Trinity Term
[2013] UKSC 38
On appeal from: [2011] EWCA Civ 1

JUDGMENT

Bank Mellat (Appellant) *v* Her Majesty's Treasury (Respondent) (No. 1)

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
Michael Brindle QC
Amy Rogers
Dr Gunnar Beck
(Instructed by Zaiwalla and Co)

Respondent
Jonathan Swift QC
Tim Eicke QC
Robert Wastell
(Instructed by Treasury Solicitors)

Special Advocates
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Intervener
Nicholas Vineall QC

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Intervener
Dinah Rose QC
Charlotte Kilroy
(Instructed by Liberty)

LORD NEUBERGER (with whom Lady Hale, Lord Clarke, Lord Sumption and Lord Carnwath agree)

1. This judgment is concerned with two connected questions:

(i) Is it possible in principle for the Supreme Court to adopt a closed material procedure on an appeal? If so,

(ii) Is it appropriate to adopt a closed material procedure on this particular appeal?

A closed material procedure involves the production of material which is so confidential and sensitive that it requires the court not only to sit in private, but to sit in a closed hearing (ie a hearing at which the court considers the material and hears submissions about it without one of the parties to the appeal seeing the material or being present), and to contemplate giving a partly closed judgment (ie a judgment part of which will not be seen by one of the parties).

Open justice and natural justice

2. The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum – see, for instance *A v Independent News & Media Ltd* [2010] EWCA Civ 343, [2010] 1 WLR 2262, and *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 WLR 1645. Examples of such cases include litigation where children are involved, where threatened breaches of privacy are being alleged, and where commercially valuable secret information is in issue.

3. Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party ("the excluded party") knowing, or being able to test, the

contents of that evidence and those arguments ("the closed material"), or even being able to see all the reasons why the court reached its conclusions.

4. In *Al Rawi v Security Service* [2012] 1 AC 531, Lord Dyson made it clear that, although "the open justice principle may be abrogated if justice cannot otherwise be achieved" (para 27), the common law would in no circumstances permit a closed material procedure. As he went on to say at [2012] 1 AC 531, para 35, having explained that, in this connection, there was no difference between civil and criminal proceedings:

> "[T]he right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that".

5. The effect of the Strasbourg Court's decisions in *Chahal v United Kingdom* (1996) 23 EHRR 413 and *A and others v United Kingdom* [2009] ECHR 301 is that Article 6 of the European Convention on Human Rights ("Article 6", which confers the right of access to the courts) is not infringed by a closed material procedure, provided that appropriate conditions are met. Those conditions, in very summary terms, would normally include the court being satisfied that (i) for weighty reasons, such as national security, the material has to be kept secret from the excluded party as well as the public, (ii) a hearing to determine the issues between the parties could not fairly go ahead without the material being shown to the judge, (iii) a summary, which is both sufficiently informative and as full as the circumstances permit, of all the closed material has been made available to the excluded party, and (iv) an independent advocate, who has seen all the material, is able to challenge the need for the procedure, and, if there is a closed hearing, is present throughout to test the accuracy and relevance of the material and to make submissions about it.

6. The importance of the requirement that a proper summary, or gist, of the closed material be provided is apparent from the decision of the House of Lords in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269. At para 59, Lord Phillips said that an excluded party "must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations", and that this need not include "the detail or the sources of the evidence forming the basis of the allegations". As he went on to explain:

> "Where, however, the open material consists purely of general assertions and the case against the [excluded party] is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

7. The nature and functions of a special advocate are discussed in *Al Rawi* [2012] 1 AC 531, by Lord Dyson, paras 36-37, and by Lord Kerr, para 94. As Lord Dyson said, the use of special advocates has "limitations", despite the fact that the rule-makers and the judges have done their best to ensure that they are given all the facilities that they need, and despite the fact that the Treasury Solicitor has ensured (to the credit of the Government) that they are of consistently high quality.

8. In a number of statutes, Parliament has stipulated that, in certain limited and specified circumstances, a closed material procedure may, indeed must, be adopted by the courts. Of course, it is open to any party affected by such legislation to contend that, in one respect or another, its provisions, or the ways in which they are being applied, infringe Article 6. However, subject to that, and save maybe in an extreme case, the courts are obliged to apply the law in this area, as in any other area, as laid down in statute by Parliament.

The statutory and factual background to this appeal

9. The statute in question in this case is the Counter-Terrorism Act 2008 ("the 2008 Act"), which, as its name suggests, is concerned with enabling steps to be taken to prevent terrorist financing and the proliferation of nuclear weapons, and thereby to improve the security of citizens of the United Kingdom. The particular provisions which apply in the present case are in Parts 5 and 6 of the 2008 Act. The first relevant provision is section 62, which is in Part 5 and "confer[s] powers on the Treasury to act against terrorist financing, money laundering and certain other activities" in accordance with Schedule 7.

10. Paragraphs 1(4), 3(1) and 4(1) of Schedule 7 to the 2008 Act permit the Treasury to "give a direction" to any "credit or financial institution", if "the Treasury reasonably believes" that "the development or production of nuclear …. weapons in [a] country … poses a significant risk to the national interests of the United Kingdom". According to paras 9 and 13 of the schedule, such a direction may "require" the person on whom it is served "not to enter into or to continue to participate in … a specified description of transactions or business relationships with a designated person". Paragraph 14 requires any such direction to be approved by affirmative resolution of Parliament.

11. Pursuant to these provisions, on 9 October 2009, the Treasury made the order the subject of these proceedings, the Financial Restrictions (Iran) Order 2009 ("the 2009 Order"), which, three days later, was laid before Parliament, where it was approved. The 2009 Order, which was in force for a year, directed "all persons operating in the financial sector" not to "enter into, or … continue to participate in, any transaction or business relationship" with two companies, one of which was Bank Mellat ("the Bank"), or any branch of either of those two companies.

12. The Bank is a large Iranian bank, with some 1800 branches and nearly 20 million customers, mostly in Iran, but also in other countries, including the United Kingdom. In 2009, prior to the 2009 Order, it was issuing letters of credit in an aggregate sum of over US$11bn, of which around 25% arose out of business transacted in this country. It has a 60% owned subsidiary bank incorporated and carrying on business here, which was at all material times regulated by the Financial Services Authority. The Order effectively shut down the United Kingdom operations of the Bank and its subsidiary, and it is said to have damaged the Bank's reputation and goodwill both in this country and abroad.

13. The first section of Part 6 of the 2008 Act is section 63, of which subsection (2) gives any person affected by a direction the right to apply to the High Court (or the Court of Session) to set it aside, and any such application is defined by section 65 as "financial restrictions proceedings". The Bank issued such proceedings to set aside the Order on 20 November 2009. The Government took the view that some of the evidence relied on by the Treasury to justify the 2009 Order was of such sensitivity that it could not be shown to the Bank or its representatives. Mitting J accepted the Government's case that justice required that the evidence in question be put before the court and that it had to be dealt with by a closed material procedure. Accordingly, he gave appropriate directions as to how the hearing should proceed.

14. The two day hearing before him was partly in open court and partly a closed hearing. The open hearing involved all evidence and arguments (save the closed material) being produced at a public hearing, with both parties, the Bank and the Treasury, seeing the evidence and addressing the court through their respective counsel, in the normal way. The closed hearing was conducted in private, in the absence of the Bank, its counsel, and the public, and involved the Treasury producing the closed material and making submissions on it through counsel. The interests of the Bank were protected, at least to an extent, by (i) the Treasury providing the Bank with a document which gave the gist of the closed material, and (ii) the presence at the closed hearing of special advocates, who had been cleared to see the material, and who made such submissions as they could on behalf of the Bank about the closed material.

15. Following the two-day hearing, Mitting J handed down two judgments on 11 June 2010. The first judgment was an open judgment, in which the Judge dismissed the Bank's application for the reasons which he explained - [2010] EWHC 1332 (QB). The second judgment was a closed judgment, which was seen by the Treasury, but not by the Bank, and is, of course, not publicly available. The closed judgment was much shorter than the open judgment, although it should be added that the open judgment is not particularly long.

16. In his open judgment, Mitting J referred to his closed judgment in two passages. At [2010] EWHC 1332 (QB), para 16, the Judge considered, inter alia, the activities of one of the Bank's former customers, Novin. Having referred to the fact that Novin had been "designated by the [UN] Security Council … as a company

which ‘operates within … and has transferred funds on behalf of” the Atomic Energy Organisation of Iran (“AEOI”), he said that “[b]y reason of the designation and for reasons set out in the closed judgment I accept that Novin was an AEOI financial conduit and did facilitate Iran’s nuclear weapons programme”. At [2010] EWHC 1332 (QB), para 18, the Judge considered the activities of another of the Bank’s former customers, Doostan International and its managing director, Mr Shabani. He said that “[f]or reasons which are set out in the closed judgment, I am not satisfied that Mr Shabani has made a full disclosure … and am satisfied that he and Doostan have played a part in the Iranian nuclear weapons programme”.

