 190, 194, "the justice of the common law will supply the omission of the legislature." In *Lloyd v McMahon* 1987] 1 AC 625, 702-3, Lord Bridge of Harwich regarded it as

> "well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

Like Lord Bingham in *R (West) v Parole Board* [2005] 1 WLR 350 at para 29, I find it hard to envisage cases in which the maximum *expressio unius exclusio alterius* could suffice to exclude so basic a right as that of fairness.

36. It does not of course follow that a duty of prior consultation will arise in every case. The basic principle was stated by Lord Reid forty years ago in *Wiseman v Borneman* [1971] AC 297, 308, in terms which are consistent with the ordinary rules for the construction of statutes and remain good law:

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."
> Cf. Lord Morris of Borth-y-Gest at 309B-C.

37. Leaving aside, for a moment, the fact that the direction was required to be made by statutory instrument subject to Parliamentary approval, it is not in my view implicit in section 63 that the right of recourse to the courts is the sole guarantee of fairness. Nor is it implicit that what the common law would otherwise require to achieve fairness is excluded. I say this for three reasons. The first is that section 63 largely reproduces the rights which a person affected by the direction would have anyway. It confers on him the right to apply to the High Court for an adjudication based on the principles of judicial review, and on the court such powers as could be made on judicial review. The only difference which section 63 makes is that permission is not required for such an application. The express provision of a right of recourse to the courts is essentially a peg on which to hang the various procedural provisions in sections 66-72. It would I think be surprising if the mere fact that the right of persons affected to apply for judicial review had been superseded by a statutory application with substantially the same ambit, were to make all the difference to the content of the Treasury's common law duty of

fairness. Whatever else Parliament may have intended by enacting section 63, it cannot in my view have intended to reduce the procedural rights of those affected by the Treasury's orders. Second, the statutory right of recourse will not be sufficient to achieve fairness in every case and is certainly not enough to achieve it in cases like this one, falling under Schedule 7, paragraph 13. This is because a direction may take effect, as it did in this case, immediately or almost immediately and, subject to Parliamentary scrutiny, will remain in effect unless and until it is set aside by the Court. An application under section 63 is likely to require evidence on both sides. With the best will in the world it is unlikely to be determined in less than three months and may take considerably longer even without allowing for appeals. In this case, some seven months elapsed before Mitting J gave judgment. This may not matter much in the case of a direction to exercise heightened customer due diligence or to monitor or report. But it matters a great deal when the direction is in the draconian terms permitted by paragraph 13. A direction to financial institutions to cease business with a designated person is apt to achieve serious and immediate damage while it remains in effect, extending well beyond transactions related to nuclear proliferation. Even if it is set aside, the impact on the designated person's goodwill may be substantial and in some cases irreversible. In some cases, where the decision impugned infringed the applicants' Convention rights, damages will be recoverable after the event. Claims for damages are, however, far from straightforward, and loss can be difficult to prove to the standard which the courts have traditionally required. Third, the recognition of a duty of prior consultation would not frustrate the purpose of the statutory scheme, nor would it cut across its practical operation. Schedule 7 directions made in circumstances like these are not the kind of directions whose effectiveness depends on the ability to strike without warning. As the judge pointed out, the kind of avoiding action which a designated person might be minded to take could equally be taken after the direction had been made.

38. I turn, therefore, to the implications of the fact that the direction is required to be made in subordinate legislation, subject to Parliamentary approval.

39. The Treasury submit that the legislative form of a Schedule 7 direction takes it out of the area in which the courts can imply a duty of fairness or prior consultation. This is self-evident in the case of primary legislation. There is not yet a statute into which such a duty of consultation can be implied. Parliament is not in any event required to be fair. Even if a legitimate expectation has been created, the courts cannot, consistently with the constitutional function of Parliament, control the right of a minister, in his capacity as a member of Parliament, to introduce a bill in either house: *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin.) at para 49; *R (on the application of UNISON) v Secretary of State for Health* [2010] EWHC 2655 (Admin).

40. The position in relation to secondary legislation is necessarily different, because a statutory instrument is made under powers conferred by statute. These powers are accordingly subject to whatever express or implied limitations or conditions can be derived from the parent Act as a matter of construction. In *R v Electricity Commissioners Ex p London Electricity Joint Committee Company (1920) Limited* [1924] 1 KB 171, 208, Lord Atkin observed at a very early stage in the development of public law that he knew of "no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval, even where the approval has to be that of the Houses of Parliament." It has sometimes been suggested that this applies only where the ground of objection to a statutory instrument is that it is wholly outside the power conferred by the Act. This was the view expressed by Lord Jauncey and affirmed by the Inner House in *City of Edinburgh District Council v Secretary of State for Scotland* 1985 SC 261. He considered that where Parliament had reserved the right to consider the merits (as opposed to the *vires*) of a statutory instrument, it was not open to the courts to review their rationality or their procedural fairness.

41. I do not think that this distinction is sustainable. In *F. Hoffman La Roche and Co v Secretary of State for Trade and Industry* [1975] AC 295, the applicants objected to a statutory instrument under the Monopolies and Mergers Act 1965 regulating the prices of their medicines, which had been approved by Parliament under the affirmative resolution procedure. The relevant power was to make orders giving effect to a report of the Monopolies Commission, which the applicants alleged was vitiated by a failure to observe the rules of natural justice. The issue was about the availability of an injunction enforcing the order in circumstances where the Secretary of State was not prepared to give an undertaking in damages. Moreover, it is fair to say that the applicants' case was that the Commission's report was invalid for procedural reasons, and therefore that there was no report on which the Secretary of State could found any power to make the order. But Lord Diplock considered the status of the order generally, at 365:

> "In constitutional law a clear distinction can be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of members of both Houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted outwith the legislative powers conferred upon him by the previous Act of Parliament under which the order is ultra vires by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects)."

42. In *R (Asif Javed) v Secretary of State for the Home Department* [2002] QB 129, the Court of Appeal held that it was entitled to review the rationality of a minister's exercise of a statutory power to designate Pakistan by order as a country in which there was "in general no serious risk of persecution", notwithstanding that the order had been laid before Parliament in draft under the affirmative resolution procedure and the position in Pakistan to some extent discussed. Lord Phillips of Worth Matravers MR, echoing the language of Atkin LJ, said at para 51 that there was no "principle of law that circumscribes the extent to which the court can review an order that has been approved by both Houses of Parliament under the affirmative resolution procedure." The order was declared to be unlawful.

43. These statements seem to me to be correct in principle. If a statutory power to make delegated legislation is subject to limitations, the question whether those limitations have been observed goes to the lawfulness of the exercise of the power. It is therefore reviewable by the courts. In principle, this applies as much to an implied limitation as to an express one, and as much to a limitation on the manner in which the power may be exercised as it does to a limitation on the matters which are within the scope of the power. The reason why this does not intrude upon the constitutional primacy of Parliament is not simply that delegated legislation, however approved, does not have the status of primary legislation. It is that a statutory instrument is the instrument of the minister (or other decision-maker) who is empowered by the enabling Act to make it. The fact that it requires the approval of Parliament does not alter that. The focus of the court is therefore on his decision to make it, and not on Parliament's decision to approve it. If that is true (as I think it is) as a matter of general principle, it is particularly true of the statutory judicial review for which section 63 of the Counter-Terrorism Act provides. Under section 63(2) the application is to set aside a "decision of the Treasury". The relevant decision of the Treasury is the decision under Schedule 7, paragraph 1 to "give a direction". If the court sets aside that decision, it is then required by section 63(4) to quash the resulting order.

44. Where the courts have declined to review the procedural fairness of statutory orders on the ground that they have been subject to Parliamentary scrutiny, they have not generally done so on the ground that Parliamentary scrutiny excludes the duty of fairness in general or the duty of prior consultation in particular. These decisions have generally been justified by reference to three closely related concepts which for my part I would not wish to challenge or undermine in any way. First, when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy. Second, there is a very significant difference between statutory instruments which alter or supplement the operation of the Act generally, and those which are

targeted at particular persons. The courts originally developed the implied duty to consult those affected by the exercise of statutory powers and receive their representations as a tool for limiting the arbitrary exercise of statutory powers for oppressive objects, normally involving the invasion of the property or personal rights of identifiable persons. *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180 was a case of this kind, and when Willes J (at 190) described the duty to give the subject an opportunity to be heard as a rule of "universal application", he was clearly thinking of this kind of case. Otherwise the proposition would be far too wide. While the principle is not necessarily confined to such cases, they remain the core of it. By comparison, the courts have been reluctant to impose a duty of fairness or consultation on general legislative orders which impact on the population at large or substantial parts of it, in the absence of a legitimate expectation, generally based on a promise or established practice. Third, a court may conclude in the case of some statutory powers that Parliamentary review was enough to satisfy the requirement of fairness, or that in the circumstances Parliament must have intended that it should be. It is particularly likely to take this view where the measure impugned is a general legislative measure. The reason is that when we speak of a duty of fairness, we are speaking not of the substantive fairness of the measure itself but of the fairness of the procedure by which it was adopted. Parliamentary scrutiny of general legislative measures made by ministers under statutory powers will often be enough to satisfy any requirement of procedural fairness. The same does not necessarily apply to targeted measures against individuals.

45. These considerations lie behind the judgments in the Court of Appeal in *R on the application of BAPIO Action Limited v Secretary of State for the Home Department* [2007] EWCA Civ. 1139, which both Mitting J and Maurice Kay LJ in the Court of Appeal placed at the forefront of their reasoning. *BAPIO* was a judicial review of the decision of the Home Secretary to amend the Immigration Rules without prior consultation so as to abolish permit-free training for doctors without a right of abode in the United Kingdom. There were transitional provisions for those who had already begun their training under the old rules, which protected almost all those who might have claimed to have a legitimate expectation based on the old rules. Sedley LJ, who delivered the leading judgment, began by referring to a dictum of Lord Scarman in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240. This was a judicial review of the Secretary of State's assessment of the proper level of expenditure by a local authority. It was a classic issue of general policy, involving decisions about the use of resources and the level of taxation, potentially affecting every householder in Britain, and quite obviously exceptionally difficult to challenge on rationality grounds. Lord Scarman said, at 250, in a passage that is not always quoted in full:

> "To sum it up, the levels of public expenditure and the incidence and distribution of taxation are matters for Parliament, and, within

> Parliament, especially for the House of Commons... If a statute, as in this case, requires the House of Commons to approve a minister's decision before he can lawfully enforce it, and if the action proposed complies with the terms of the statute..., it is not for the judges to say that the action has such unreasonable consequences that the guidance upon which the action is based and of which the House of Commons had notice was perverse and must be set aside. For that is a question of policy for the minister and the Commons, unless there has been bad faith or misconduct by the minister. Where Parliament has legislated that the action to be taken by the Secretary of State must, before it is taken, be approved by the House of Commons, it is no part of the judges' role to declare that the action proposed is unfair, unless it constitutes an abuse of power in the sense which I have explained."

Sedley LJ rightly pointed out in *BAPIO* that this reasoning was "predicated on the inapt nature of the subject-matter – public finance – for judicial scrutiny, not upon a quasi-immunity from judicial review of delegated legislation or rules which have been laid before Parliament." He pointed out that there was no such immunity, and that the Immigration Rules would be reviewable for want of power to make them or for irrationality. Turning to the question whether they were reviewable for procedural unfairness he said this:

> "The real obstacle which I think stands in the appellants' way is the difficulty of propounding a principle which reconciles fairness to an adversely affected class with the principles of public administration that are also part of the common law. These are not based on administrative convenience or potential embarrassment. They arise from the separation of powers and the entitlement of executive government to formulate and reformulate policy, albeit subject to such constraints as the law places upon the process and the product. One set of such constraints in modern public law are the doctrines of legitimate expectation, both procedural and substantive."

I agree with this in the cases to which Sedley LJ was referring, namely those in which delegated legislation was an expression of legislative policy. I think that it represents a more nuanced and accurate statement of the law than the more hard-edged formulations of Maurice Kay LJ and Rimer LJ in the same case.

46. The present case, however, is entirely different. In point of form, a statutory instrument embodying a Schedule 7 direction is legislation. But, as Megarry J observed in *Bates v Lord Hailsham of St. Marylebone* [1972] 1 WLR 1373, the fact that an order takes the form of a statutory instrument is not decisive: "what is

important is not its form but its nature, which is plainly legislative" (page 1378). The Treasury direction designating Bank Mellat under Schedule 7, paragraph 13, was not legislative in nature. There is a difference between the sovereign's legislation and his commands. The one speaks generally and impersonally, the other specifically and to nominate persons. As David Hume pointed out in his *Treatise of Human Nature* (Book III, Part ii, sec 2-6), "all civil laws are general, and regard alone some essential circumstances of the case, without taking into consideration the characters, situations and connexions of the person concerned." The Treasury direction in this case was a command. The relevant legislation and the whole legislative policy on which it was based, were contained in the Act itself. The direction, although made by statutory instrument, involved the application of a discretionary legislative power to Bank Mellat and IRISL and nothing else. It was as good an example as one could find of a measure targeted against identifiable individuals. Moreover, as I have pointed out in dealing with the Bank's substantive complaints, it singled out Bank Mellat from other Iranian banks on account of the Bank's conduct or, in Hume's words, its "characteristics, situations and connexions". It directly affected the Bank's property and business assets. If the direction had not been required to be made by statutory instrument, there would have been every reason in the absence of any practical difficulties to say that the Treasury had a duty to give prior notice to the Bank and to hear what they had to say. In a case like this, is the position any different because a statutory instrument was involved? I think not. That was simply the form which the specific application of this particular legislation was required to take.

