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Iranian Bank Restrictions

Features

Bank Mellat v Her Majesty's Treasury (No 2)

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[2013] UKSC 39 Supreme Court

(Lord Sumption and others) (19 June 2013)

FACTS

HM Treasury restricted access to the UK's financial markets by a major Iranian commercial bank, Bank Mellat, on account of its alleged connection with Iran's nuclear weapons and ballistic missile programmes. The Treasury used a statutory instrument: the Financial Restrictions (Iran) Order 2009.

CONCLUSION

In the leading majority judgment, Lord Sumption held that on substantive and procedural grounds the Treasury's direction should be set aside.

Substantively, an arbitrary and irrational distinction had been made between the Bank and other Iranian banks operating in the UK. The measure as a whole was disproportionate. The problem was not specific to

the Bank but an inherent risk of banking. Comparable banks continued to enjoy access to the market. Other banks were as likely to have the same problem which was inherent in international banking. The direction was irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make to its objective. The first instance judge found that the Bank had a conscientiously applied policy of not providing banking services to entities identified in the United Nations list of prohibited customers.

Nothing in the Treasury's case explained why the court should accept that it was necessary to eliminate the Bank's business in London in order to achieve the objective of the statute, if the same objective could be sufficiently achieved in the case of comparable banks by requiring them to observe financial sanctions and relevant risk warnings.

Procedurally, the Bank received no notice of the Treasury's intention to make the direction to stop it doing business, and therefore had no opportunity to make representations. The duty to give 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 public law. Consultation was required as a matter of fairness and good administration. The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of a decision-maker which is implied into statute. 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.

The Treasury made significant factual mistakes in the course of deciding whether to make the direction, and subsequently justifying it to Parliament, for example the Bank's shareholder composition. The Treasury's direction was unlawful for want of prior notice to the Bank or any procedure enabling the Bank to be heard in advance of the order being made.