17. The Bank appealed, and the appeal was heard by the Court of Appeal largely by way of an ordinary, open, hearing. However, there was a short closed hearing at which they considered the closed judgment of Mitting J, and at which the special advocates, but not representatives of the Bank, were present. The Bank’s appeal was dismissed by the Court of Appeal (Maurice Kay and Pitchford LJJ, Elias LJ dissenting in part) in an open judgment, which was handed down on 13 January 2011 – [2011] EWCA Civ 1. In the last paragraph of his judgment, [2011] EWCA Civ 1, para 83, Maurice Kay LJ said that although the Court “held a brief closed hearing in the course of the appeal”, he did not “find it necessary to refer to it or to the closed judgment of Mitting J”.

18. The Bank then appealed to this Court. Before the hearing of the appeal, it was clear that the Treasury would ask this Court to look at the closed judgment of Mitting J. Therefore, it was agreed between the parties that the first day of the three day appeal should be given over to the question of whether the Supreme Court could conduct a closed hearing. At the end of that day’s argument, we announced that, by a majority, we had decided that we could do so and that we would give our reasons later.

19. The second day and most of the third day of the hearing were given over to submissions made in open court by counsel for the Bank (and counsel for certain interested parties, shareholders in the Bank) in support of the appeal, and to submissions in reply on behalf of the Treasury. We were then asked by counsel for the Treasury to go into closed session in order to consider the closed judgment of Mitting J. This was opposed by counsel for the Bank and by the special advocates. While we were openly sceptical about the necessity of acceding to the application, by a bare majority we decided to do so. Accordingly, the Court had a closed hearing which lasted about 20 minutes, at which we heard brief submissions on behalf of the Treasury and counter-submissions from the special advocates. We then resumed the open hearing for the purpose of counsel for the Bank making his closing submissions.

20. Contemporaneously with this judgment, we are giving our judgment on the substantive issue, namely whether the 2009 Order should be quashed. The purpose of this judgment is (i) to explain why we decided that we had power to have a closed material hearing, and (ii) to consider the closed material procedure we adopted on this appeal, and to give some guidance for the future in relation to the closed material hearing procedure on appeals.

The closed material procedure in the courts of England and Wales

21. The practice and procedure of the civil courts of England and Wales (the County Court, the High Court and the Court of Appeal) are governed by the Civil Procedure Act 1997 ("the 1997 Act"). Section 1(1) of the 1997 Act provides for the practice and procedure to be set out in the Civil Procedure Rules ("CPR"), and states that they are to be made, and modified, by the negative statutory instrument procedure. Section 1(3) of the 1997 Act states that the power to make the CPR "is to be exercised with a view to securing that the civil justice system is accessible, fair and efficient".

22. The underlying purpose of the CPR is enshrined in the so-called "overriding objective" in CPR 1(1), which requires every case to be dealt with "justly". By CPR 1(2), this expression is stipulated to include "so far as is practicable …ensuring that the parties are on an equal footing [and] ensuring that [every case] is dealt with … fairly". The CPR contain detailed rules with regard to procedures before, during and after trial, which seek to ensure that all civil proceedings are conducted in a way which is fair and effective, and, in particular for present purposes, in a way which achieves, as far as is possible in this imperfect, complex and unequal world, openness and equality of treatment as between the parties.

23. In a series of provisions in Part 6 of the 2008 Act, Parliament has recognised that financial restrictions proceedings may require the rules of general application in the CPR to be changed or adapted if a closed material procedure is to be permitted. The first of those provisions is section 66(1), which explains that:

> "The following provisions apply to rules of court relating to—
>
> (a) financial restrictions proceedings, or
>
> (b) proceedings on an appeal relating to financial restrictions proceedings."

Section 66(2) requires the "rules of court" to have regard to "the need to secure that" both (a) directions made under schedule 7 to the 2008 Act "are properly reviewed", and (b) that information is not disclosed "when [it] would be contrary to the public interest".

24. Section 66(3) of the 2008 Act states that "rules of court" may make provision for various aspects of financial restrictions proceedings, including (a) "the mode of proof and about evidence" and (c) "about legal representation". Section 66(4) states that "[r]ules of court" may (a) enable "the proceedings to take place without full particulars of the [direction] being given to a party …", (b) enable "the court to

conduct proceedings in the absence of any person, including a party …", (c) deal with "the functions of … a special advocate", (d) empower the court "to give [an excluded] party … a summary of evidence taken in the party's absence."

25. Section 67 of the 2008 Act is concerned with rules about disclosure in cases covered by section 66(1). Section 67(2) provides that, subject to the ensuing subsections, "[r]ules of court" must secure that the Treasury give disclosure on the normal principles - ie that they must disclose material which (i) they rely on, (ii) adversely affects their case, and (iii) supports the case of another party. Section 67(3) states that "[r]ules of court" must secure that (a) the Treasury can apply not to disclose material, (b) they can do so under a closed material procedure, with a special advocate present, and (c) the court should accede to the application "if it considers that the disclosure of the material would be contrary to the public interest", in which case (d) the court must "consider requiring the Treasury to provide a summary of the material to every party", provided that (e) the summary should not include material "the disclosure of which would be contrary to the public interest". Section 67(6) emphasises that nothing in the section should require the court to act in such a way as to contravene Article 6.

26. Section 68 of the 2008 Act is concerned with the appointment of special advocates for the purpose of financial restrictions proceedings. Section 72 of the 2008 Act enabled the Lord Chancellor to make the original rules referred to in the preceding sections. Section 72(4) provides that (a) any such rules should be laid before both Houses of Parliament, and (b) if they are not approved within forty days, any such rules will "cease to have effect".

27. The final provision in Part 6 of the 2008 Act is section 73, the interpretation section, which states that, for the purposes of Part 6 of the 2008 Act:

> "'rules of court' means rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session".

28. Pursuant to sections 66 and 67 of the 2008 Act, the Civil Procedure (Amendment No 2) Rules (SI 2008/3085) were made by the Lord Chancellor on 2 December 2008, laid before Parliament the next day, and came into force on 4 December 2008. As a result, the CPR now include a new rule 79, which applies to "Proceedings under the Counter-Terrorism Act 2008". CPR 79.2 (1) modifies the overriding objective "and so far as relevant any other rule", to accommodate (2) the court's duty to "ensure that information is not disclosed contrary to the public interest".

29. CPR 79 then goes on to modify, disapply or replace many of the generally applicable provisions of the CPR in relation to proceedings under the 2008 Act. Most of these variations arise from the provision for a closed material procedure in some

such proceedings. Thus, the CPR are amended to take into account the potential need for (i) involvement of special advocates (in e.g. CPR 79.8, CPR 79.18-21), (ii) an application for a closed material procedure (dealt with in CPR 79.11 and CPR 79.25), (iii) directions if such a procedure is ordered (in CPR 79.26), (iv) modification of the rules in relation to evidence and disclosure, including disapplication of CPR 31 relating to public interest immunity (in CPR 79.22), and (v) the possibility of a closed judgment (in CPR 79.28).

The statutory provisions and procedural rules of the Supreme Court

30. The Supreme Court was created by the Constitutional Reform Act 2005 ("the 2005 Act"). Section 40(2) of the 2005 Act states that "[a]n appeal lies to the Court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings". The effect of section 40(3) is that the right of appeal to the Supreme Court from any Scottish court remains the same as it was in relation to appeals to the House of Lords. Section 40(5) states that the Supreme Court "has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment". Section 40(6) provides that "[a]n appeal under subsection (2) lies only with the permission of the Court of Appeal or the Supreme Court …".

31. Section 45(1) of the 2005 Act provides that the President of the Supreme Court "may make rules (to be known as 'Supreme Court Rules') governing the practice and procedure to be followed in the Court". Section 45(3) states that this power must be exercised so as to ensure that "(a) the Court is accessible, fair and efficient", and "(b) the rules are both simple and simply expressed". Section 46 of the 2005 Act states that these rules (1) must be submitted to the Lord Chancellor by the President of the Supreme Court (or, in the case of the initial rules, the senior Lord of Appeal in Ordinary), and then (2) must be laid before Parliament by the Lord Chancellor, and (3) are then subject to the negative resolution procedure.