47. With a measure such as this one, targeted against "designated persons", it is not possible to say that procedural fairness is sufficiently guaranteed by Parliamentary scrutiny or to suppose that Parliament in enacting the Counter-Terrorism Act ever thought it was. The justification for the direction depends on the particular character and conduct of the designated person, about which Parliament cannot have the same plenitude of information as it is assumed to have about matters of general legislative policy. Many of the essential facts about the particular target will be peculiarly within the designated person's knowledge, and even those known to the Treasury will not necessarily be publicly disclosed.

48. In some cases, the procedure might be regarded as fair even in the case of a targeted measure, and even if the target did not have an opportunity to be heard before the order was made, if he was in a position to make effective representations in the course of the passage of the affirmative resolutions through Parliament. But this was hardly a realistic alternative to prior consultation in the present case. In the first place, the Bank was not in a position to defend itself against the Treasury's allegation that they had had dealings with entities involved in the Iranian weapons programmes until the Treasury identified the entities that they were referring to. They did not identify them in the course of justifying the order in Parliament. They were first identified in correspondence with the Bank's

solicitors on 3 December 2009, after the present proceedings had been begun and a month after the Parliamentary processes were complete. Second, unlike other statutory instruments made under the Counter-Terrorism Act, an order giving effect to a Schedule 7 direction is not laid before Parliament in draft before taking effect. It may and in this case did take effect upon being made and was capable of continuing in effect for up to 28 days in advance of an affirmative resolution. This is quite long enough to achieve substantial damage to the interests of the designated person. Third, Schedule 7, paragraph 14(5), expressly excludes the application of the hybrid instrument procedure to such an order. The hybrid instrument procedure is a procedure under the standing orders of the House of Lords which applies to certain instruments directly affecting private or local interests in a manner different from other persons or interests in the same category. Its effect is to allow the House to receive petitions from parties affected. The result is to exclude any right which a designated person might otherwise have had to make representations by petition as part of the formal Parliamentary process. In my view, these factors underline the value and the importance in the interests of fairness of the Treasury giving the Bank an opportunity to be heard before the order was made.

49. I conclude that the Treasury's direction designating Bank Mellat was unlawful for want of prior notice to them or any procedure enabling them to be heard in advance of the order being made. This makes it unnecessary to consider the more difficult question whether a duty of prior consultation arose by virtue of Article 6 of the European Convention on Human Rights or Article 1 of the First Protocol.

Conclusion

50. I would allow the appeal, set aside the decision of the Treasury to make the direction and quash the order giving effect to it.

LORD REED (dissenting)

Introduction

51. These proceedings are brought by Bank Mellat under section 63(2) of the Counter-Terrorism Act 2008 ("the 2008 Act"). In terms of section 63(1)(c), the section applies to any decision of the Treasury in connection with the exercise of any of their functions under Schedule 7 to the 2008 Act. Section 63(3) provides that in determining whether the decision should be set aside the court is to apply the principles applicable on an application for judicial review. In terms of section

63(5), if the court sets aside the decision of the Treasury to make an order under Schedule 7, it must quash the order.

52. Bank Mellat seeks to have a decision of the Treasury to make an order under Schedule 7 set aside, and the order quashed. Bank Mellat relies on a number of common law grounds of judicial review, including procedural unfairness and unreasonableness, and maintains that the order is also ultra vires since it fails to comply with paragraph 9(6) of Schedule 7, which stipulates that the requirements imposed by a direction under that schedule must be proportionate. Bank Mellat further contends that the making of the order was in any event unlawful by virtue of section 6 of the Human Rights Act 1998. The latter contention is based on the argument that there has been a breach of the procedural standards imposed by article 6 of the Convention and article 1 of Protocol No 1 ("A1P1"), and in addition that the order constitutes a disproportionate interference with Bank Mellat's enjoyment of its possessions, contrary to A1P1.

Procedural fairness

53. In relation to the issues of procedural fairness arising under the common law, there is much in Lord Sumption's judgment with which I respectfully agree. In particular, I agree that the fact that the decision challenged in these proceedings concerned the giving of a direction in the form of a statutory instrument, which had to be approved by Parliament within 28 days in order to remain in force, does not in itself necessarily exclude the application of common law standards of procedural fairness. I also agree that there is no fundamental distinction in principle between the jurisdiction of the court to review the legality of a statutory instrument on procedural and other grounds: see in particular *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 365 per Lord Diplock.

54. I also agree with Lord Sumption that the reason why a statutory instrument lies within the scope of the courts' supervisory jurisdiction, whereas an Act of Parliament does not, is that the making of a statutory instrument is an act of the executive, exercising limited powers. This point was explained by Sir John Donaldson MR in *R v Her Majesty's Treasury, Ex p Smedley* [1985] 1 QB 657, 666-667:

> "Furthermore, whilst Parliament is entirely independent of the courts in its freedom to enact whatever legislation it sees fit, legislation by Order in Council, statutory instrument or other subordinate means is in a quite different category, not being Parliamentary legislation. This subordinate legislation is subject to some degree of judicial

> control in the sense that it is within the province and authority of the courts to hold that particular examples are not authorised by statute, or, as the case may be by the common law, and so are without legal force or effect."

A similar explanation was given by Lord Phillips of Worth Matravers MR in *R (Asif Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789; [2002] QB 129, para 33. Since the executive is acting under powers conferred by Parliament when it makes a statutory instrument, it can only act within the scope of those powers as determined by the courts. The subject-matter of the court's supervision is the lawfulness of the decision taken by the executive: there is no question of judicial supervision of the exercise by Parliament of its power to approve the instrument or to withhold its approval. That distinction is reflected in section 63 of the 2008 Act, which, as I have mentioned, permits an application to be made to set aside the decision of the Treasury. If the court sets aside that decision, it then quashes the resulting order, but it does not review anything done by Parliament.

55. Where I part company with Lord Sumption and the majority of the court is in relation to the application of the common law principles of procedural fairness in the context of Schedule 7 to the 2008 Act. In relation to that matter, I agree with the judgment of Lord Hope, and wish to make only a few additional observations in view of the implications of the contrary approach. I also agree with Lord Hope's judgment in relation to the issues of procedural fairness arising under the Human Rights Act.

56. Lord Hope has described the provisions of Part 4 of Schedule 7 to the 2008 Act. Parliament has laid down in those provisions a detailed scheme for the making of orders such as the order with which this appeal is concerned. That scheme contains no provision entitling the person designated in the order to be given a hearing before the order is made by the Treasury or approved by Parliament. The absence of such provision does not in itself automatically entail that Parliament intended that there should be no such entitlement, but in the context of such detailed procedural provisions it is a pointer towards such an intention: if Parliament had intended that there should be consultation prior to the making of an order, one would expect that also to have been specified in the provisions. The inference that Parliament did not intend that there should be such an entitlement derives support from a number of other considerations.

57. First, it is readily understandable that no such entitlement should be provided, given the subject-matter and the context in which the decision-making function is exercised. Part 1 of Schedule 7 lays down in paragraph 1 the conditions which must be met in relation to a country before the Treasury may give a

direction under that schedule. Put shortly, they are that the Financial Action Task Force ("FATF": an inter-governmental body founded by the G7 countries which sets standards for controls to prevent money-laundering and the financing of terrorism) has advised that measures should be taken in relation to the country because of the risk of terrorist financing or money laundering activities being carried on there or by its government or persons resident or incorporated there (paragraph 1(2)), or the Treasury reasonably believe that there is such a risk (paragraph 1(3)), or the Treasury reasonably believe that the development or production of nuclear, radiological, biological or chemical weapons in the country poses a significant risk to the national interests of the United Kingdom (paragraph 1(4)). In the present case, it is paragraph 1(4) which is relevant. Given the nature of those conditions, prior consultation with the persons who may be affected by a direction, including for example the persons believed to be involved in terrorism, is liable to be inappropriate or impossible: it may, for example, be excluded by a need for action to be taken urgently in the national interest. That factor is reflected in the provision for the order to have effect in advance of Parliamentary approval: paragraph 14(2)(b).

58. The scope for meaningful representations by the designated person is also liable to be limited by the impossibility of disclosing, other than in broad outline, the basis upon which the conditions laid down in paragraphs 1(3) or (4) are considered to be satisfied. That factor is reflected in the provisions of sections 66 to 68 in respect of proceedings under section 63, which allow for closed material procedure. Parliament has made no provision for any analogous procedure before the order has been made or approved.

59. In some circumstances, prior consultation could in addition reduce the practical effectiveness of the requirements imposed under paragraph 13 of Schedule 7, by affording the designated person an opportunity to take avoidance action. This risk is discounted by Lord Sumption, as it was by Mitting J, but I am less confident that it can be entirely disregarded. Part of Bank Mellat's complaint in the present case, for example, is that the effect of the order was to freeze accounts held by it with its UK subsidiary, in which assets of €183m were deposited. Court orders which have the effect of freezing assets are generally granted on an ex parte basis, precisely because they are liable to be ineffective if prior notice is given.

60. Lord Sumption's response to these points is that whether there is a duty of consultation depends on the particular circumstances in which a direction is made. I can see, in principle, that since the requirements of fairness vary from case to case, the need for a particular procedural step can in principle be assessed on a case by case basis. The problem with applying that approach to a statutory scheme however is that it can make it difficult in practice for decision-makers (and individuals affected by decisions) to predict what is required by way of procedure

in particular cases. In a context in which vital national interests are engaged, such as that in which the powers under Schedule 7 have to be exercised, it is of great importance that the Treasury should be in no doubt as to what is required. Lord Sumption addresses that point by distinguishing between targeted and other measures. That distinction draws attention to a factor of undoubted importance, but it is not the only factor relevant to an assessment of what fairness requires: as Lord Sumption acknowledges, other matters, such as the risk of disclosing intelligence material or jeopardising the effectiveness of the measure, are also relevant. I do not consider that Parliament is likely to have intended that the Treasury should have to undertake such an uncertain assessment of what fairness might require in each individual case before they could act, particularly when it would do so at the risk of judicial review (prior to the making of the order) if their conclusion, for example as to the extent of necessary disclosure, were to be challenged. In practice, that approach would leave the Treasury in an impossible position. As Taylor LJ observed in *R v Birmingham City Council, Ex p Ferrero Ltd* [1993] 1 All ER 530, 542, when rejecting a similar argument in relation to consumer protection legislation, if the supposed duty to consult were to depend upon the facts and urgency of each case, enforcement authorities would be faced with a serious dilemma.

61. The direction in paragraph 14(5) that the order is not to proceed in Parliament as a hybrid instrument seems to me, in agreement with Lord Hope, to be a further indication of Parliament's intention, since, as Lord Hope has explained, the practical effect of that direction is to exclude the potential application of procedures under which the designated person can participate in the Parliamentary proceedings. I appreciate that the Parliamentary procedure is distinct from the antecedent procedure under which the order is made. It nevertheless appears to me to have some bearing on the point in issue, in that, if it was intended that the designated person should be entitled to participate in the procedure leading to the making of the order, it would make little sense to enact a provision specifically preventing him from participating in the procedure leading to its approval by Parliament.

62. Finally, the provisions of sections 63 and 65 to 68 create a statutory procedure under which any person affected by a decision taken by the Treasury under Schedule 7 is entitled as of right to apply to the courts to have that decision set aside. Those provisions give such persons greater rights than those enjoyed by the ordinary applicant for judicial review (except in Scotland), insofar as the ordinary applicant has to apply for permission to make such an application. The provisions indicate that Parliament intended to ensure judicial protection of the interests of such persons after the decision had been made.

63. In these circumstances, it appears to me that Parliament has by implication excluded any duty to consult the designated person or to allow an opportunity for

representations to be submitted before the order is made. There is therefore no room for the application of common law requirements of procedural fairness. No doubt, as Lord Sumption points out, a procedure involving consultation could contribute to good administration by making additional information available to the Treasury. It is however apparent that Parliament has given priority to other competing considerations. It is not the function of the courts to re-write the scheme intended by Parliament.

The substantive grounds of challenge

64. I also have the misfortune to differ from the majority of the court in relation to the substantive grounds on which the decision is challenged. I set out the reasons for my dissent more fully than I might otherwise have done in view of the importance of the issues, and the fact that my conclusion on this aspect of the case was also reached by all the judges of the lower courts.

The relevant legal principles

65. I am largely in agreement with Lord Sumption as to the relevant legal principles: other than in relation to the ratio of *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, and the issue discussed in paras 123-124, we differ only in relation to the application of the law to the facts. I wish first however to consider two issues which appear to me to be important and which affect the structure of the analysis to be carried out.