32. Pursuant to sections 45 and 46 of the 2005 Act, the Supreme Court Rules 2009 (SI 2009/1603) were duly made and laid before Parliament, and came into force on 1 October 2009, the day on which the Supreme Court opened. These rules ("SCR") now govern the procedure of this Court. They are far simpler than the CPR (unsurprisingly, as they are only concerned with appeals, indeed appeals which are almost always second, or even third, appeals).

33. SCR 2 is headed "Scope and objective", and SCR 2(2) states that "the overriding objective" of the SCR is "to secure that the Court is accessible, fair and efficient". The SCR contain no provisions which enable public interest immunity to be avoided, and no express provisions for closed procedures other than SCR 27(2), as set out in the next paragraph. Thus, SCR 22(1)(b) provides for the service by the appellant of "an appendix … of the essential documents which were in evidence before, or which record the proceedings in, the courts below", and SCR 28 states that a Supreme Court judgment "may be … delivered in open court; or … promulgated by

the Registrar". However, it is to be noted that SCR 29(1) begins by stating that "In relation to an appeal …, the Supreme Court has all the powers of the court below".

34. SCR 27 is headed "Hearing in open court", and it provides:

> "(1) Every contested appeal shall be heard in open court except where it is necessary in the interests of justice or in the public interest to sit in private for part of an appeal hearing.
>
> (2) Where the Court considers it necessary for a party … to be excluded from a hearing or part of a hearing in order to secure that information is not disclosed contrary to the public interest, the Court must conduct the hearing, or that part of it from which the party [is] excluded, in private but the Court may exclude a party … only if a person who has been appointed as a special advocate to represent the interests of that party is present when the party [is] excluded.
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> (3) Where the Court decides it is necessary for the Court to sit in private, it shall announce its reasons for so doing publicly before the hearing begins.
>
> ….. "

Can the Supreme Court conduct a closed material procedure: introductory

35. If a closed material procedure was lawfully conducted at the first instance hearing, it would seem a little surprising if an appellate court was precluded from adopting such a procedure on an appeal from the first instance judgment. As the advocate to the Court said in the course of his full and balanced argument, one would normally expect an appeal court to be entitled to have access to all the material available to the court below and to see all the reasoning of the court below. Otherwise, it is hard to see how an appeal process could be conducted fairly or even sensibly. And, if that involves the appellate court seeing and considering closed material, it would seem to follow that that court would have to adopt a closed material procedure.

36. However, particularly in the light of the fundamental principle established in *Al Rawi* [2012] 1 AC 531, the question needs to be looked at with great care. In particular, it is necessary to enquire whether statute requires the Supreme Court to adopt a closed material procedure, at least in some circumstances, on an appeal from the Court of Appeal upholding (or reversing) a first instance decision on an application under section 63(2) of the 2008 Act. As was said by counsel for Liberty (interveners on this appeal), supported by counsel for the Bank, any contention that a closed material procedure in a particular court in particular circumstances is sanctioned by a statute must be closely and critically scrutinised.

The case for saying that this Court can conduct a closed material procedure

37. The contention that this court has the power to have a closed material procedure is based on section 40(2) of the 2005 Act, supported by section 40(5). The argument proceeds as follows. (i) Section 40(2) provides that an appeal lies to the Supreme Court against "any" judgment of the Court of Appeal; (ii) that must extend to a judgment which is wholly or partially closed; (iii) in order for an appeal against a wholly or partially closed judgment to be effective, the hearing would have to involve, normally only in part, a closed material procedure; (iv) such a conclusion is reinforced by the power accorded to the Court by section 40(5) to "determine any question necessary … for the purposes of doing justice", as justice will not be able to be done in some such cases if the appellate court cannot consider the closed material.

38. The strength of this argument is reinforced when one considers the possible outcomes if the Supreme Court cannot consider a closed judgment (or the closed part of the judgment) under a closed material procedure. If that were the case, then, as I see it, there would be five possible consequences.

39. The first possibility would be that the appeal could not be entertained: that cannot be right, because it would conflict with section 40(2), which simply and unambiguously confers on the Supreme Court the power to hear appeals from "any" judgment of the Court of Appeal. The Supreme Court frequently refuses permission to bring an appeal from the Court of Appeal, but that is covered by section 40(6) of the 2005 Act, which expressly provides for such permission. It is one thing to cut down section 40(2) by providing that permission to appeal can be refused on a case by case basis expressly catered for in section 40(6); it is quite another to suggest that a whole class of appeals is impliedly excluded from the wide and general words of section 40(2).

40. The second possibility would be that the Supreme Court could consider the whole judgment, with the closed part being considered in open court. While it can be said that such a course would not involve a breach of any specific provision of Part 6 of the 2008 Act, if construed on a strictly semantic basis, it would wholly undermine its purpose, and the procedural structure it has set up. Unsurprisingly, this second possibility was not canvassed in argument.

41. The third possibility would be that the appeal could be entertained, but only on the basis that the Supreme Court could not look at the closed material. In an extreme case, where the whole judgment of the Court of Appeal was closed, this would be impossible, and would run into the same difficulty under section 40(2) as identified in para 39 above. Even in a case where the Court of Appeal judgment was only closed in part, such a course would be self-evidently unsatisfactory and would seriously risk injustice, and in some cases it would be absurd.

42. The fourth possibility would be that the Court was bound to allow the appeal; the fifth possibility would be that, conversely, the Court was bound to dismiss the appeal. There are clearly theoretical arguments in favour of either course, but it is unnecessary to consider them, because each of those courses is self-evidently equally unsatisfactory. If either of them was correct, it would mean that, when exercising its power to give permission under section 40(6) of the 2005 Act, the Supreme Court would effectively be deciding the appeal, and, indeed, would be doing so without seeing the whole of the judgment below, and without hearing oral argument.

43. In my view, subject to any arguments to the contrary, this analysis establishes that the Supreme Court can conduct a closed material procedure where it is satisfied that it may be necessary to do so in order to dispose of an appeal. This conclusion is reinforced by section 40(5) of the 2005 Act. An appeal under section 40(2) is "an appeal … under any enactment". Accordingly, where an appeal is brought against a decision under the 2008 Act, the Supreme Court has "power to determine any question necessary to be determined for the purposes of doing justice in" such an appeal. On any appeal where the judgment is wholly or partly closed, it seems to me that this court could not do justice, or at least would run a very serious risk of not doing justice, if it could not consider the closed material, and it could only do that if it adopted a closed material procedure.

44. It might, I suppose, be said that adopting a closed material procedure on any appeal would involve the antithesis of "doing justice in" that appeal. In a case where Parliament and the CPR have lawfully provided for a closed material procedure at first instance and in the Court of Appeal, I am of the view that, on the contrary, for this Court to entertain an appeal without considering the closed material would, at least in many cases, not be doing justice, either in the sense of fairly determining the appeal or in the sense of being seen fairly to determine the appeal, notwithstanding that the material will be considered in a closed hearing.

45. The view that the Supreme Court can conduct a closed material procedure also derives some support from the provisions of SCR 27(2), and from SCR 29(1). However, if the Supreme Court would not otherwise have the power to conduct a closed material procedure, it could not, in my view, derive such a power solely from its rules. Accordingly those two rules can fairly be said to do no more than to give comfort to my conclusion.

46. It is right to mention that on this appeal, we are not being invited to consider a closed judgment of the Court of Appeal, as they did not find it necessary to give a closed judgment or even to include a closed paragraph in their open judgment. However, the trial judge gave a closed judgment, and, if it is open to this Court to consider, in a closed material procedure, a closed Court of Appeal judgment for the reasons just discussed, it must follow that we can consider, in a closed material procedure, a closed judgment given by the trial judge.

47. Accordingly, I conclude that, unless there are stronger arguments to the contrary, the Supreme Court has power to entertain a closed material procedure on appeals against decisions of the courts of England and Wales on applications brought under section 63(2) of the 2008 Act.

The arguments that we cannot conduct a closed material procedure

48. Having reached this provisional conclusion, it is right to acknowledge and consider the contrary arguments. Those arguments are:

i. A closed material procedure is such a serious inroad into natural justice that it can only be justified by clear and unambiguous statutory words, such as are found in Part 6 of the 2008 Act, but not in the 2005 Act;
ii. Parliament has plainly limited the closed material procedure under the 2008 Act to the High Court, the Court of Appeal and the Court of Session;
iii. It is appropriate to exclude the Supreme Court from the courts which can have a closed material procedure, given its role as a constitutional court and ultimate guardian of the common law;
iv. A closed material procedure requires a set of rules such as CPR 79 which are detailed and appropriately modify the generally applicable rules, and there is no such set of rules for the Supreme Court.