66. The first issue, which caused difficulty in the courts below and remains in dispute before this court, is what the principle of proportionality involves: in particular, whether it is aptly expressed in the well-known dictum of Lord Clyde in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69, 80. It is evident from the difficulties experienced by the lower courts in the present case, and from the differing approaches which they adopted, that some clarification is desirable.

67. The second issue concerns the meaning of paragraph 9(6) of Schedule 7 to the 2008 Act. This issue also caused difficulty in the courts below and was in dispute before this court. The provision stipulates that the requirements imposed by a direction under Schedule 7 must be proportionate having regard to the advice received from the FATF under paragraph 1(2) of Schedule 7 or, as the case may be, the risk mentioned in paragraph 1(3) or (4) to the national interests of the United Kingdom. The question is whether the requirement imposed by paragraph 9(6) is the same as the principle of proportionality as understood in the context of

Convention rights. The latter principle is of course relevant to the question whether the decision of the Treasury was incompatible with A1P1 and therefore unlawful by virtue of section 6(1) of the Human Rights Act.

The concept of proportionality

68. The idea that proportionality is an aspect of justice can be traced back via Aquinas to the *Nicomachean Ethics* and beyond. The development of the concept in modern times as a standard in public law derives from the Enlightenment, when the relationship between citizens and their rulers came to be considered in a new way, reflected in the concepts of the social contract and of natural rights. As Blackstone wrote in his *Commentaries on the Laws of England*, 9th ed (1783), Vol 1, p 125, the concept of civil liberty comprises "natural liberty so far restrained by human laws (and not farther) as is necessary and expedient for the general advantage of the public". The idea that the state should limit natural rights only to the minimum extent necessary developed in Germany into a public law standard known as *Verhältnismäßigkeit*, or proportionality. From its origins in German administrative law, where it forms the basis of a rigorously structured analysis of the validity of legislative and administrative acts, the concept of proportionality came to be adopted in the case law of the European Court of Justice and the European Court of Human Rights. From the latter, it migrated to Canada, where it has received a particularly careful and influential analysis, and from Canada it spread to a number of other common law jurisdictions.

69. Proportionality has become one of the general principles of EU law, and appears in article 5(4) of the Treaty on European Union ("TEU"). The test is expressed in more compressed and general terms than in German or Canadian law, and the relevant jurisprudence is not always clear, at least to a reader from a common law tradition. In *R v Ministry of Agriculture, Fisheries and Food, ex p Fedesa and others* (Case C-331/88) [1990] ECR I-4023, the European Court of Justice stated (para 13):

> "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

The intensity with which the test is applied – that is to say, the degree of weight or respect given to the assessment of the primary decision-maker - depends upon the context.

70. As I have mentioned, proportionality is also a concept applied by the European Court of Human Rights. As the court has often stated, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see eg *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69). The court has described its approach to striking such a balance in different ways in different contexts, and in practice often approaches the matter in a relatively broad-brush way. In cases concerned with A1P1, for example, the court has often asked whether the person concerned had to bear an individual and excessive burden (see eg *James v United Kingdom* (1986) 8 EHRR 123, para 50). The intensity of review varies considerably according to the right in issue and the context in which the question arises. Unsurprisingly, given that it is an international court, its approach to proportionality does not correspond precisely to the various approaches adopted in contracting states.

71. An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle does not however entitle the courts simply to substitute their own assessment for that of the decision-maker. As I have noted, the intensity of review under EU law and the Convention varies according to the nature of the right at stake and the context in which the interference occurs. Those are not however the only relevant factors. One important factor in relation to the Convention is that the Strasbourg court recognises that it may be less well placed than a national court to decide whether an appropriate balance has been struck in the particular national context. For that reason, in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation. That concept does not apply in the same way at the national level, where the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend upon the context, and will in part reflect national traditions and institutional culture. For these reasons, the approach adopted to proportionality at the national level cannot simply mirror that of the Strasbourg court.

72. The approach to proportionality adopted in our domestic case law under the Human Rights Act has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights,

including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982. The three-limb test set out by Lord Clyde in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 has been influential:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

De Freitas was a Privy Council case concerned with fundamental rights under the constitution of Antigua and Barbuda, and the dictum drew on South African, Canadian and Zimbabwean authority. The three criteria have however an affinity to those formulated by the Strasbourg court in cases concerned with the requirement under articles 8 to 11 that an interference with the protected right should be necessary in a democratic society (eg *Jersild v Denmark* (1994) Publications of the ECtHR Series A No 298, para 31), provided the third limb of the test is understood as permitting the primary decision-maker an area within which its judgment will be respected.

73. The *De Freitas* formulation has been applied by the House of Lords and the Supreme Court as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 19 that the formulation was derived from the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, and that a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups. That, it was said, was an aspect which should never be overlooked or discounted. That this aspect constituted a fourth criterion was noted by Lord Wilson, with whom Lord Phillips and Lord Clarke agreed, in *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 45.

74. The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether,

balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in *De Freitas*, and the fourth reflects the additional observation made in *Huang*. I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

75. In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781-782 that the limitation of the protected right must be "one that it was reasonable for the legislature to impose", and that the courts were "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (*Illinois Elections Bd v Socialist Workers Party* (1979) 440 US 173, 188-189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right.

76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four).

Paragraph 9(6) of Schedule 7

77. A direction under Schedule 7 may only be given to a credit or financial institution that is a United Kingdom person or is acting in the course of a business carried on by it in the United Kingdom: paragraphs 3 and 4. The effect of the direction is to impose requirements upon such an institution or institutions. Under paragraph 9(1), the requirements may apply in relation to transactions or business relationships with

> "(a) a person carrying on business in the country [in respect of which the conditions mentioned in paragraph 1 are satisfied];
>
> (b) the government of the country;
>
> (c) a person resident or incorporated in the country."

Under paragraph 9(2), the requirements may be imposed in relation to

> "(a) a particular person within sub-paragraph (1) [known as a "designated person": paragraph 9(3)],
>
> (b) any description of persons within that sub-paragraph, or
>
> (c) all persons within that sub-paragraph."

Under paragraph 9(4), different types of requirement may be imposed upon the institution or institutions: enhanced customer due diligence in relation to transactions or business relationships with a designated person, ongoing monitoring of such relationships, systematic reporting in respect of such transactions or relationships, or limiting or ceasing such transactions or relationships. Under paragraph 9(5), a direction may make different provision in relation to different descriptions of designated person and in relation to different descriptions of transaction or relationship. It is in that context that paragraph 9(6) provides:

> "The requirements imposed by a direction must be proportionate having regard to the advice mentioned in paragraph 1(2) or, as the case may be, the risk mentioned in paragraph 1(3) or (4) to the national interests of the United Kingdom."

78. In the present case, Mitting J proceeded on the basis that the word "proportionate" was used in paragraph 9(6) "in the sense in which it is used in Strasbourg and Luxembourg". He formed that view on the basis that proportionality had been introduced into English law mainly via Luxembourg and Strasbourg, and the 2008 Act would have been intended to be compliant with Convention rights. The Court of Appeal proceeded on the same basis. Lord Sumption proceeds, as I understand his judgment, on the basis that paragraph 9(6) requires there to be a relationship between the requirements imposed by the

direction and the risk which justifies the making of the direction which is "rational and proportionate", the latter term importing the test of proportionality set out in *De Freitas*, as subsequently developed in *Huang*. I agree with that interpretation, but think it worth spending a moment to explain why.

79. Paragraph 9(6) does not appear to me to be concerned with either EU law or the Convention. There is no necessity for Parliament to have replicated the requirements of EU law in so far as they might be relevant, bearing in mind that the power to give a direction is not exercisable in relation to an EEA state: paragraph 1(5). To the extent that the requirements of a direction might interfere with the exercise of a freedom protected by EU law, the EU rights of the person affected would in any event be directly effective. Nor is there any reason for Parliament to have singled out and replicated the proportionality element of the test of compatibility with Convention rights. That element would in any event apply along with the other elements of the test, in the event that a direction interfered with Convention rights, by virtue of the Human Rights Act.

80. As Lord Sumption has explained, paragraph 9(6) appears from its terms to be concerned with the relationship between the requirements imposed by a direction, on the one hand, and the risk to the national interests of the United Kingdom, on the other hand. The issue is whether the requirements are proportionate to the risk. That is consistent with the context in which the provision appears: the remainder of paragraph 9 sets out the various types of requirement which can be imposed upon the person to whom a direction is given, some more onerous than others. The focus of paragraph 9(6) is therefore not upon the relationship between the requirements and their effect upon the designated person's Convention rights. So, in the present case, the central question arising under paragraph 9(6) is whether the requirements imposed on the United Kingdom financial sector are proportionate having regard to the risk posed to the United Kingdom's national interests by nuclear proliferation in Iran.

81. If there were otherwise any doubt about the problem which paragraph 9(6) was intended to address, the Parliamentary history appears to me to resolve it. When the provisions in Schedule 7 were introduced, at Report Stage in the House of Lords, there was no provision in the form of paragraph 9(6). Concern was expressed about the financial cost of compliance with requirements which would be incurred by United Kingdom businesses to which directions were given (Hansard (HL Debates), 11 November 2008, col 585). The Financial Secretary to the Treasury responded to that concern at the end of the debate by stating that Ministers would seek to balance the need to take effective action against the potential impact on United Kingdom business, and gave an undertaking that the Government would table an amendment at Third Reading to include a provision giving effect to that approach (col 593). Paragraph 9(6) was subsequently tabled in accordance with that undertaking (Hansard (HL Debates), 17 November 2008,

col 933). The potential problem that paragraph 9(6) was intended to guard against therefore had nothing to do with European law.

82. In stipulating that the requirements must be proportionate having regard to the risk, paragraph 9(6) reflects a principle which has roots in the common law: there are a number of cases where administrative acts of an oppressive or penal character have been quashed as being disproportionate, a well-known example being *R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052. In the context of legislation enacted in 2008, however, it seems to me that Parliament can be taken to have been aware of the development of a more structured approach to proportionality by United Kingdom courts, in particular following *De Freitas*, and to have intended that that approach should be applied. I would therefore interpret paragraph 9(6) as stipulating that the requirements must be proportionate to the risk in the sense that they meet the second, third and fourth criteria listed in para 74 (it being implicit in the legislation itself that the first criterion is met).

Applying the proportionality test

83. There is no doubt that the objective of the order – to reduce access by entities involved in Iran's nuclear weapons programme to the UK financial sector, and thereby inhibit the development of nuclear weapons by Iran and the consequent risk to the national interests of this country – is sufficiently important to justify an interference with Bank Mellat's enjoyment of its possessions. The question under paragraph 9(6) of Schedule 7, and under the Human Rights Act, is whether the remaining three criteria of proportionality are satisfied. Lord Sumption identifies the central issue as being whether the singling out of Bank Mellat has been justified, and considers that issue in the context of the second and, more briefly, the third and fourth criteria: whether the measure is rationally connected to its objective, whether a less intrusive measure would have been equally effective, and whether the measure is proportionate having regard to its effects upon Bank Mellat's rights. I shall proceed on the same basis. Before considering these issues, it may however be helpful to recall some aspects of the relevant background.

The background

84. On 23 December 2006 the UN Security Council adopted Resolution 1737, which imposed a range of sanctions targeted at Iran's nuclear and ballistic missile programmes. These included, in paragraph 12, a requirement that all States should freeze the funds owned or controlled by designated persons and entities and of other persons and entities subsequently designated as being involved in Iran's nuclear or ballistic missile activities, and ensure that funds and financial assets

were prevented from being made available by persons or entities within their territories to or for the benefit of those persons or entities. The UK gave effect to the resolution by the Iran (Financial Sanctions) Order 2007 (SI 2007/281) and directions made under that order.

85. On 24 March 2007 the Security Council adopted Resolution 1747, which designated Novin Energy Company ("Novin"), Bank Sepah and its subsidiary Bank Sepah International plc as such entities. The resolution stated in particular that Novin operated within the Atomic Energy Organisation of Iran ("AEOI") and had transferred funds on its behalf to entities associated with Iran's nuclear programme. Bank Sepah and Bank Sepah International were said to provide support for Iran's Aerospace Industries Organisation ("AIO") and its subordinates, two of which had been designated under Resolution 1737.

86. On 19 April 2007 the EC Council adopted Regulation 423/2007/EC (OJ L 103/1) concerning restrictive measures against Iran. Article 7(1) required all funds and economic resources held or controlled by persons designated under Resolution 1737 to be frozen. Those persons were listed in Annex IV. Article 7(2) imposed a similar requirement in respect of persons listed in Annex V to the regulation. The regulation was amended the following day, by Regulation 441/2007/EC (OJ L 104/28) to add a number of entities, including Novin, Bank Sepah and Bank Sepah International, to those listed in Annex IV.

87. On 25 October 2007 the assets of Bank Mellat and its subsidiaries in the United States were frozen, and US persons were prohibited from engaging in transactions with them, as the result of a designation by the US Treasury Department's Office of Foreign Assets Control. The designation was made on the basis that Bank Mellat provided banking services in support of Iran's nuclear programme.

88. On 3 March 2008 the Security Council adopted Resolution 1803, paragraph 10 of which called upon all states to exercise vigilance over the activities of financial institutions in their territories with banks domiciled in Iran, and in particular with Bank Melli and Bank Saderat and their subsidiaries.