49. None of these points meets the basic argument which persuades me that it is open to the Supreme Court to undertake a closed material procedure, but they nonetheless merit careful attention. Before discussing them, however, it is right to address Liberty's understandable reliance on the fact that, in *Al Rawi* [2012] 1 AC 531, this Court uncompromisingly set its face against introducing a closed material procedure.

50. The stand taken by this Court in *Al Rawi* [2012] 1 AC 531 remains unquestioned, but it does not amount to any sort of indication that there could be no circumstances in which those concerned with the administration of justice could reasonably introduce a closed material procedure. Indeed, at the end of the short passage quoted in para 4 above from Lord Dyson's judgment, he acknowledged that Parliament can do so.

51. Having said that, any judge, indeed anybody concerned about the dispensation of justice, must regard the prospect of a closed material procedure, whenever it is mooted and however understandable the reasons it is proposed, with distaste and concern. However, such distaste and concern do not dictate the outcome in a case where a statute provides for such a procedure; rather, they serve to emphasise the care with which the courts must consider the ambit and effect of the statute in question.

52. At a relatively high level, in terms of constitutional principle and governmental functions, it seems to me that the following propositions apply. (i) The executive has a duty to maintain national security, which includes both stopping the financing of terrorism and nuclear proliferation and ensuring that some of the information relating to the financing of terrorism remains confidential; (ii) the rule of law requires that any steps aimed at preventing financing of terrorism which damage a person should be reviewable by the courts, and, as far as possible in open court and in accordance with natural justice; (iii) given that such reviews will often involve the executive relying on confidential material, it is for the legislature to decide and to prescribe in general how the tension between the need for natural justice and the need to maintain confidentiality is to be resolved in the national interest; (iv) in the absence of a written constitution, it is the European Convention, through Article 6, as signed up to by the executive and interpreted by the courts, which operates as a principled control mechanism on what the legislature can prescribe in this connection; (v) it is for the courts to decide, within the parameters laid down by the legislature, how the tension between the two needs of natural justice and confidentiality is to be resolved in any particular case.

53. In the more specific context of the issues with which the 2008 Act is concerned, it would be unreasonable not to accept that (i) the Act's aims of fighting the spread of terrorist activity and nuclear proliferation, and improving the security of UK citizens, are important aspects of the most fundamental duties of the executive, and (ii) those aims would be at real risk of being severely hampered if the courts hearing financial restrictions proceedings could not adopt a closed material procedure. Point (i) is self-evident: the two most fundamental functions of the executive are the maintenance of the defence of the realm and of the rule of law, and the 2008 Act appears to me to be within the scope of both those functions. In relation to point (ii), if there can be no closed material procedure, either (a) sensitive material would be seen by a person who may be supporting terrorism or nuclear proliferation, which might advance the very activities which the 2008 Act is designed to deter, or (b) such material would not be put in evidence, in which case a direction under that Act, which was appropriate and in the public interest, may be discharged for lack of evidential support.

54. The legislature has laid down in Part 6 of the 2008 Act, as expanded by CPR 79, how challenges to a direction under schedule 7 to the 2008 Act should be dealt with by the courts, and this includes a closed material procedure, which aims to strike a balance between two competing public interests, and it is a balance which has been held by the Strasbourg Court to be compatible in principle with Article 6. Whether or not one agrees with it, the justification for the way in which the balance has been struck by the legislature in Part 6 of the 2008 Act is clear, lawful and rational. It is against that background that the issue of principle raised on this appeal must be judged.

55. Turning now to the four arguments raised by the intervener and the Bank, there is a basic principle that fundamental rights cannot be taken away by a generally or ambiguously expressed provision in a statute – see eg per Lord Hoffmann in *R v*

Secretary of State, Ex p Simms [2000] 2 AC 115, 132. There is also a basic principle that fundamental rights can only be overridden by a statutory provision through express words or by necessary implication, not merely by reasonable implication – see eg per Lord Hobhouse in *R (Morgan Grenfell) v Special Commissioners* [2003] 1 AC 563, para 45.

56. While these two basic principles are of fundamental importance, they should not be applied without regard to the purpose and context of the statutory provision in issue. Section 40(2) is plainly intended to render every decision of the Court of Appeal to be capable of being appealed to the Supreme Court (unless specifically precluded by another statute), and, as explained, where it is necessary for this court to consider closed material in order to dispose of the appeal justly, this would only be achievable if a closed material procedure could be adopted. In any event, I am unconvinced that the wording of section 40(2) of the 2005 Act could be fairly described as "general" in the sense that that word is used in *Simms* [2000] 2 AC 115, 132: it would be more accurate to describe it as being broad, indeed as broad as possible, in its intended application. Further, if section 40(2) is to be given its full natural meaning, then, for the reasons discussed in the preceding section of this judgment, it necessarily means that the Supreme Court can adopt a closed material procedure.

57. It is true that section 67, read together with section 73, of the 2008 Act only extends to the rules of the Court of Appeal, High Court and Court of Session, but there were no Supreme Court Rules when that Act was passed. Indeed, there was no Supreme Court at that time: the Judicial Committee of the House of Lords, the Law Lords, were still in place, although they had a very short life expectancy (as an institution). They sat as a committee of the House of Lords, and could have been expected to look after their own procedure. It is true that the 2005 Act had been enacted by the time that the Bill which became the 2008 Act was being considered, but those drafting and debating the Bill would have known that the 2005 Act contained sections 40(2) and (5); they would also have known that the SCR had yet to be promulgated, and could have assumed that they would provide for a closed material procedure – as indeed they do in SCR 27(2), and, indirectly, in SCR 29(1).

58. In any event, rules governing what should be done before and during a trial have to be far more detailed than those governing what should be done before and during an appeal. Given that there were to be very detailed procedures prescribed for a closed material procedure at first instance (and on the first appeal), Parliament could fairly have assumed that there would be no need for very detailed provisions for a closed material procedure in this Court: again, in the light of SCR 27(2) and 29(1), such a view would have been prescient. It is true that sections 66-73 of the 2008 Act apply to the Court of Appeal as well as to the High Court, but that is because the CPR apply to both courts.

59. I am unimpressed by the argument that the Supreme Court was intentionally excluded from the ambit of closed material procedures in sections 66-73 of the 2008

Act, because of the Court's status. If that was the legislative intention, one would have expected it not only to have been spelt out, but to have been catered for, especially in the light of section 40(2) of the 2005 Act. It seems most unlikely that Parliament would have left section 40(2) unamended, while intending the Supreme Court to be unable to adopt a closed material procedure. If it had had such an intention, Parliament would, in my view, have provided that, in relation to cases where the courts below had adopted a closed material procedure, appeals to the Supreme Court were excluded, or could only proceed on a certain specified procedural basis. Otherwise, on this hypothesis, Parliament would have intended to leave this Court with the series of unsatisfactory options considered in paras 39-42 above.

60. The notion that the Supreme Court's constitutional role is so important that it cannot conduct a closed material procedure has a certain appeal (particularly perhaps to a Supreme Court Justice), but I am unimpressed by it. The Supreme Court is not a special constitutional court, but it generally limits the appeals it considers to those that raise points of general public importance. If the Supreme Court were to adopt a closed material procedure on an appeal, it would be most unlikely to result in a judgment which contained any statements of general public importance, or even of general significance, which were in closed form. Almost by definition, the closed evidence will be factual (including, possibly, expert) in nature, and it will normally be specific to the particular case. It is hard to believe that there could be circumstances in which it would be impossible for the Court to provide an open judgment which dealt clearly and comprehensively with all the points of any general legal significance in the appeal, even if some of the discussion of the details of the evidence and arguments has to remain closed. And if such circumstances did arise, then the problem would be a measure of the extraordinary sensitivity of the material concerned, which would make it all the more important that it remained closed. Having read in draft the judgment of Lord Hope, I would like to record my agreement with what he says in paras 98-100 in connection with this Court giving a closed judgment.

61. We were taken to other statutes which provide for a closed material procedure, but all that they establish, in my view, is that there is more than one drafting technique available to prescribe for such procedures.

62. All in all, therefore, I am unpersuaded by the various arguments raised against my provisional view that it is open to this Court to adopt a closed material procedure in an appeal under the 2008 Act if justice requires it.

The decision to have a closed material procedure on this appeal

63. At the end of their open submissions in defence of the decision of the Court of Appeal that the 2009 Order should be discharged, counsel for the Treasury asked us to adopt a closed material procedure in order to consider the closed judgment of Mitting J. We were sceptical about the need to do so, for three reasons. First, the proposal was opposed on the ground that it was unnecessary, by the special advocates (who had seen the closed judgment) and by counsel on behalf of the Bank (who had not seen the

closed judgment). Secondly, the Judge had referred in his open judgment to the closed judgment on two occasions; on each occasion, it was to draw support for a conclusion which was not challenged before us, and we thought it unlikely that he would have relied to any significant extent on any other part of his closed judgment without saying so in his open judgment. Thirdly, the Court of Appeal had found it unnecessary to refer to any part of the closed judgment.

64. Nonetheless, on instructions from his clients, counsel for the Treasury told us that a closed session could make a difference to the outcome of this appeal. By a bare majority, with those in the majority (which included me) all having real misgivings, the Court decided that it should accede to the proposal to have a closed material procedure. Although we strongly suspected that nothing in the closed judgment would have any effect on the outcome of the appeal, we could not be sure in the absence of seeing the closed judgment and listening to submissions on it. And, as we all appreciated that there was a real possibility that we were going to allow the appeal, and therefore to disagree with Mitting J (who gave the closed judgment) and the Court of Appeal (who had seen the closed judgment), we felt that there would be a real risk of justice not being seen to be done, and an outside possibility of justice actually not being done, to the Treasury if we did not proceed to hold a closed hearing, as the Treasury requested.

65. In anticipation that we might take that course, we had required counsel for the Treasury to supply the special advocates with a note summarising the Treasury's case on the closed judgment. Having decided to have a closed hearing, we proceeded to read the closed judgment and heard argument on it in a closed hearing from counsel for the Treasury, from the special advocate, and from counsel to the court (who, like us, saw the closed judgment for the first time just before the closed hearing).

66. In my opinion, there was no point in our seeing the closed judgment. There was nothing in it which could have affected our reasoning in relation to the substantive appeal, let alone which could have influenced the outcome of that appeal. So far as it was said to have included relevant findings, the most that could be said of the closed judgment is that it put some evidential flesh on some fairly bare bones embodying some of the conclusions of fact reached in the open judgment. It is fair to say that, in two respects, Mitting J made findings in his closed judgment, which supported views he had expressed in his open judgment, over and above the two passages referred to in para 16 above. However, as with the views expressed in those two passages, the views were not ones which were challenged on this appeal.

Applications for closed material hearings on appeal

67. I draw certain conclusions from this experience.

68. First, where a judge gives an open judgment and a closed judgment, it is highly desirable that, in the open judgment, the judge (i) identifies every conclusion in that

judgment which has been reached in whole or in part in the light of points made or evidence referred to in the closed judgment, and (ii) that the judge says that this is what he or she has done. This was a point made by Carnwath LJ, in a judgment given after Mitting J's judgments in this case, in *AT v Secretary of State for the Home Department* [2012] EWCA Civ 42, para 51.

69. Secondly, a judge who has relied on closed material in a closed judgment, should say in the open judgment as much as can properly be said about the closed material which he has relied on. Any party who has been excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and arguments it received. Further, the more the judge can say about the closed material in the open judgment, the less likely it is that a closed hearing will be asked for or accorded on an appeal. In cases where judges have to give a closed judgment, they should say in their open judgment, as far as they properly can, what the closed material has contributed to the overall assessment they have reached in their open judgment.

70. On an appeal against an open and closed judgment, an appellate court should, of course, only be asked to conduct a closed hearing if it is strictly necessary for fairly determining the appeal. So my third point is that any party who is proposing to invite the appellate court to take such a course should consider very carefully whether it really is necessary to go outside the open material in order for the appeal to be fairly heard. If the advocate for one of the parties invites an appellate court to look at the closed judgment on the ground that it may be relevant to the appeal, it is very difficult for the court to reject the application, at least without looking at the closed judgment, which involves the initiation of a closed material procedure, which should be avoided if at all possible. This puts an important onus on the legal representatives of the party asking an appeal court to look at closed material. An advocate acting for a party who wants a closed hearing should carefully consider whether the request is one which should, or even can properly, be made and advise the client whether such a course is necessary or appropriate. Advocates, perhaps particularly when acting for the executive, have a duty to the court as well as a duty to their clients, and the court itself is under a duty to avoid a closed material procedure if that can be achieved.

71. Fourthly, if the appellate court decides that it should look at closed material, careful consideration should be given by the advocates, and indeed by the court, to the question whether it would nonetheless be possible to avoid a closed substantive hearing. It is quite feasible for a court to consider, and be addressed on, confidential material in open court. If such a course is taken, the advocates and the court must obviously take care in how they refer to the contents of the closed material, and sometimes a brief closed hearing will be necessary to set the ground rules. Sometimes, the closed material will be so sensitive or so difficult to refer to elliptically, that such a course will be impracticable. However, it should always be considered, as it is plainly less objectionable to have a brief closed procedural hearing to discuss the possibility than to have a closed hearing which considers substantive issues. I should add that, if such a course is taken, the court should order that, despite it being referred to and

looked at in open court, the documents in issue cannot be shown to anyone and their contents cannot be referred to out of court.

72. Fifthly, if the court decides that a closed material procedure appears to be necessary, the parties should try and agree a way of avoiding, or minimising the extent of, a closed hearing. This would also involve the legal representatives to the parties to any such appeal advising their clients accordingly, and, if a closed hearing is needed, doing their best to agree a gist of any relevant closed document (including any closed judgment below).

73. Sixthly, if there is a closed hearing, the lawyers representing the party who is relying on the closed material, as well as that party itself, should ensure that, well in advance of the hearing of the appeal, (i) the excluded party is given as much information as possible about any closed documents (including any closed judgment) relied on, and (ii) the special advocates are given as full information as possible as to the nature of the passages relied on in such closed documents and the arguments which will be advanced in relation thereto.

74. Finally, appellate courts should be robust about acceding to applications to go into closed session or even to look at closed material. Given that the issues will have already been debated and adjudicated upon, there must be very few appeals where any sort of closed material procedure is likely to be necessary. And, in those few cases where it may be necessary, it is hard to believe that an advocate seeking to rely on closed material or seeking a closed hearing, could be unable to articulate convincing reasons in open court for taking such a course. As already mentioned, the closed material procedure on this appeal added nothing. Had counsel for the Secretary of State had the benefit of the guidance set out above, and in particular in paras 70 and 71, I very much doubt that he would have felt able to contend that we should have a closed material procedure. For the future, any party or appellate court considering whether to adopt such a procedure would do well to bear in mind what Lord Hope says in paras 89-97 of his judgment, with which I agree.

LORD HOPE (dissenting)

75. This case raises some fundamental issues about the effect of provisions in Parts 5 and 6 of the Counter-Terrorism Act 2008. Part 5 of the Act, which gives effect to Schedule 7, confers far-reaching powers on the Treasury to deal with terrorist financing and money laundering. Part 6 creates a scheme for appeals against financial restrictions decisions by the Treasury. In a nutshell these issues can be summarised in a single sentence: how much attention should this court pay to what Parliament has, or has not, actually said as to how financial restriction proceedings are to be conducted in the courts?

76. Parliament has set out in Part 6 of the 2008 Act provisions for the use in appeals against financial restrictions decisions of the Treasury of material that the Treasury refuse to disclose to appellants or their legal representatives, commonly referred to as "closed material". Chapter 2 of Part 6 is closely modelled on the Schedule to the Prevention of Terrorism Act 2005. Section 67(3), which appears in that Chapter, requires that rules of court must provide the Treasury with the opportunity to apply to the court for permission not to disclose material otherwise than to the court and to any person appointed as a special advocate. Section 73 provides that in that Chapter the expression "rules of court" means "rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session".

77. But no mention is made here, or anywhere else in the 2008 Act, of the use of closed material in the court of last resort in the United Kingdom – the appellate committee of the House of Lords as it then was, or the Supreme Court of the United Kingdom as it was to become. The 2008 Act received the Royal Assent on 26 November 2008. The bulk of Part 3 of the Constitutional Reform Act 2005, which made provision for the Supreme Court, was not brought into force until 1 October 2009: Constitutional Reform Act 2005 (Commencement No 11) Order 2009 (SI 2009/1604). But sections 45 and 46, which provide for the making of the Rules of the Supreme Court, were brought into force on 27 February 2006: Constitutional Reform Act 2005 (Commencement No 4) Order (SI 2006/228). These rules were already in draft and had been circulated to consultees for their comments by 28 November 2008. Yet the Treasury, by which the legislation in Parts 5 and 6 of the 2008 Act was being promoted, did not seek the views of Parliament as to whether the Rules of the Supreme Court should, like those of the other courts mentioned in section 73, make provision for the use of closed material in proceedings brought under Part 6 of the 2008 Act.