89. On 23 June 2008 the EC Council adopted Decision 2008/475/EC (OJ L 163/29), which added a number of persons to those listed in Annex V of Regulation 423/2007. They included Bank Melli and its subsidiaries, including Melli Bank plc. The reason given was that these entities had been providing or attempting to provide financial support for companies which were involved in, or procured goods for, Iran's nuclear and missile programmes, including Novin. In

particular, Bank Melli was said to have provided a range of financial services to such companies, including opening letters of credit and maintaining accounts.

90. On 10 November 2008 the EC Council adopted Regulation 1110/2008/EC (OJ L 300/1), which imposed obligations, including requirements of vigilance and reporting requirements, upon financial institutions in the EC in relation to their activities with financial institutions domiciled in Iran, and in particular with Bank Saderat. Similar obligations, backed by criminal penalties, were also imposed upon Bank Saderat branches and subsidiaries in the EC.

91. The provisions of the 2008 Act concerned with financial restrictions, including Schedule 7, were introduced during the passage of the Bill following a statement issued by the FATF on 16 October 2008, which called on its members, and urged all jurisdictions, to strengthen preventive measures to protect their financial sectors from risks posed by Iran, as a result of its failure to introduce measures to address the risk of terrorist financing. As I have explained, Regulation 1110/2008/EC was adopted at about the same time.

Rational connection

92. In *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211, 291 Wilson J observed:

> "The *Oakes* inquiry into 'rational connection' between objectives and means to attain them requires nothing more than showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt."

The words "furthered by" point towards a causal test: a measure is rationally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective. The manner in which the courts should determine whether that test is satisfied requires careful consideration.

93. Legislation may be based on an evaluation of complex facts, or considerations (for example, of economic or social policy, or national security) which are contestable and may be controversial. In such situations, the court has to allow room for the exercise of judgment by the executive and legislative branches of government, which bear democratic responsibility for these decisions. The making of government and legislative policy cannot be turned into a judicial process. In the Canadian case of *RJR-MacDonald Inc v Canada* [1995] 3 SCR

199, for example, concerned with a legislative ban on tobacco advertising, expert evidence was led at a lengthy trial, following which the trial judge concluded that there was no reliable evidence to support the policy of banning advertising, and that there was therefore no rational connection between the ban and its objective. That conclusion was however overturned by the Supreme Court. McLachlin J, giving the judgment of the majority, stated (at para 153) that in order to establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic." She added (at para 154) that, where legislation was directed at changing human behaviour, the court had been prepared to find a causal connection on the basis of reason or logic, without insisting on proof of a relationship between the infringing measure and the legislative objective. La Forest J, giving the other principal judgment, considered that a common sense connection was sufficient to satisfy the requirement that there be a rational connection (para 86).

94. These observations found an echo, in a not dissimilar context, in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437; [2012] QB 394, concerned with a ban on the sale of tobacco from vending machines. It was argued, in the context of the proportionality of the restriction on the free movement of goods under EU law, that the ban was not suitable to achieve the objective of reducing tobacco consumption, since tobacco products could still be bought over the counter. All the members of the Court of Appeal emphasised the responsibility of elected government for the protection of public health, and the consequent need to allow a broad margin of appreciation to the decision-maker. Lord Neuberger of Abbotsbury MR observed that, in considering whether the aim of the ban was achieved, "at least arguably and to some extent", the court should be careful to avoid substituting itself for the decision-maker or being over-particular about the reasoning or evidence relied on by the decision-maker (paras 232-233). He commented that the evidence and analysis in the explanatory memorandum and impact assessment which had been laid before Parliament with the draft regulations were neither very convincing nor very telling, not least because of the absence of any evidence to suggest that the ban would have any effect (para 236). Nevertheless, the Secretary of State's assessment or belief that the ban would lead to some reduction in smoking did not seem unreasonable:

> "The unsatisfactory basis for the figures and analysis in the [impact assessment] does not, in the absence of any other factor, justify concluding that the ban is disproportionate, given the wide margin of appreciation to be accorded. If one takes away one source of cigarettes, particularly one that involves no control over the identity of the purchaser, it is scarcely unreasonable to conclude that it will reduce consumption of cigarettes to some extent, although … that conclusion is not one which necessarily follows ineluctably."

Like La Forest and McLachlin JJ in the *RJR-MacDonald* case, Lord Neuberger MR treated "common sense" and "logic" (paras 238, 242 and 244) as a sufficient basis for finding that the ban was rational. In the parallel litigation in the Court of Session, the court also referred to common sense as a basis for concluding that the legislation was apt to achieve its objective (*Sinclair Collis Ltd v Lord Advocate* 2013 SLT 100, para 62).

95. A more problematical case is that of *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68: a case which is particularly relevant to the decision of the majority in the present case, as appears from Lord Sumption's judgment. The issue was whether a derogation from article 5(1) of the Convention, so as to permit legislation providing for the indefinite detention without trial of foreign terrorist suspects, was "strictly required" by the public emergency represented by the threat of terrorist attacks in the United Kingdom. A majority of the House of Lords found that the derogation was not strictly required, since the legislation was disproportionate and was in addition discriminatory, contrary to article 14 of the Convention. The latter finding need not be considered in the present context, but the finding in relation to proportionality is of importance.

96. Lord Bingham of Cornhill identified the central problem (at para 43) as being:

> "that the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom."

Lord Bingham did not explicitly apply the three *De Freitas* criteria or the fuller *Oakes* analysis (to which he referred at para 30), but in the passage cited appears to balance the severity of the effects on the rights of the persons detained against the importance of the objective: that is to say, step four in the analysis. Lord Hope of Craighead focused on the question whether there was some other way of dealing with the emergency which would not be incompatible with the Convention rights (para 124): in other words, a test of necessity. Lord Scott of Foscote also considered that the legislation failed to meet the necessity test, since it had not been shown that monitoring arrangements or movement restrictions would not suffice (para 155). That was also the approach adopted by Lord Rodger of Earlsferry, who stated that, proceeding on the same basis as the Government and

Parliament, that detention of the British suspects was not strictly required to meet the threat that they posed to the life of the nation, the detention of the foreign suspects could not be strictly required either to meet the comparable threat that they posed (para 189). Baroness Hale of Richmond also focused on the question of necessity, observing that if it was not necessary to lock up the nationals it could not be necessary to lock up the foreigners (para 231). Lord Carswell agreed with Lord Bingham.

97. I have spent some time considering the basis of the decision in *A v Secretary of State for the Home Department* in order to clarify what the case did not decide. First, it did not decide that the legislation lacked a rational connection to its objective because it would be only partially effective. As in *Sinclair Collis,* the legislation would have made a contribution to the achievement of its objective. Secondly, the case did not decide that the legislation lacked a rational connection to its objective because it was discriminatory. The difference in treatment of British and foreign suspects was relevant to proportionality because it bore on the question whether the interference with the rights of the foreign suspects had been shown to be necessary.

98. In the present case, it is apparent that any judicial assessment of the rationality of a direction under Schedule 7 must recognise the need to allow the Treasury a wide margin of appreciation, for the reasons explained by Lord Sumption at para 21.

99. Lord Sumption identifies two flaws in the reasoning which led the courts below to conclude that the requirements imposed by the direction were rational and proportionate: first, their conclusion did not explain, let alone justify, the singling out of Bank Mellat; and secondly, the justification which they found was not the one which Ministers advanced before Parliament, and was in some respects inconsistent with it.

The justification for making the order

100. Subject to one qualification, Mitting J accepted the Treasury's explanation of why the order had been made, as set out in paras 73 to 75 of a witness statement made by Mr James Robertson, who had been since December 2008 the head of the Financial Crime Team in the International Finance Directorate of the Treasury.

101. In his statement, Mr Robertson explained that, in exercising their functions under Schedule 7 of the 2008 Act, the Treasury worked in close collaboration with a number of government departments and agencies, including in particular those

concerned with intelligence. He explained the serious risk to UK national interests which would result from Iran's development of nuclear weapons: the consequent destabilising effect upon a region where the UK has personnel and installations, the potential disruption of global oil and gas supplies, the economic consequences of such disruption, the possibility of an attack on Iran, and the potential implications of such an attack.

102. Mr Robertson also explained that it was considered that Iran's banking system provided many of the financial services which underpinned its nuclear and ballistic missile programmes. Iran's banking system lacked the controls which existed in most other countries to prevent money-laundering and the financing of terrorism, and which would also serve to identify transactions related to Iran's nuclear and ballistic missile programmes. As a consequence, Iranian financial institutions were vulnerable to being used to channel illicit finance. This had been highlighted in several reports by the FATF. As a result, UK financial institutions dealing with Iranian entities could not rely on such checks having taken place in Iran. This problem was reflected in the targeting of Iranian banks in the Security Council resolutions and in the EU legislation.

103. In relation to the decision to make the order in question, Mr Robertson explained that, following the coming into force of the 2008 Act, the Treasury commissioned work on the role of Iranian banks in financing Iran's nuclear and ballistic missile programmes. That work highlighted concerns about the role of Bank Mellat, and identified three particular areas of concern. First, it had provided banking services to Novin, and had maintained accounts for the AEOI, mainly through Novin, since 2003. It had managed accounts and facilitated money transfers for Novin after Novin had been designated under Resolution 1747. Secondly, senior officials of the AIO, the parent of entities which were involved in Iran's ballistic missile sector and designated under Security Council Resolution 1737, had used Bank Mellat's services during 2007 and 2008 to conduct business connected with Iran's ballistic missile programme. Thirdly, between 2007 and 2009 Bank Mellat had provided banking services for Doostan International ("Doostan"), a company linked to the ballistic missile programme.

104. Mr Robertson summarised the case for making the order as follows (para 73):

> "The Treasury was satisfied that Bank Mellat has provided financial services to companies engaged in Iran's nuclear and ballistic missile programmes. A direction to cease business with Bank Mellat would restrict the financial services available to entities involved in Iran's nuclear and ballistic missile programmes by denying them access to the UK financial sector through Bank Mellat. This would have the

> maximum possible adverse impact on the nuclear and ballistic missile programmes of the measures available under Schedule 7 in relation to Bank Mellat. If Bank Mellat wished to continue its activities in support of those programmes it would need to seek other sources of financial services, assuming such alternatives were actually available to it. There was also the possibility that as a bank subject to restrictions in the United Kingdom, Bank Mellat would not be in a position to access the global financial system as effectively in order to seek substitute arrangements for those no longer available to it in the UK. At the very least, this would impede the Iranian nuclear and ballistic missile programmes by imposing additional costs and delays on the programmes."

105. Mr Robertson explained at para 74 that it had been recognised that entities connected with the nuclear and missile programmes which wished to route transactions through the UK could do so by using another Iranian bank. A potential effect of the order was however that the UK financial sector would decide to wind down business with Iran more generally, which would reduce the risk of business being routed through another Iranian bank. Even if that did not occur, the order would make transactions involving the UK more difficult. Iranian banks generally experienced difficulties in dealing with UK banks as a result of the international sanctions. A small number of Iranian banks had access to the UK via their British subsidiaries. The action taken against Bank Mellat, which had a British subsidiary, narrowed access to the UK financial sector and further restricted the options available to Iranian banks.

106. Finally, Mr Robertson said at para 75 that the order would also increase pressure on the Iranian Government to comply with its international obligations. Applying such a restriction to one of Iran's largest banks would reduce the financial services available to the Iranian Government. In relation to that aspect, Mr Robertson stated that the Iranian Government still controlled a significant amount of the shares in Bank Mellat, following its privatisation in February 2009: 20% of the shares were officially owned by the Government, another 20% were held by Government social security organisations for the benefit of their employees, and a further 40% were allocated to low-income shareholders whose voting rights were exercised by the Government.

107. Mitting J accepted the Treasury's reasons for making the order as stated at paras 73-75 of Mr Robertson's statement. The only qualification was that, in relation to para 75, Mitting J accepted evidence that the Iranian Government only exercised voting rights over its 20% shareholding in Bank Mellat. That qualification was not considered to be of any materiality.

108. Lord Sumption states that Mitting J did not accept the part of Mr Robertson's statement which described the problems relating to Bank Mellat, which I have summarised at para 103. It appears to me however that what was said in that connection by Mr Robertson was substantially accepted, other than the allegation relating to senior officials of AIO, which Bank Mellat said it was unable to investigate without additional information. Mitting J stated that it was common ground that Bank Mellat had provided trade finance or banking facilities for an importer of materials used in the production of nuclear weapons, namely Novin. He accepted that Novin was an AEOI financial conduit and had facilitated Iran's nuclear programme. He also accepted that Bank Mellat had provided banking facilities to Doostan and its managing director, Mr Shabani, who had each played a part in Iran's nuclear weapons programme.

109. It is true that Mitting J accepted that, once Novin had been designated by the Security Council under Resolution 1747, Bank Mellat ran down and "eventually" ceased its relationship with Novin, and that it had in place a mechanism, which it operated conscientiously, to ensure that it did not provide banking facilities to entities or persons designated by the Security Council. Mitting J also accepted that Bank Mellat had investigated the accounts held by Doostan and Mr Shabani, in response to the Treasury's allegations in these proceedings, and had found nothing unusual or suspicious. Mitting J nevertheless found that Doostan and Mr Shabani had played a part in Iran's nuclear programme, and rejected Mr Shabani's evidence to the contrary.