78. In the light of this background, which leaves the issue for decision by this court uninstructed by Parliament, I am unable, with respect, to agree with the conclusions reached on it by the majority.

Closed material

79. The issue as to the use of closed material, as I see it, raises three distinct questions, although they are all interconnected. The first is an issue of principle: when, if ever, will it be open to the Supreme Court to adopt a closed material procedure? The second is whether it is necessary, in the interests of justice or in the public interest, for the closed material to be seen and considered by the court in this case. The third is whether, having done so, the court should issue a closed judgment, bearing in mind that the effect of doing this will be that the party to whom the material has not been disclosed will be unable to see the court's reasons for the conclusions that it has reached on a consideration of that material.

(a) the issue of principle

80. The issue of principle as to the use of closed material was examined by Lord Dyson in *Al Rawi v Security Service* [2011] UKSC 43, [2012] 1 AC 531. He concluded that a closed material procedure should only be introduced in ordinary civil procedure if Parliament saw fit to do so. I said that I agreed with the reasons that he gave, as did Lord Kerr. But we both added some further reasons of our own. It is worth noting too the width of the issue to which the argument both in the Court of Appeal and in this court was addressed: see para 71. I thought that the view which we took would resolve the issue in a case of this kind too.

81. The crucial points that we all made can be summarised, quite briefly, in this way. The right to know and effectively challenge the opposing party's case is a fundamental feature of the judicial process. The right to a fair trial includes the right to be confronted by one's accusers and the right to know the reasons for the outcome. It is fundamental to our system of justice that, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. There may come a point where a line must be drawn when procedural choices of one kind or another have to be made. A distinction may be drawn between choices which do not raise issues of principle and choices that affect the very substance of a fair trial. There is no room for compromise where the choices are of the latter kind. The court cannot abrogate the fundamental common law right by the exercise of any inherent power. Any weakening of the law's defences would be bound to lead to state of uncertainty and, sooner or later, to attempts to widen the breach still further. The court has for centuries been the guardian of these fundamental principles. The rule of law depends on its continuing to fulfil that role.

82. Acknowledging that closed material procedures and the use of special advocates were controversial, Lord Dyson said in para 47 of his judgment in *Al Rawi* that it was not for the courts to extend the procedure beyond the boundaries which had been drawn for its use by Parliament. I said in para 74 of my judgment that fundamental issues as to where the balance lay between the principles of open justice and of fairness and the demands of national security were best left for determination through the democratic process by Parliament. Lord Brown and Lord Kerr were doubtful whether it would be possible as a matter of principle for the court to be invested with jurisdiction in this way: paras 86, 99.

83. I would, for my part, be content to agree with the way Lord Dyson put it in para 48 of *Al Rawi*, where he said:

> "The common law principles to which I have referred are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consultation and proper consideration of the sensitive issues involved. It is not surprising that Parliament has seen fit to make provision for a closed material procedure in certain carefully defined

> situations and has required the making of detailed procedural rules to give effect to the legislation."

In para 69 he agreed with the Court of Appeal that the issues of principle raised by the closed material procedure were so fundamental that a closed material procedure should only be introduced in ordinary civil litigation if Parliament saw fit to do so. He then added these words:

> "No doubt, if Parliament did decide on such a course, it would do so in a carefully defined way and would require detailed procedural rules to be made (such as CPR Pts 76and 79) to regulate the procedure."

84. The answer which I would give to the first of the three questions which I have identified in para 79, above, is that it will be open to the Supreme Court to adopt a closed material procedure if, but only if and only to the extent that, the use of that procedure has been expressly sanctioned by Parliament. The fact that this procedure has been sanctioned for use in the lower courts does not meet Lord Dyson's point that the procedure nevertheless erodes fundamental common law principles. And the fact that it has been used in the lower courts leaves open the question whether it would be consistent with fundamental principle for it to be used in the court of last resort. It leaves open the question whether it can ever be right for the Supreme Court, of all courts, without the sanction of Parliament to hear argument on points of which one of the parties has had no notice and is unable to address in argument, and whether it can ever be right for it to have to give its reasons, in whole or in part, in a closed judgment.

85. The word "fundamental", which appears so often in Lord Dyson's judgment in *Al Rawi*, and appears again in my own judgment in paras 72-74 and Lord Kerr's judgment in para 94, serves to emphasise the enormity of the issues that are at stake if the objections to such a procedure are to be overcome. If the procedure is to be used in this court, the issues of principle require that its use should always be carefully provided for and defined by Parliament and never be left to implication. Only then can one be confident that Parliament really has squarely confronted what it is doing. Otherwise, as Lord Hoffmann said in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 132, there is too great a risk that the full implications may have passed unnoticed in the democratic process.

86. The absence of a direction in Part 6 of the 2008 Act that the provisions about rules of court relating to proceedings on an appeal relating to financial restrictions proceedings extend to the Supreme Court is, therefore, especially significant. This makes it plain that Parliament was not asked to address its mind to this issue at all. Nor was the Supreme Court, for its part, put on notice that the President when making the Supreme Court Rules, the provisions about which were already in force (see para 77, above), was to have regard to the matters set out in sections 63(2)-(4) of the Act. The fact that rule 27(2) of the Supreme Court Rules contemplates that the court might consider it necessary for a party and that party's representative to be excluded from a

hearing in order to secure that information is not disclosed contrary to the public interest does not answer this point. It was, no doubt, a wise precaution to make provision for a variety of situations of that kind that might arise. But it does not address directly the use of a closed material procedure with all the consequences that might then follow, including the possibility of having to issue a closed judgment. The question whether the Supreme Court had power to adopt such a procedure had not yet been tested in argument when the rules were made, and it was not open to the President in the exercise of his rule-making function to confer on the court a power that it did not have.

87. The argument that the provisions of sections 40(2) and (5) of the 2005 Act show that this court can conduct such a procedure to dispose of an appeal where the judgment appealed against was wholly or partly closed does not meet my point that the issue is so fundamental that it must be left to an express and carefully defined provision by Parliament. I do not think that a point of such fundamental importance can be left to implication. It is plain that the issue was not brought before Parliament when it enacted Part 3 of the 2005 Act. There is nothing in the express language of section 40 which shows that the statute must have given authority to the Supreme Court for the use of this procedure: see *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, para 45 per Lord Hobhouse.

88. For these reasons I was of the opinion at the end of the hearing on the first day's argument that it was not open to the Supreme Court to adopt a closed material procedure in this case, as it had not been expressly authorised by Parliament. I remain of that opinion. The effect of the decision of the majority, however, is that there is now no way back on this issue. The Rubicon has been crossed.

(b) should the closed material be seen and considered in this case?

89. As the majority view was in favour of the view that it was open in principle to the court to resort to the closed material procedure, I gave careful thought to the question whether it should be resorted to in this case. It seemed to me that the onus was on the Treasury to show that this was necessary. It was not just a question of asserting, without reasons, that there was material in Mitting J's closed judgment at [2010] EWHC 1332 (QB) that was relevant to the issues in the appeal. I do not think that it would be inconsistent with the majority's decision on the issue of principle for the court to set a high standard on the issue of necessity. Convincing reasons must be given as to why the closed material should be looked at.

90. The Treasury submitted that the court would have to have regard to the judgment if it was to be in a position properly and fairly to exercise its jurisdiction in the appeal, unless it was prepared to dismiss the Bank's case. This was because the closed reasons formed part of Mitting J's findings on the Treasury's evidence and of his conclusions as to its case. So it might be impossible for the appeal to be fairly determined if the court was not willing to have regard to them. But there are various

reasons why, as it seemed to me, the Treasury's approach fell far short of what was needed to show that it was necessary for this procedure to be resorted to.

91. First, there is the fact that the Court of Appeal, which did see and consider Mitting J's closed judgment and held a brief closed hearing in the course of the appeal to that court, did not find it necessary to refer to the closed judgment in more detail than the judge himself did: [2011] EWCA Civ 1, [2012] QB 101, para 83. That, in itself, would not be a conclusive reason for not resorting to the procedure in this court if it was necessary to do justice on the appeal. But it does point to the need for the Treasury to give convincing reasons as to why this should be done. Mitting J referred to his closed judgment in para 16 of his judgment, where he said that he accepted that Novin Energy Company was a conduit for the Atomic Energy Organisation of Iran and that it did facilitate Iran's nuclear weapons programme. He referred to it again in para 18, where he said that for the reasons set out in the closed judgment, he was satisfied that Doostan International had played a part in the Iranian nuclear programme. The Court of Appeal had the opportunity to say if those findings were not justified. It did not do so, and it was not submitted for the Bank that the reasons that the judge gave for those findings should be reviewed again by this court.

92. Second, there are the views of the special advocates to which close attention should always be paid. Mr Chamberlain drew attention to the fact that there was no closed ground of appeal in this case, and that neither of the two findings which were based on material in the closed judgment was in issue. This was because the Bank's case was that those findings were not enough to justify the order made by the Treasury. His advice was that the court did not need to consider closed material in order to determine that issue.

93. Third, there are the reasons that were set out in a note that was provided to the special advocate at the court's request by the Treasury and which the special advocates had seen when Mr Chamberlain gave the advice referred to in the previous paragraph. It was to the contents of this note that much of the discussion as to whether it was necessary for the court to see the closed judgment was directed.

94. The first three paragraphs of the note refer to various passages in the closed judgment which, as was stated in the fourth paragraph, demonstrated the weight to be attached to the judge's conclusion that the Bank had the capacity to assist proliferators, that such assistance could be afforded to a range of companies involved in proliferation and that the assistance provided was material. It did not seem to me that it was necessary to look at the closed material to reinforce this point, as its importance was already apparent from points made by Mitting J in his open judgment. In the last sentence of para 16, having described the Bank's relationship with Novin, the judge said that he accepted the conclusion of the Treasury's witness Mr Robertson 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.

95. The fifth paragraph of the note was in these terms:

> "See further, the last sentence of para 5 of the closed judgment. This point is important in its own right in demonstrating the existence of the rational/proportionate connection."

Mr Eicke QC for the Treasury was asked repeatedly to say what "the point" was to which this paragraph refers. It was made clear that the court was looking not for the details which supported whatever was said in that sentence, but simply for an indication of its subject matter. Mr Eicke declined, no doubt on instruction, to provide this information. He declined also to say what "the point" was to which para 6(3) was directed, where it was said that, to the extent that it was necessary to do so, the Bank's case at para 60 was contradicted by the point at para 2 of the closed judgment. In para 60 of its case the Bank states that there is nothing in the judge's findings to suggest that the Bank had done anything to materially increase the risk that the United Kingdom financial sector would be embroiled in proliferation-related transactions. It seemed reasonable to ask how looking at the closed judgment would assist on this point, but the court was provided with no answer as to how it might do so.

96. I was not impressed by Mr Eicke's inability to answer these questions. The guiding principles seem to me to be these. Resort to the closed material procedure will result in every case in an inequality of arms between the State, which will always be the party who invokes the procedure and will always have access to that material, and the other party against whom the State has taken action and to whom access to that material is always denied. Regard must, of course, be had to the national interest which requires that some sensitive material must be kept secret. But the court must be astute not to allow the system to be over-used by those in charge of that material. The need for care in this respect increases as the issues are refined at the stage of an appeal. In a case of this kind, where the judge has told the appellate courts in his open judgment how he has used the closed material and the Court of Appeal has found nothing in the closed judgment that required comment, resort to it for further information could only be justified if there was a point of real substance in it that had, in fairness to the State, to be taken into account at the stage of the appeal. The Treasury's refusal to come out of its closet and provide even the merest hint as to what these points were was as unattractive as it was unconvincing.

97. I would therefore, if left to myself, have declined to look at the closed judgment. It seemed to me that the judge had said enough in his judgment to explain the significance of the points to which the Treasury had regard when they decided to make the Order. Any points to which emphasis had to be attached could be made sufficiently in open court in the course of the oral argument.

(c) should the court issue a closed judgment?

98. The most obnoxious feature of the closed material procedure at the stage of an appeal is the possibility that the appellate court may have to give the whole or part of its reasons for the disposal of the appeal in a judgment to which the State only, and not the other party to the appeal or anyone else, has access. As was stressed several times by Lord Dyson and those who agreed with him in *Al Rawi*, fundamental principles of the right to a fair trial include the right to know the reasons for the outcome: see, for example, [2012] 1 AC 531, para 45. This point loses none of its force at the stage of an appeal. And it has even more force at the stage of a final appeal, as once the Supreme Court has given its reasons in a judgment of that kind there will be no opportunity for any further review of the closed material by a special advocate or by anyone else. Secret justice at this level is really not justice at all.

99. I very much hope that the Supreme Court will never find itself in a position when it has to resort to the giving of a closed judgment in the disposal of an appeal. A stern and steadfast resistance to the use of that procedure would go some way to redressing the unwelcome departure from the principle of open justice that the decision that the Supreme Court may in principle adopt a closed material procedure will inevitably give rise to. In itself, merely looking at a closed judgment to see whether there is anything in it that might be of significance may be thought not give rise to any unfairness to the party who does not have access to that material. A check of that kind may not seem a large step to take. It is an entirely different matter if it leads to the issuing of even more material in the form of a closed judgment that the other party cannot see.

100. As it happened, it was not necessary to answer this question. It became clear in this case, when the judge's closed judgment had been seen and considered, that there was nothing in it which required any such judgment to be issued by this court. The fact this was so reinforces my suspicion that the Treasury were being over-cautious in their refusal to offer any assistance as to what the points were to which reference was made in their note to the Special Advocates and that they were over-using the procedure. I am not to be taken as suggesting that it was wrong for the Treasury to make use of closed material in the lower courts, where its use has been expressly authorised by Parliament. But the attitude which they have adopted in this appeal was a misuse of the procedure, because they invited the court to look at the closed judgment when there was nothing in it that could not have been gathered equally well from a careful scrutiny of the open judgment. This experience should serve as a warning that the State will need to be much more forthcoming if an invitation to this court to look at closed material were to be repeated in the future.

LORD KERR (dissenting)

101. Two principles of absolute clarity govern the law in relation to the manner in which trials should be conducted. The first is that a party to proceedings should be

informed of the case against him and should have full opportunity to answer that case in open court. The second principle is that the first principle may not be derogated from except by clear parliamentary authority.

102. These principles received emphatic endorsement by the Supreme Court in *Al-Rawi v Security Service* [2012] 1 AC 531. In delivering the leading judgment, Lord Dyson said this:

> "10. There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. The importance of the open justice principle has been emphasised many times: see, for example, *R v Sussex Justices, Ex p McCarthy* [1924] r KB 256, 259, per Lord Hewart CJ, *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 449H-450B, per Lord Diplock, and recently *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* QB 218, paras 38-39, per Lord Judge CJ.
>
> 11. The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In *Scott v Scott* [1913] AC 417, Lord Shaw of Dunfermline (p 476) criticised the decision of the lower court to hold a hearing in camera as constituting 'a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security'. Viscount Haldane LC (p 438) said that any judge faced with a demand to depart from the general rule must treat the question 'as one of principle, and as turning, not on convenience, but on necessity'.
>
> 12. Secondly, trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance. The Privy Council said in the civil case of *Kanda v Government of Malaya* [1962] AC 322,337:
>
> 'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.'

> 13. Another aspect of the principle of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses. As was said by the High Court of Australia in *Lee v The Queen* (I998) I95 CLR 594, para 32: 'Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.'"

103. The essential ratio of *Al-Rawi*, so far as concerns the present appeal, was neatly expressed by Lord Dyson in para 35 where he said, "… the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that." The simple question which lies at the heart of this appeal is whether Parliament has done that for hearings before the Supreme Court.

104. It was suggested that the decision in *Al-Rawi* can be distinguished or that it has no application to the present appeal because it was concerned with a trial and not with an appeal from a decision in proceedings where there was statutory authority to conduct a closed hearing. I do not accept this argument. The principle recognised in *Al-Rawi* is both fundamental and general. Its effect is straightforward. Courts do not have power to authorise a closed material procedure unless they has been given that power by Parliament. If Parliament has not conferred the power on this court, it matters not that those courts from which an appeal lies to this court have been empowered to conduct such a hearing.

105. Representing as it does such a radical departure from the conventional mode of trial and, more importantly, such a drastic infringement on a centuries old right, it is to be expected that a closed materials procedure would be provided for in the most unambiguous and forthright terms or by unmistakably necessary implication. On that basis alone, section 40(5) of the Constitutional Reform Act is hardly a promising candidate. But before looking more closely at that provision, I should say something about the relevant provisions in the Counter-Terrorism Act 2008, principally to examine how Parliament has in fact set about making explicit provision for closed material procedures in other courts and to point up the contrast with the route that the respondent in this case would have us take to arrive at the same destination.