110. Lord Sumption's statement that Mitting J found that Bank Mellat's provision of banking services to entities involved in the Iranian nuclear weapons and ballistic missile programmes, namely Novin and Doostan, had happened "in spite of their conscientiously operated procedures to avoid doing so", appears to me, with respect, to convey a different impression from Mitting J's judgment. It was no answer to the Treasury's concerns in relation to Novin that procedures were initiated after it had been designated by the Security Council: procedures triggered by a Security Council Resolution did not sufficiently address the risk, since they operated long after objectionable banking activities had already taken place. In relation to Doostan, it was only in the course of the proceedings that Bank Mellat carried out the investigations referred to. The value of those investigations can be judged from the fact that on 9 June 2010, after the hearing before Mitting J, Doostan was designated by Security Council Resolution 1929 as an entity involved in Iranian ballistic missile activities, and was subjected to the asset freezing regime established by Resolution 1737. It was only following that designation that Bank Mellat's procedures would have been applicable. In the circumstances, I am unable to agree with Lord Sumption's statement that Mitting J's finding about Bank Mellat's procedures "suggests that they were satisfactory, at any rate in relation to the weapons programmes".

111. Far from regarding the foregoing matters as undermining the Treasury's case, Mitting J treated them as being essentially beside the point:

> "The Treasury's case is not that the bank has knowingly assisted Security Council designated entities after designation, or even that it has knowingly assisted entities liable to be designated, but which have not yet been, by providing banking facilities to them, but that it has the capacity to do so, has in one instance done so and is likely to do so in the future. The fundamental justification for the order is that, even as an unknowing and unwilling actor, the bank is, by reason of its international reach, well placed to assist entities to facilitate the development of nuclear weapons, by providing them with banking facilities, in particular trade finance."

It was on that basis that Mitting J commented that Bank Mellat's dealings with Doostan and Mr Shabani did not greatly matter.

112. Lord Sumption's criticism of the rationality of the connection between the direction and its objective is that "the direction made no attempt to prevent every Iranian bank with an international reach from facilitating Iran's weapons programme, but only one of them". It is said that "the distinction [drawn] between Bank Mellat and other Iranian banks … was an arbitrary and irrational distinction".

113. I am unable to agree with this criticism. It is true that the problems in relation to the lack of adequate controls within Iran's banking system, identified by the FATF and mentioned by Mr Robertson in his statement, were not unique to Bank Mellat. It followed that UK financial institutions were at risk when dealing with Iranian entities in general, as Mr Robertson explained. The response of the UN Security Council and the EC Council had not however been to impose restrictions in respect of all Iranian banks, but in respect of particular banks where there was evidence of their involvement in the financing of Iran's nuclear weapons programme: notably Bank Sepah, Bank Sepah International, Bank Melli, Bank Saderat and their subsidiaries. The Treasury followed the same approach when it obtained evidence of Bank Mellat's involvement.

114. Lord Sumption states that other Iranian banks were as likely as Bank Mellat to number entities involved in Iran's nuclear and ballistic missile programmes amongst their clients. As I have explained, Mr Robertson acknowledged at para 74 of his statement that entities involved in Iran's nuclear weapons programme could in principle use other Iranian banks. He pointed out however that the order might lead the UK banking sector to wind down business with Iran generally, and that

the order would in any event make transactions involving the UK more difficult. That was because it was difficult for Iranian banks to access UK financial markets directly, since UK banks were reluctant to deal with them. The exceptions were the small number of Iranian banks which had UK subsidiaries. Those were Bank Melli, Bank Sepah, Bank Saderat and Bank Mellat. As I have explained, the UK subsidiaries of Bank Melli and Bank Sepah were already subject to asset freezing orders. The order under challenge applied to Persia International Bank plc ("PIB"), which was the UK subsidiary of Bank Mellat. The UK subsidiary of the remaining Iranian bank with such a subsidiary, Bank Saderat, was subject at the time to systematic reporting requirements under Regulation 1110/2008, as I have explained. Subsequent to the making of the order under challenge, it was subjected to an asset freeze.

115. In these circumstances, an order directed specifically against Bank Mellat and its UK subsidiary was far from being pointless or arbitrary. One effect of the order was to prevent the only UK subsidiary of an Iranian bank which was not already subject to controls, namely PIB, from dealing with its parent, Bank Mellat. Lord Sumption notes that PIB was not prevented from dealing with its minority shareholder, Bank Tejarat. There is however nothing to indicate that Bank Tejarat had any involvement with entities involved in the Iranian nuclear weapons programme. If information indicating such involvement were to emerge, no doubt action would be taken. In the event, PIB's assets were subsequently frozen by Council Regulation (EU) 668/2010, made on 26 July 2010. Although Iranian banks, or Iranian entities involved in the nuclear weapons programme, could in principle seek to use non-Iranian international banks, those could be expected to have compliance mechanisms in place: it was only in relation to Iran that the absence of such mechanisms had caused the FATF to call for preventive measures.

116. It is of course true that the direction would not of itself prevent the development of nuclear weapons in Iran. It could however reasonably be expected to realise the objective of hindering their development at least to some extent (to adopt the phrase used by Lord Neuberger MR in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437; [2012] QB 394). That is sufficient to establish a rational connection between the direction and its objective.

117. In the light of the foregoing, Mitting J was entitled to accept that there was a rational connection between the requirements imposed by the order and its objective, on the basis that, as he found, "a direction to cease business with Bank Mellat would restrict the financial services available to entities involved in [Iran's nuclear and ballistic missile] programme by denying them access to the UK financial sector through the bank"; "suspect entities would find it difficult to replace existing arrangements through the bank"; and "some pressure would be brought to bear on the Iranian Government" to comply with its international obligations. Mitting J was therefore entitled to hold that he was "satisfied that the

requirements imposed by the order are rationally connected to the objective of inhibiting the development of nuclear weapons in Iran and, so, the risk to the national interests of the United Kingdom". Those findings were affirmed by the Court of Appeal, which commented that "a contrary conclusion would resonate with naïveté".

A different justification from that given to Parliament

118. A separate point made by Lord Sumption is that the justification for the making of the order which was accepted by Mitting J was not the one which Ministers advanced when laying the order before Parliament, and was in some respects inconsistent with it: indeed, it is said that the Treasury's argument underwent a radical shift.

119. This point does not appear to me to be well-founded in fact. It does not in any event appear to me to affect the question whether the requirements imposed by the order were rationally connected to its objective.

120. Considering first the factual position, a written Ministerial statement was made on 12 October 2009, three days after the order had been made. It stated:

> "Iran continues to pursue its proliferation sensitive nuclear and ballistic missile activities in defiance of five UN Security Council Resolutions. We cannot and will not ignore specific activities undertaken by Iranian companies which we know to be facilitating activity identified by the UN as being of concern, particularly where such activities have the potential to affect the UK's interests.
>
> On the particular entities in question, vessels of the Islamic Republic of Iran Shipping Lines (IRISL) have transported goods for both Iran's ballistic missile and nuclear programmes.
>
> Similarly, Bank Mellat has provided banking services to a UN listed organisation connected to Iran's proliferation sensitive activities, and been involved in transactions related to financing Iran's nuclear and ballistic missile programme.
>
> The direction to cease business will therefore reduce the risk of the UK financial sector being used, knowingly or otherwise, to facilitate Iran's nuclear proliferation sensitive activities."

121. An explanatory memorandum to the order was also laid before Parliament the same day. Under the heading "What is being done and why", the memorandum stated:

> "These restrictions are being imposed in respect of these two entities because of their provision of services for Iran's ballistic missile and nuclear programmes. It is considered that a direction to cease business with these entities will contribute to addressing the risk to the UK national interests posed by Iran's nuclear proliferation sensitive activities."

Similar explanations of the thinking behind the order were also provided by Ministers during the Parliamentary proceedings leading to the approval of the order.

122. The Treasury did not in these documents and statements accuse Bank Mellat of being knowingly involved in Iran's nuclear and ballistic missile programme: what was said was that it had provided banking services to a UN listed organisation, and that it had been involved in transactions related to financing that programme. Those were statements of objective fact. The objective of the order was explained as being to reduce the risk of the UK financial sector being used, unknowingly or otherwise, to facilitate Iran's proliferation sensitive activities. That explanation appears to me to be consistent with the more detailed account of the Treasury's reasoning provided by Mr Robertson. As Mitting J found, the statements made to Parliament gave an adequate summary.

123. Proceeding however on the hypothesis that the reasons given to Parliament were inconsistent with the reasons put forward by Mr Robertson in his statement, that difference has no evident bearing on the answer to the question whether the measure is rationally connected to its objective. As I have explained at paras 92-94, that question poses an objective test concerned with the capacity of the measure to realise its objective, based on common sense or logic. If Parliament approved the measure on the basis of a given justification, that might affect the credibility of evidence subsequently putting forward a different justification; but that is not an issue which arises on this appeal. It could also affect the weight which the court might give to Parliamentary approval of the measure when considering its proportionality; but that is not a factor which has been taken into account in considering the question of rational connection.

124. This objective approach to the criterion of rational connection is consistent with what was said, in relation to proportionality more generally, in *Huang v*

Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167, para 11:

> "The task … on an appeal on a Convention ground against a decision of the primary decision-maker … is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety."

To similar effect, Lord Hoffmann noted in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, para 68:

> "Article 9 of the Convention is concerned with substance, not procedure. It confers no right to have the decision made in any particular way. What matters is the result."

In this respect, there is no difference between article 9 and other Convention rights.

Less intrusive means

125. Lord Sumption concludes that the direction also fails the proportionality test at the third stage of the analysis, on the basis that it cannot be necessary to require UK financial institutions to cease dealing with Bank Mellat if less drastic measures are considered to provide sufficient protection in relation to other Iranian banks. For the reasons I have given, I do not consider that the Iranian banks in question (that is to say, the smaller banks without UK subsidiaries) are truly in a comparable position to Bank Mellat. Like the Court of Appeal, I attach importance to the evidence of Mr Robertson that the Treasury considered but rejected less intrusive measures, for reasons which he explained. In a matter of this kind, great weight must be given to the considered judgment of the Treasury. Against that background, I accept Mitting J's conclusion that there is no other reasonably practicable means of ensuring that the facilities of an Iranian bank with international reach will not be used in the UK for the purpose of facilitating the development of nuclear weapons by Iran.

Proportionate effect

126. If, as I would hold, (1) the Government's objective was sufficiently important to justify limiting the rights of Bank Mellat, (2) the requirements imposed by the direction were rationally connected to that objective and (3) no less intrusive measure would have been equally effective in achieving the objective, the question remains whether (4) having regard to the severity of its effect on Bank Mellat's rights, the direction was justified by the importance of the objective. Lord Sumption concludes that it was not, given that, in his view, the direction would make little if any contribution to the achievement of its objective. For the reasons I have explained, I do not agree with that assessment. On the basis that the direction would make a worthwhile contribution to the achievement of the Government's objective, I agree with Mitting J that its impact upon the rights of Bank Mellat is proportionate.

127. In that connection, I would make three observations. The first is that the effects upon Bank Mellat's business cannot in my opinion be considered disproportionate to a significant reduction in the risk of very great harm to the UK's vital national interests. The Bank claims that it has suffered a revenue loss of US$25m a year, that it was prevented for the duration of the order from drawing on deposits of €183m, and that its reputation and goodwill have been damaged. The severity of those effects has however to be considered in the context of the very substantial scale of the business conducted by the Bank, illustrated by its evidence that it holds some 33 million accounts for over 19 million customers, has almost 2000 branches, and issued letters of credit in 2009 to the value of $11bn. If the contribution made by the direction towards the achievement of the Government's objective was limited, the impact upon the Bank was also limited.

128. The second is that the right in issue, under A1P1, is not of the most sensitive character; the person affected, a major international bank, does not fall into a vulnerable or marginalised category; and the order is temporary in nature.

129. The third is that the court does not possess expertise or experience in international relations, national security or financial regulation. The risks to our national interests, if the wrong judgment is made in relation to nuclear proliferation, could hardly be more serious. Democratic responsibility and accountability for protecting the citizens of this country from those risks rest upon the Government, not upon the courts. In a complex situation of this kind, where the stakes are so high, the court has to attach considerable weight to the Government's assessment that the requirements are necessary and proportionate to the risk.

Conclusion

130. For these reasons, and those given by Lord Hope in relation to procedural fairness, I would dismiss the appeal.

LORD HOPE (DISSENTING)

131. I find myself unable, with respect, to agree with the conclusions that the majority have reached on both the substantive and the procedural issues in this case. I, for my part, would dismiss the appeal.

The substantive issues

132. I agree with Lord Reed and Lord Sumption about the formulation of the test that should be applied to the question raised by Bank Mellat's objections to the direction. The more difficult issue is as to the result when that test is applied to the facts. I was inclined at the end of the argument to think that the making of the Financial Restrictions (Iran) Order 2009 (SI 2009/2725) ("the Order") was disproportionate because the Bank had been singled out for special treatment, and because the distinction that was drawn between it and other Iranian banks in that respect appeared to be arbitrary and irrational. There seemed to me to be force in the arguments that Lord Sumption has given for thinking that the effect of the Order on the commercial dealings of the Bank was out of proportion to any contribution that the directions were likely to make to the statutory purpose that it was designed to serve.

133. I have however been persuaded by Lord Reed's careful analysis of the explanation that was given on the Treasury's behalf by Mr Robertson that the reasons that Mitting J and the Court of Appeal gave for coming to the contrary conclusion were sound. In matters of this kind a wide margin of appreciation must be given to the Treasury, and I am satisfied that sufficient grounds were shown for finding that an order directed only against the Bank and its UK subsidiary was rationally connected to the objective of inhibiting the development of nuclear weapons in Iran and that it was proportionate. There were good reasons for not involving all the other Iranian banks, and the facts as a whole show that the choice that was made was not arbitrary. The problem that the Order was designed to address was restricted to a small number of Iranian banks with UK subsidiaries, and the Bank was not being "singled out" in the pejorative sense that those words convey. I also agree with Lord Reed that the question whether the directions in the Order were rationally connected to its purpose does not depend on whether the justification that the courts below found established was the same as that which

was given in the statement when the Order was laid before Parliament. Like him I would hold that the objective was sufficiently important to justify restricting the Bank's activities, that the requirements imposed by the direction were rationally connected to that objective and that Mitting J was entitled to hold that there were no other reasonably practicable means of achieving it.

The procedural issues

134. The question to which these issues are directed is whether there was a duty to consult the Bank before the Order was made under section 62 of the Counter-Terrorism Act 2008. The powers conferred on the Treasury for the making of such a direction are set out in Schedule 7 to the Act. The procedures that are to be followed are in Part 4 of that Schedule. Paragraphs 14(1) and (2) provide that a direction is to be contained in an order made by the Treasury, that the order must be laid before Parliament after being made and that it ceases to have effect if not approved by a resolution of both Houses of Parliament within 28 days. Paragraph 14(5) states that, if apart from that sub-paragraph an order under paragraph 14 would be treated for the purposes of the standing orders of either House of Parliament as a hybrid instrument, it is to proceed in that House as if it were not such an instrument. Hybrid instruments are subject to a special procedure in the House of Lords which gives those who are specially and directly affected by the instrument to present their arguments to a select committee for consideration on their merits before the instrument can be approved by either House.

135. Paragraph 15 of Schedule 7 provides that, where a direction is given to a particular person, the Treasury must give notice of the direction to that person. The direction in this case was given not to the Bank or to any other particular person, but to a description of persons operating in the financial sector in the United Kingdom: see paragraph 14(1)(a). They were directed by the Order not to enter into, or to continue to participate in, any transaction or business relationship with the Bank. The sequence in which these paragraphs appear in Part 4, as in the case of paragraph 16 which deals with publication, indicates that the direction will have already have been made by the time when notice is given under paragraph 15. Its purpose is to alert the person concerned so that steps can be taken at once to comply with the direction.

136. Here, then, is a provision which excludes the procedure which allows those directly affected to ask for an examination of the direction on its merits before the instrument is approved under paragraph 14(2). And there is another provision which provides for notice to be given, but only to a particular person to whom the direction is given and only after the making of the direction. Is it nevertheless open to the court to require the Treasury to consult with a body which will be affected by a direction which is to be given to others before the order is made, as the Bank

maintains? This is a step which finds no place in the procedure which has been provided for by Parliament. Is a procedure for delegated legislation which has been approved by Parliament open to scrutiny by the courts with a view to the imposition of additional procedural safeguards?

137. The Bank submits that the Treasury were required both by domestic law and by the procedural requirements of article 6(1) of the European Convention on Human Rights and article 1 of the First Protocol to give the Bank an opportunity to make representations before they made the direction. It points to the fact that the direction imposed the most extreme form of sanction that was available to the Treasury in the exercise of these powers. It bound the entirety of the United Kingdom's financial sector and the Bank, and all its branches were designated persons with whom the financial sector was directed to cease doing business. Yet the procedure in the 2008 Act under which the Order which contained the direction was made gave no opportunity for affected persons to make representations before it was made and then laid before Parliament.

138. This challenge was dismissed by Mitting J. He said that it was readily understandable why no provision was made for affected persons to be given such an opportunity: [2010] EWHC 1332 (QB), para 5.

> "Although in this case I am only concerned with a direction made in the circumstances set out in paragraph 1(4) of Schedule 7 in respect of a bank, there are many other circumstances in which directions could be made when Parliament cannot have intended that there should be an opportunity for affected persons to make representations. They include individuals engaged in terrorist financing or money laundering activities (paragraphs 1(3)(c) and 9(1)(c)); and governments reasonably believed to be engaged in the development or production of nuclear etc weapons (paragraphs 1(4)(a) and 9(1)(b); and the manifold persons in the UK financial sector to whom the direction is given (paragraph 3(1))."

He also pointed out that a duty to permit prior representations where there was no reason to believe that avoiding action would be taken by an affected person would be judge-made. Where Parliament had conferred a rule-making power on the executive subject to Parliamentary control, it was not generally for the courts to superimpose additional procedural safeguards: *R (Bapio) v Secretary of State for the Home Department* [2007] EWCA Civ 1139.

139. In paras 6-8 the judge rejected the challenge under A1P1 on the ground that section 63 was the means by which the Bank was afforded a reasonable

opportunity of effectively challenging the measures contained in the Order: *Jokela v Finland* (2002) 37 EHRR 581, para 45. He also rejected the challenge under article 6(1) on the ground that there was no dispute over a civil right at the time when the Order was made: *Micallef v Malta* (2009) 50 EHRR 920, para 74. In any event a hybrid procedure, consisting of an executive decision affirmed by Parliament which was subject to a later challenge before a court, was compatible with the article. He added that there was no claim for a declaration of incompatibility under section 4 of the Human Rights Act 1998.

140. In the Court of Appeal Maurice Kay and Pitchford LJJ rejected the Bank's procedural challenge on similar grounds: [2011] EWCA Civ 1. But Elias LJ held that the Treasury had failed to comply with the common law principles of fairness and that it was also in breach of A1P1 and article 6(1). He said that the Order was of a qualitatively different character to that with which the court was concerned in the *Bapio* case. It was not laying down rules which affected a broad and amorphous class or classes of person. It was specifically directed at the Bank and the Treasury knew that the action of implementing the Order would damage its rights, as was its purpose. He was not persuaded that Parliament in formulating the procedures in Schedule 7 must have intended to exclude any rights to natural justice. The judge's analysis of the challenge under article 6(1) that there was no dispute when the Order was made was inconsistent with the decision in *R (Wright) v Secretary of State for Health* [2009] 1 AC 739. As the Treasury had conceded that there was insufficient urgency to justify a failure to allow the Bank to seek to answer the allegations against it before the Order was made, the only proper conclusion was that the failure to give a hearing infringed article 6(1). It followed that the subsequent procedure was not sufficient to comply with A1P1.

(a) the common law challenge

141. The Order which the Treasury made under Schedule 7 to the 2008 Act was a statutory instrument within the meaning of section 1(1) of the Statutory Instruments Act 1946. It was made in the exercise of a power to make a direction under paragraph 1(1) of the Schedule which was required by paragraph 14(1) to be given by means of an order that was to be laid before Parliament. Section 96(1) of the 2008 Act provides that orders under the Act must be made by statutory instrument. For the purposes of the definition in section 1 of the 1946 Act, a power to make, confirm or approve orders that is conferred on the Treasury is deemed to be conferred on the Minister of the Crown in charge of that department: 1946 Act, section 11(1).

142. The procedure that is laid down for Parliamentary approval of an order under Part 4 of Schedule 7 which contains a direction of the kind that was given in this case provides that the order is to be laid before Parliament before it is made,

and that it ceases to have effect if not approved by a resolution of each House within 28 days: paragraph 14(2). Erskine May, *Treatise on the Law, Privileges, Proceedings and Usages of Parliament* (24th ed, 2011) states at p 676 that this type of affirmative procedure is frequently resorted to when delegated legislation must come into force immediately on being made without any prior consultation. It appears from that comment that it is standard practice for orders to be made under this procedure without prior consultation with those who are likely to be affected by them. Paragraph 14(5) states that, if apart from that sub-paragraph it would be treated for the purposes of the standing orders of either House as a hybrid instrument, it is to proceed in that House as if it were not such an instrument.

143. Under the hybrid instrument procedure the instrument is subject to a procedure which enables those who are affected by the instrument to present arguments against it to a select committee which reports on its merits and recommends whether or not it should be approved: Erskine May, p 684. The disapplication of this procedure by an express provision of this kind is said to be relatively common in recent times: Craies *on Legislation* (10th ed, 2012), para 6.2.2.3. Nevertheless it is feature of the procedure under Part 4 of the Schedule that it has expressly excluded the possibility of consultation before the order is made. It excludes the possibility of presenting arguments against the order prior to its receiving approval in either House.

144. Part 4 of Schedule 7 must be read together with sections 63 and 65-68 of the Act. These sections provide for the making of an application to set aside any decision of the Treasury in connection with the exercise of their functions under Schedule 7 to the Act, with the same relief as may be made or given in proceedings for judicial review. Permission is not required for the making of an application under section 63, and there is no time limit. Provisions of the kind that appear in this group of sections are unusual. They must be taken to have been included in the Act as a counterweight to the absence of any procedure for prior consultation with affected persons or the making of representations by them at any earlier stage. The provision for a closed material procedure indicates that Parliament was aware that some at least of the reasoning for the making of a direction would be likely to require to be withheld from affected persons.

145. These provisions reinforce the impression conveyed by the provisions of paragraph 14 of Schedule 7 that Parliament cannot have intended that there should be an opportunity for representations before the decision was made or as part of the Parliamentary process. A ministerial statement was issued on the making of the order on 12 October 2012 in accordance with a prior commitment to do so by the Minister when the Bill was passing through Parliament. By this means the Treasury's reasons for making the Order were placed before each House before it was approved.

146. The question then is whether the Bank had a common law right to be consulted before the making of the decision contained in the Order that was laid before Parliament. I readily acknowledge that the duty to give advance notice before a statutory power that may affect the subject adversely is exercised, whether by statutory instrument or otherwise, is deeply rooted in the common law. But, as Lord Sumption says in para 31 above, whether there is such a duty where the enabling statute does not deal with the point expressly must depend on the circumstances. The Bank accepts there is no authority that is on all fours with this case. Cases such as *R v Secretary of State for Health, Ex p United States Tobacco International Inc* [1992] QB 353, where it was held that the Secretary of State had a duty to give the applicants an opportunity to make representations on the expert advice he had received before making regulations banning oral snuff in view of the history of his dealings with them as well as the effect on their business, are far removed from the facts of this case.

147. The closest analogy is the *Bapio* case, where the provisions in question were alterations by the Home Secretary to the Immigration Rules and advice given to NHS employers by the Department of Health. Elias LJ was right to draw attention to the fact that the Order in this case was of a different character as it was specifically directed at the Bank. But the reasons given by the Court of Appeal for rejecting the proposition that there was duty to consult in that case seems to me to be capable of being applied more widely and to be just as much in point here as in *Bapio*.

148. First, there is the point made by Sedley LJ in para 44 that, if the Bank is right, its argument raises serious and very troublesome questions as to its implications. What limits, if any are to be placed on those to whom the duty is owed? As Mitting J pointed out in para 5 of his judgment, the conditions for the making of a direction in paragraph 1 of Schedule 7 and the requirements that may be imposed under paragraph 9 include various circumstances in which Parliament cannot have intended that there should be an opportunity to make prior representations. They include, for example, cases falling within the second condition described in paragraph 1(3) of Schedule 7, which applies where terrorist financing or money-laundering activities "are being carried on" by persons resident or incorporated in the country which pose a significant risk to the national interests of the United Kingdom. Is the duty to notify the persons affected to apply in those cases too? The urgency that the Treasury saw in the Bank's case was not as extreme as it might be in that situation, but its case must not be considered in isolation. A decision in its favour on this point will have far-reaching consequences for the application of Schedule 7 generally. It will also call into question the practice referred to by Erskine May for the affirmative resolution procedure to be resorted to when delegated legislation must come into force immediately on being made without any prior consultation: see para 140. Are the majority to be understood as saying that this must never happen?

149. If an opportunity to make prior representations is to be given, how is the exercise to be carried out, and under what conditions and subject what safeguards to ensure that any responses are properly taken into account? What information must be given to the affected party to ensure that its representations are effective? How is material that it would not be in the public interest to disclose to the affected party to be dealt with? There is also the possibility that the affected party may seek a judicial review of the way the process is being conducted before the direction is given: see *R v Secretary of State for the Environment, Ex p Brent London Borough Council* [1982] QB 593. This too would raise issues about the disclosure of material that in the public interest ought not to be disclosed. It could also significantly delay the whole process if, as Lord Sumption acknowledges in para 37 above, an application of the kind envisaged by section 63 would be unlikely to be determined within three months. I do not think that these questions can be ignored or left unanswered. Clear and precise guidance is needed if the procedure that the majority say must be implied into Schedule 7 is to be workable. I do not know where that guidance is to be found.

150. Then there are the points made by Maurice Kay LJ in para 58, with whose reasons Pitchford LJ agreed in para 65. He doubted whether, as a matter of principle, a duty to consult can generally be superimposed on a statutory rule-making procedure which required the intended rules to be laid before Parliament and subjected to the negative resolution procedure. And he attached some significance to the fact that the primary legislation had not provided an express duty of prior consultation as it had on many other occasions. Those points have added force in this case in view of the point made by Erskine May at p 676, as the paragraph 14 procedure requires the order to be made before it is laid and that it be approved by an affirmative resolution of each House of Parliament.

151. The disapplication of the hybrid instrument procedure is a further factor, as is the provision in paragraph 15 for the giving of notice of the direction to a particular person after the order has been laid and the opportunity that sections 63 and 65-68 give for an application to be made to set it aside, subject to rules designed to secure that disclosures of information are not made when they would be contrary to the public interest. The structure of the legislation, the scope for its application and the sensitive nature of the information on which decisions in this area of activity are likely to have been based all point in the same direction. They indicate that there was here a deliberate decision by Parliament not to subject the Treasury to a duty to consult before making the direction. This is readily understandable, in view of the nature of the risks to the national interest that the legislation was intended to deal with.

152. I would hold therefore that the Bank did not have a common law right to be consulted before the direction was given. Elias LJ said in para 97 that in his judgment the preconditions for supplementing the procedure to secure a right to

natural justice that were identified by Lord Reid in *Wiseman v Borneman* [1971] AC 297, 308 were met in this case, as the statutory procedure was insufficient to achieve justice and it was not contended that complying with the basic elements of natural justice would frustrate the purpose of the legislation. But Lord Reid did not go so far as to say that the court must always intervene whenever those preconditions were satisfied. Whether it would be right for the court to do this must always depend on the circumstances.

153. I would, for my part, respect the evident intention of Parliament that the Treasury should have power to make orders of the kind contemplated by paragraphs 1 and 9 of Schedule 7 without prior consultation, and that the basic elements of natural justice were to be met in the manner prescribed by sections 63 and 65-68. For the court to insist upon a prior duty to consult at common law would be inconsistent with the purpose of the legislation, which is to protect the national interests of the United Kingdom in circumstances where there is a significant risk to those interests, and it would contradict what I would understand to have been the will of Parliament. I do not think that it is open to this court to take that course. I would reject the challenge that is made at common law.

(b) the Convention rights challenge

154. The gravamen of this challenge is that, as the making of the direction was incompatible with the Convention rights on which the Bank founds, it was unlawful for the Treasury to make the direction: Human Rights Act 1998, section 6(1). Counsel for the Treasury did not seek to argue that this was a case to which section 6(1) did not apply because the primary legislation could not be read or given effect in a way which was compatible with the Convention rights and it was acting so as to give effect to those provisions: section 6(2)(b).

155. It is convenient to examine the argument that was directed to article 6(1) first, as the A1P1 argument too is about the absence of a procedural protection for the Bank's rights. In *Jokela v Finland* (2002) 37 EHRR 581, para 45 the Strasbourg court said that, in considering whether a person was afforded a reasonable opportunity of putting his case to the responsible authorities for the purposes of A1P1, a comprehensive view must be taken of the applicable procedures. The procedural challenge in both cases rests on essentially the same grounds.

156. The Bank submitted that the Treasury's decision to make the Order was a determination of the Bank's civil rights within the meaning of article 6(1), and that their failure to allow the Bank any opportunity to make representations was a plain breach of that article. It was also submitted that its case is indistinguishable from *R*

(Wright) v Secretary of State for Health [2009] UKHL 3, [2009] AC 739, where the provisional listing of persons considered to be unsuitable to work with vulnerable adults was held to be unlawful because the workers were denied an opportunity to answer the allegations that were made against them before they were listed.

157. As Baroness Hale of Richmond said in *Wright* at para 19, the article 6(1) issue raises two questions. The first is whether the case is concerned with a civil right at all. The second is whether the making of the direction amounted to a "determination" of a civil right. The first question is easily answered. It is not disputed that the Bank's right to carry on its business was a civil right and that the effect of the direction was greatly to impede the exercise of that right. The difficult issue is whether the making of a direction amounted to a determination of the Bank's civil right, given that an opportunity for the determination by an independent and impartial tribunal of its right to carry on its business unimpeded by the direction was afforded by the right to make an application to the court under section 63 after the direction was made.

158. It is well established that decisions which determine civil rights and obligations may be made by the administrative authorities, provided that there is then access to an independent and impartial tribunal which is in a position to exercise full jurisdiction as to the issues involved: *Bryan v United Kingdom* (1995) 21 EHRR 342; *Wright*, para 23. For the provisions of article 6(1) about the determination of a civil right to be applicable there must be a dispute over a civil right which can be said, at least on arguable grounds, to be recognised under domestic law: *Micallef v Malta* (2010) 50 EHRR 37, para 74. The Strasbourg court also concluded that for article 6(1) to apply the result of the proceedings must be directly decisive for the right in question. As Baroness Hale said in *Wright*, para 21:

> "It is one thing temporarily to freeze a person's assets, so that he cannot divest himself of them before an issue is tried; it is another thing to deprive someone of their employment by operation of law."

159. The Order in this case was not simply an asset-freezing order, but I agree with Maurice Kay LJ, para 76, that there are similarities. It can be seen, as Pitchford LJ said in para 126, as an interim preventive measure taken in a situation which, on the Treasury's view of the matter, was of some urgency. At the stage when the decision was taken there was, in my view, no directly decisive determination of the Bank's civil rights. The Treasury were in no position to carry out an article 6(1) compliant determination at that stage, and they could not do so anyway as they were not an independent or impartial tribunal. But the procedure for the making of an application under section 63 was available as soon as the

person could claim to be affected by the decision: section 63(2). There was then an issue about the Bank's civil rights which could be determined in a manner that was compatible with article 6(1). It was, no doubt, for this purpose, that section 63 was enacted. As there was then an opportunity for the Order to be set aside without delay on an application of judicial review principles, I think that it was unnecessary for an opportunity to be provided for the Bank to be consulted before the Order was made in order to satisfy the requirements of the article.

160. For these reasons, together with the further reasons given by Lord Reed, I would reject the Bank's contention that the way in which the Order was made was incompatible with article 6(1) because it was not given an opportunity to make representations. On a comprehensive view of the applicable procedures, I would for the same reasons reject the Bank's challenge to the making of the Order under A1P1.

LORD NEUBERGER (dissenting in part)

Introductory

161. Bank Mellat seeks to challenge the Financial Restrictions (Iran) Order 2009, SI 2009/2725 ("the Order") on two grounds. The first is substantive, namely that the reasons for which Her Majesty's Treasury ("the Treasury") decided to give the direction ("the Direction"), which resulted in the Order, were fundamentally flawed. The second ground of challenge is procedural, namely that, before giving the Direction, the Treasury should have given the Bank an opportunity to make representations.

162. I have reached the conclusion that (i) in agreement with Lord Reed, the substantive challenge fails, but (ii) in agreement with Lord Sumption, the procedural challenge succeeds.

The substantive ground of challenge

163. The prevention of nuclear proliferation ("proliferation"), including impairing its funding, is an issue which is not just very important. It is an issue which has diplomatic, national security, and financial market dimensions, and which presents the executive with enormous technical and practical difficulties. Further, any attempts to prevent proliferation will almost inevitably have substantial repercussions for third parties, innocent as well as guilty. It should therefore cause no surprise that decisions and actions which are aimed by the

executive at preventing proliferation throw into sharp focus the delicacy of the balance between the court's duty to uphold the rule of law and the court's duty not to trespass into areas which are properly left to the executive.

164. Judges have no more important function than that of protecting individuals and organisations from abuse or misuse by the executive of its considerable and extensive powers – even, as is almost always the case, when such abuse or misuse does not involve bad faith. The substantial adverse financial consequences for Bank Mellat of the giving of the Direction in this case provide a good example of the importance of this function. On the other hand, the judiciary's power to review decisions of the executive must be exercised bearing in mind that responsibility for the decision lies with the executive, not the judiciary, and judges do not have the relevant expertise or experience of those responsible for the decision. In the present case, the importance and relevance of expertise and experience in international relations, national security and financial regulation, is self-evident.

165. Accordingly, while the court has to apply well-established legal principles when deciding whether the Direction can be substantively justified, I agree with Lord Sumption when he says in para 21 that the Treasury must be allowed "a large margin of judgment", or, as Lord Reed puts it in para 92, "a wide margin of appreciation", when taking steps to prevent proliferation internationally, through the means of giving a direction under Schedule 7 to the Counter-Terrorism Act 2008 ("the 2008 Act").

166. Indeed, there is very little between Lord Sumption and Lord Reed as to the principles to be applied when addressing a challenge to such a direction, or to an order made pursuant to it. I agree with Lord Reed's general and far-ranging observations about proportionality in his paras 69-78, and what he says in paras 79-84 about the word "proportionate" in para 9(6) of Schedule 7 to the 2008 Act ("Schedule 7"). I also agree with his observations about "rational connection" in paras 86-90.

167. As Lord Reed implies in para 65, there is very little difference between what he says in those 21 paragraphs and what Lord Sumption says in paras 20, 21, 25 and 26. The only real difference arises from their interpretation of the grounds upon which the House of Lords decided *A v Secretary of State for the Home Department* [2005] 2 AC 68. On that issue, while there are passages in some of the opinions which support the rather wider ratio suggested by Lord Sumption in para 25, I agree with what Lord Reed says in para 95-97.

168. The explanation for the fact that Lord Sumption and Lord Reed have reached opposing conclusions on Bank Mellat's substantive challenge to the

Direction largely lies in the difference between their respective analyses of the facts. Essentially, Lord Sumption concludes that the Treasury's decision to make the Direction was legally flawed for two main reasons, which he summarises in para 22. First, that there was no reason to single out Bank Mellat, as "the problem [which the Treasury relies on] is a general problem of international banking"; secondly, that the ground now advanced by the Treasury for the Direction is different from that advanced by Government ministers when the Order was placed before Parliament.

169. I have concluded that, while those two points each have some force in a qualified form, neither of them amounts to a sufficiently justified criticism of the Direction to justify quashing the Order. I agree with Lord Reed's analysis in relation to the first point in paras 105-117, and, in relation to the second point, paras 119-124. However, because the issue is finely balanced, as evidenced by the division of opinion in this Court, I will briefly summarise my reasons.

170. As to the first point, it seems to me that the Treasury considered that it was appropriate to make a direction under Schedule 7 against Bank Mellat for a combination of grounds. In summary, those grounds were (i) Bank Mellat was an Iranian bank, and Iran's banking system lacked the controls to prevent the funding of proliferation, which most other countries had, (ii) Bank Mellat had, as a matter of fact, provided banking services to businesses connected with Iran's nuclear weapons programme ("the programme"), (iii) other Iranian banks with branches or subsidiaries in London, who had helped finance the programme, were subject to asset-freezing orders or to a systematic reporting requirement, and (iv) although other Iranian banks could be used for the purpose, the Order would represent a severe constraint on Iran's ability to obtain banking services for the purpose of funding the programme. Ground (iii) and, to some extent, ground (iv) are defensive rather than inherently justificatory.

171. Ground (i) is, I accept, weakened by the fact that it is very difficult for any bank or national banking system to identify the ultimate purpose for which facilities are being provided, especially where the customer wishes to conceal that purpose. Nonetheless, that does not wholly undermine ground (i), especially in relation to an Iranian bank which has supported entities connected with the programme. As to ground (ii), it is true that Bank Mellat conscientiously took steps to sever its relationship with the entities which had been involved with the programme, but that was only after UN Security Council resolution 1747 in 2007, and, even then, facilities were being provided to one such entity even after these proceedings had been initiated. Despite ground (iii), there may have been some Iranian banks which had access to the London market, but they were few and small, and there was no evidence that they were funding entities which supported the programme. Ground (iv) on its own would not be impressive, but it is, in my

view, a reasonable additional factor which helps underpin the decision to give the Direction.

172. I do not find it easy to resolve the question of whether Bank Mellat's substantive challenge to the Direction should succeed. As the brief summary in the preceding two paragraphs suggests, and as is also apparent from the much fuller analysis proffered by Lord Reed, the arguments raised by the Treasury to justify the Direction are not particularly strong, and the financial consequences of the Direction and subsequent Order against the Bank, which is not suggested to have intentionally supported the programme, are very grave. The Treasury's case is further weakened by the fact that, when it gave the Direction and promulgated the Order, it believed that the great majority of the shares in Bank Mellat were owned by the Iranian government, which is, and at all material times, was not the case. It is not a major point, but it does have a little traction, given that the grounds for the Direction are not particularly strong, and that this mistake does have some bearing on the Treasury's ground (iv) in para 10.

173. All in all, while the four grounds summarised in para 170 above, even when taken together, are not overwhelming, I have reached the conclusion that they are strong enough to justify the Treasury's contention that, despite the very serious financial consequences for Bank Mellat, the Direction was given on grounds which were unassailable as a matter of law. The Direction was in an area, and related to an issue, in respect of which the courts should accord the executive a wide margin of appreciation, and, while the grounds advanced by the Treasury for giving the Direction do not appear very strong on examination, they are rational and they have some force. In those circumstances, were it not for the grave effect of the Direction on the Bank, I would fairly readily have concluded that the Treasury had acted lawfully in giving it.

174. However, I entertain real doubt as to whether the Direction was justifiable once one weighs the benefits it was likely to achieve, in the light of the relative weakness of the grounds, against the inevitable and substantial harm it would cause to Bank Mellat. However, in the end, I am not persuaded that a court can properly conclude that the benefit of the Direction must have been so slight that the Treasury could not reasonably have concluded that it was right to give it, notwithstanding the harm the Bank would thereby suffer..

175. On my view of the facts on the second reason identified in para 168 above, it is unnecessary to decide the further question of principle which divides Lord Sumption and Lord Reed, which the latter discusses in paras 123-124. I prefer to leave that question open.

176. If the Treasury's justification for giving the Direction, and Ministers' explanation for it to Parliament, had been that Bank Mellat knew that it was funding entities which supported the programme, which the Treasury now accepts would not have been right, a not unfamiliar question would arise. That question is the extent to which the court should uphold a decision of the executive which was justified by one reason when it was made, but when the matter comes to court, the reason is abandoned and the decision is sought to be justified by a different reason. It is an issue on which there are a number of judicial observations in a domestic judicial review context, most famously perhaps that of Megarry J in an oft-quoted passage in *John v Rees* [1970] Ch 345, at p 402, cited with qualified approval on a number of occasions, eg in *Secretary of State for the Home Department v AF* [2010] 2 AC 269, paras 61-2 and 73.

177. I would have thought that there was room for argument as to how such a question should be approached in the present context, following the introduction of the European Convention on Human Rights into UK law, especially as this is a case where the Convention is engaged (through Article 1 of the First Protocol), where proportionality is referred to in the empowering statute, and where the decision has been put before, and approved by, Parliament.

The procedural ground of challenge

178. As Lord Sumption says in paras 29-30, where the executive intends to exercise a statutory power to a person's substantial detriment, it is well established that, in the absence of special facts, the common law imposes a duty on the executive to give notice to that person of its intention, and to give that person an opportunity to be heard before the power is so exercised. While this has been described as a "rule of universal application … founded upon the plainest principles of justice" (per Willes J in *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180, 190), it has more recently been expressed in somewhat more measured terms. In *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560, Lord Mustill said that "fairness" will "very often require that a person who may be adversely affected by the decision will have an opportunity to make representations … either before the decision is taken …; or after it is taken, with a view to procuring its modification".

179. In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or

pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute.

180. For the reasons given by Lord Sumption in paras 28-49, I consider that the Direction in this case was invalid owing to the failure of the Treasury to afford Bank Mellat the opportunity of making representations prior to its being made. Because of the division of opinion on this issue, I will attempt to summarise my reasons

181. On the face of it at least, this was a paradigm case for the giving of prior notice. (i) The Direction was targeted at just two entities, one of which was the Bank; (ii) the consequences of giving the Direction and the making of the Order would clearly be drastic so far as the Bank was concerned; (iii) there was no need for secrecy or great haste in giving the Direction; (iv) the Direction would come into effect virtually at once; (v) the reasons for the Direction and Order were all based on the Bank's dealings and ownership, so there could have been little doubt but that the Bank would have had relevant things to say about the proposed direction. On this last point, the Bank's knowledge of its customers' activities, the Bank's ability to deal with the problem of unknowingly assisting the programme, and the ownership of the Bank are all points on which the Bank would have made strong and relevant representations if it had been given the chance to do so.

182. Despite this, Bank Mellat was given no notice of the Treasury's intention to give the Direction against it or to put the Order before Parliament, and therefore it had no opportunity to put its case as to why such a direction should not be made. The Treasury raised a number of arguments as to why it was entitled not to give notice to the Bank of its intention to give the Direction. Some of those arguments were based on provisions of the 2008 Act; others were based on impracticality.

183. I have no hesitation in rejecting the arguments based on impracticality, namely that (i) notice would have given the Bank the opportunity to re-arrange its relationships, (ii) notice would have been ineffective or difficult because of the Treasury's reliance on secret material, (iii) notice would have to have been given to all those who dealt with the Bank, which would not have been realistic. As to those arguments, I have nothing to add to what Lord Sumption says at paras 31-32.

184. I turn then to the Treasury's arguments based on the terms of the 2008 Act. There is nothing in the express terms of the statute which assists the Treasury, and it therefore has to rely on implication. In that connection, two arguments are raised as to why no consultation was required, namely (i) the fact that the Order had to be approved by affirmative resolution in both Houses of Parliament, and (ii) section

63 of the 2008 Act ("section 63") entitled Bank Mellat to challenge any direction, and thus any consequential order, after it was made, and, when taken together with other provisions of Schedule 7, it is clear that there was no duty to have prior consultation.

185. I would reject the contention that the fact that the Direction is enshrined in, or approved by, the Order means that its validity cannot be considered by the court. I agree with what is said by Lord Sumption in paras 40-45 and by Lord Reed in para 54. The fact that the Order in the present case was confirmed by Parliament does not detract from the applicability of the rule, in so far as it applies to the actions of the executive, i.e. the Treasury decision to make the Direction, as opposed to the legislative decision to confirm the consequent Order. Consequently, if the administrative decision to make the Direction was legally flawed for failure to consult the Bank, then the consequential Order should be quashed. There is no question of such a decision of this court in any way impinging on the sovereignty of Parliament.

186. Lord Reed, however, relies in para 61 on para 14(5) of Schedule 7, which provides that if an order under Schedule 7 "would be treated for the purposes of the standing orders of either House of Parliament as a hybrid instrument, it is to proceed in that House as if it were not such an instrument". In my view, the provision takes the matter no further, as it relates to the characterisation of, and Parliamentary processes relating to the making of, an order. I do not, with respect, see how it can impinge on the lawfulness of the Treasury's processes when deciding to make the antecedent direction. If anything, the exclusion of Bank Mellat from the Parliamentary process, as illuminatingly explained by Lord Hope, seems to me to support the argument that the Bank ought to have been consulted earlier.

187. As to the Treasury's second argument, it may be that, in some cases, the fact that the statute granting the power in question gives a specific right of challenge subsequent to its exercise can be enough to dispense with any prior obligation to consult. However, in my view, it is by no means a sufficient answer in many cases. As a matter of logic, the two rights are a long way away from being mutually inconsistent or even duplicative. Indeed, if it were otherwise, the right to be consulted would be very rare, because, as Lord Sumption points out in para 37, there is almost always a right to challenge a decision of the executive as a matter of public law.

188. A right to be consulted before a power is exercised is very different in its nature and in its potential effect from a right to challenge it after it has been exercised. The former involves representations to the intending exerciser of the power in relatively informal and flexible circumstances with a variety of possible

outcomes, whereas the latter involves arguing against the exerciser in a formal, forensic context, where the court's powers are relatively constrained. In an era where mediation is increasingly supported, not least by the executive, the desirability of prior consultation, even where subsequent challenge through the courts is possible, is at least as great as it ever was.

189. As between the two rights, the present case provides a very good demonstration of the difference between them in terms of their effect. The right to challenge a direction under Schedule 7 has many drawbacks compared with a right to be consulted before the direction is given. Particularly as the Direction has virtually immediate effect, the time it may take to challenge any subsequent order, coupled with the uncertainty while such challenge is under way, and the costs involved in such a challenge, mean that a subsequent right of challenge would be much less valuable than a right to make representations in advance. Further, there must be a real risk of a significant adverse effect on a bank's reputation if a direction is made, even if it is subsequently quashed. Ignoring the subsequent appeals, well over seven months elapsed between the giving of the Direction in this case and Mitting J's decision as to its validity. Seven months is a very long time from the Bank's perspective, and, even viewed objectively, it is a long time given that the Direction was only to last for twelve months.

190. I am unimpressed by the Treasury's reliance on section 63. It purports to grant little, if anything, more than a specific statutory right to persons against whom a direction is made than they would be accorded by public law. That is clear from subsection (3) which provides that, on any challenge to a direction "the court shall apply the principles applicable on an application for judicial review". Unlike Lord Reed in para 62, I do not see section 63 as giving greater rights to a person against whom a direction is made than they would enjoy under public law; nor do I consider that sections 65-68 of the 2008 Act suggest otherwise. Those sections were included, in my view, to deal with the need to protect confidential material in any proceedings under section 63. Indeed, I suspect that section 63 was included in the Act because it was more sensible in drafting terms to link those procedures to proceedings specified in the 2008 Act.

191. Lord Reed identifies a number of other factors in paras 58-62 of his judgment which, when taken together with sections 63, and 65-8, of the 2008 Act, persuade him that the normal duty to consult has been abrogated. I do not agree. At a high level, I consider that, while the right to be consulted in advance about the exercise of a statutory power which will cause significant harm can be abrogated by implication in the statute, the right is so important that the implication must be very clear. More specifically, I am unimpressed with the various other factors which weigh with Lord Reed. The difficulty of consulting because of the need for confidentiality does not impress me for the reason given by Lord Sumption in para 31. It may be that, where the Treasury was proposing to make a direction against

another bank or banks in different circumstances, it may not be practicable to give it or them to give an opportunity to comment, but such a point must be assessed on a case by case basis and in this case it fails for the reasons given by Lord Sumption in paras 31-33.

192. As already explained, I do not consider that para 14(5) of Schedule 7 assists. Nor do I find para 15 of Schedule 7 of much help. The 2008 Act clearly had to specify the date from which a direction took effect, and where the direction concerned a specific person, as in this case, it was obviously sensible to provide that it took effect on the date on which it was served on that person. I find it impossible to think of any other way of ensuring both clarity and fairness.

Conclusion

193. In my view, therefore, Bank Mellat's appeal should be allowed, the direction made by the Treasury should be set aside, and the Order quashed.

194. I end by pointing out that the two grounds of challenge to the Direction in this case are not entirely unrelated either in principle or in fact. The uniting principle which applies both to the Bank's substantive challenge and to its procedural challenge is the fundamental public law rule that the executive must exercise a statutorily conferred power fairly. When it comes to giving a direction under Schedule 7 which will foreseeably and substantially harm an entity, fairness requires the Treasury to have good enough reasons for giving the direction. It equally requires the Treasury to give the entity notice of the intention to give the direction, so that the entity can make representations about it in advance.

195. So far as the facts are concerned, I have explained in paras 170-174 above why there is in my view considerable force in the Bank's substantive challenge to the giving of the Direction, The fact that the justification for the Direction was not very strong, coupled with the more specific facts that the Treasury was wrong about the ownership of Bank Mellat and could usefully have discovered what steps the Bank was taking to avoid inadvertently supporting the programme, provide specific and practical support for the conclusion that the Bank should have been given an opportunity to make representations before the Direction was given.

LORD DYSON (dissenting in part)

196. I agree, for the reasons given by Lord Sumption, that the appeal should be allowed on the procedural issue.

197. I was at first persuaded by Lord Sumption's judgment that the appeal should also be allowed on the substantive issue. But, like Lord Hope and Lord Neuberger, I find Lord Reed's analysis at paras 102 to 117 and 118 to 122 more convincing. Like Lord Neuberger, I express no view on paras 123 and 124 of Lord Reed's judgment.

198. The Treasury has explained why Bank Mellat was singled out. The explanation is summarised at paras 103 to 106 and 113 of Lord Reed's judgment. Lord Sumption accepts (para 27) that the Schedule 7 direction may well have added something to Iran's practical problem in financing transactions associated with its weapons programmes. But he concludes that the direction was irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make to its objective.

199. This conclusion is based on (i) making an assessment of what effect the direction would have on Iran's ability to finance the weapons programme and (ii) conducting a proportionality exercise by balancing that effect against the undoubtedly grave consequences that the direction would have for Bank Mellat.

200. As Lord Sumption acknowledges at para 21, any assessment of the rationality and proportionality of the direction must recognise that the nature of the issue requires that the Treasury be allowed a large area of judgment or margin of appreciation. The court is in a poor position to weigh the effectiveness of a measure whose object is to reduce (if not eliminate) Iran's ability to fund its weapons programmes. This is not an area in which the court has any expertise. Accordingly, it should only hold that such a measure is irrational or disproportionate if it is confident that this has been clearly demonstrated. For the reasons given by Lord Reed, I am not confident that this has been done in the present case.

201. I would therefore dismiss the appeal on the substantive issue.

LORD CARNWATH (dissenting in part)

202. Like the other partial dissentients my views on the substantive issue have wavered. In the end however I am persuaded by Lord Sumption that the appeal should succeed on that issue for the reasons he gives (his paras 19-27). Notwithstanding the force of Lord Reed's alternative analysis, and the other judgments in support, I do not propose to add anything of my own. It seems better that Lord Sumption's reasoning should stand as the single majority judgment on this crucial issue. On the procedural point, by contrast, I find myself clearly on the

side of the minority, agreeing wholly with the reasoning of Lord Hope on what I regard as a point of considerable general importance (paras 134-159).