106. The first and most obvious thing to say about the Counter-Terrorism Act is, of course, that it was enacted three years after the Constitutional Reform Act. We now know (not least by reason of *Al-Rawi*) that the High Court and the Court of Appeal could not have ordered a closed material procedure in a case such as the present by recourse to an inherent power. This required the authorisation of the 2008 Act. It appears to me, therefore, that an argument that the Supreme Court did have power to hold such a hearing before 2008, when the High Court and the Court of Appeal did not, would be utterly implausible. But if section 40(5) did not empower the Supreme Court before 2008 to hold a closed material procedure hearing, how can it be said to have done so after the enactment of the Counter-Terrorism Act and Rules made

thereunder, all of which conspicuously make no reference whatever to this court? I shall return to this question briefly below.

107. Bank Mellat's proceedings before the High Court were brought under section 63 of the 2008 Act. Section 63(2) gives a person affected by a decision taken by the Treasury in connection with a range of asset freezing and other financial powers the right to apply to the High Court to have that decision set aside. These are known as "financial restrictions proceedings" - section 65. Provisions as to how they are to be conducted are made in sections 66 to 72.

108. Section 66 contains general provisions about rules of court to be made in relation to financial restrictions proceedings. Subsection (2) enjoins the person making the rules to have regard to (a) the need to secure that the decisions that are the subject of the proceedings are properly reviewed; and (b) the need to secure that disclosures of information are not made where they would be contrary to the public interest. Subsection (3) states that rules of court may make provision (a) about the mode of proof and about evidence in the proceedings; (b) enabling or requiring the proceedings to be determined without a hearing; and (c) about legal representation in the proceedings.

109. Section 66(4) is an important provision which foreshadows rules of court authorising significant differences from the conventional mode of trial in the way that financial restrictions proceedings may be conducted. It provides:

> "Rules of court may make provision-
>
> (a) enabling the proceedings to take place without full particulars of the reasons for the decisions to which the proceedings relate being given to a party to the proceedings (or to any legal representative of that party);
>
> (b) enabling the court to conduct proceedings in the absence of any person, including a party to the proceedings (or any legal representative of that party);
>
> (c) about the functions of a person appointed as a special advocate;
>
> (d) enabling the court to give a party to the proceedings a summary of evidence taken in the party's absence."

110. Section 67(2) provides that rules of court must secure that the Treasury is required to disclose material on which they rely; material which adversely affects its case; and material which supports the case of a party to the proceedings. This subsection is made subject to the succeeding provisions of the section, however. These

include subsection (3) which introduces significant qualifications on the duties imposed in subsection (2). It provides:

> "(3) Rules of court must secure-
>
> (a) that the Treasury have the opportunity to make an application to the court for permission not to disclose material otherwise than to-
>
> (i) the court, and
>
> (ii) any person appointed as a special advocate;
>
> (b) that such an application is always considered in the absence of every party to the proceedings (and every party's legal representative);
>
> (c) that the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be contrary to the public interest;
>
> (d) that, if permission is given by the court not to disclose material, it must consider requiring the Treasury to provide a summary of the material to every party to the proceedings (and every party's legal representative);
>
> (e) that the court is required to ensure that such a summary does not contain material the disclosure of which would be contrary to the public interest."

111. As the interveners, Liberty, have pointed out, section 67(3) heralded the effective disapplication of the law relating to public interest immunity. Simply stated, that law required a court, faced with a request by a party to authorise the withholding of relevant evidence, to balance the public interest which the application was said to protect against those public interests which favoured its production, including the fair administration of justice. No such weighing of competing interests could take place after the enactment of the rules which section 67(3) stipulated should secure, among other things, that the court *must* give permission for material not to be disclosed if it considered that its disclosure would be contrary to the public interest. That outcome was inevitable as soon as the conclusion that revelation of the material was contrary to the public interest. Countervailing interests such as the due and fair administration of justice were to be of no consequence.

112. The effective abolition of public interest immunity in financial restrictions proceedings and the requirement that applications be entertained for evidence to be withheld from all except the court and special advocates clearly called for the protection, in some other guise, of the interests of the litigant who had been denied access to the withheld material. This was provided for in section 68. Subsection (1) of that section provides:

> "(1) The relevant law officer may appoint a person to represent the interests of a party to-
>
> (a) financial restrictions proceedings, or
>
> b) proceedings on an appeal, or further appeal, relating to financial restrictions proceedings, in any of those proceedings from which the party (and any legal representative of the party) is excluded.
>
> This is referred to in this Chapter as appointment as 'a special advocate'."

113. The 2008 Act had therefore set up a reasonably elaborate structure for the making of rules which would authorise, in financial restrictions proceedings, a significant departure from the system of trial that would normally obtain in most other forms of civil disputes. But section 73 of the Act made it clear that this system of trial was intended only for the High Court, the Court of Appeal and the Court of Session for it provided that "rules of court", where that expression had been used in the legislation, meant rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session.

114. The principal rules in the Civil Procedure Rules are made pursuant to section 1 of the Civil Procedure Act 1997. Section 1(3) of this Act provides that the power to make Civil Procedure Rules shall be exercised with a view to securing that the civil justice system is accessible fair and efficient. Part 79 of the Civil Procedure Rules (which was designed to implement the rules which Part 6 of the 2008 Act, dealing with financial restrictions proceedings, contemplated) was inserted in the Civil Procedure Rules by the Civil Procedure (Amendment No 2) Rules 2008/308517. As well as making detailed rules to fulfil the provisions of sections 66 and 67, Parts 79.2 and 79.13 modified the overriding objective which otherwise applies to proceedings in both the High Court and the Court of Appeal. That objective is stated in CPR Part 1.1, to be to deal with cases justly. Rule 1.1 (2) (a) provides that dealing with cases justly includes, so far as is practicable, ensuring that parties are on an equal footing. But by Parts 79.2 and 79.13 this overall objective (in so far as it related to financial restrictions proceedings) was to be read and given effect to compatibly with the court's statutory duty (in section 66(2) of the 2008 Act) to ensure that information was not disclosed contrary to the public interest. Part 79.22 disapplied in its entirety Part 31 of the CPR which had contained the procedural rules relating to public interest

immunity. Again it can be seen that, in relation to financial restrictions proceedings a fairly radical re-ordering of the rules that governed most forms of civil litigation was introduced.

115. All of this is in stark contrast to the position as regards the Supreme Court. Section 40(5) of the Constitutional Reform Act 2005 provides:

> "(5) The Court has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment."

116. As I have said, there cannot be any plausible argument that this provision gave the Supreme Court power to conduct a closed procedures hearing before the enactment of the Counter-Terrorism Act in November 2008. Is it possible that the power of the court to conduct such a hearing has been animated by the 2008 Act? One can recognise a theoretical argument that in order to determine any question in an appeal against a finding made by a lower court in a closed material procedures hearing, it is necessary for the Supreme Court to be able to conduct such a hearing. That argument must, however, immediately confront the fact that nothing in the 2008 Act refers to the Supreme Court. Notwithstanding the elaborate structure that has been put in place to govern the conduct of such a hearing in the High Court, the Court of Appeal and the Court of Session, no provision has been made as to how a closed material procedure hearing in the Supreme Court might take place. For my part, I find it inconceivable that it was intended that the Supreme Court should have power to carry out a closed materials procedure while leaving it bereft of the structure and safeguards which were deemed essential for the other courts in which such a hearing is expressly permitted.

117. Moreover, the use of a closed materials procedure involves the suspension of the law relating to public interest immunity. Thus, for the Supreme Court to recognise that it has power to conduct a closed materials procedure hearing necessarily involves an acceptance that its power to conduct an inquiry into whether public interest immunity requires the withholding of the material is no longer available. That this should be the effect of section 40(5) would be surprising enough. But that it should have that effect for the first time three years after the Constitutional Reform Act 2005 was passed is surely wholly improbable.

118. Section 40(5) gives the Supreme Court power to determine questions which need to be determined for the purposes of doing justice in an appeal. But the conferring of that power should not be confused with authorising the use of a wholly different procedure for the manner in which those questions are to be determined. This is particularly so when that different procedure was not in contemplation at the time the section was enacted.

119. It is significant that the subsection confers the power for the express purpose of doing justice in an appeal. The doing of justice is conventionally understood to mean that all parties to litigation will have equal access to material which is liable to influence the outcome of the dispute. This is echoed in section 45 of the Constitutional Reform Act – the provision which deals with rule making powers. Section 45(1) invests the President of the Court with the power to make rules governing the practice and the procedure to be followed in the court. Subsection (3)(a) requires that the President must exercise that power with a view to securing that the court is accessible, fair and efficient. This mirrors section 1(3) of the Civil Procedure Act 1997. And Rule 2 of the Supreme Court Rules 2009 sets out the overriding objective as being to secure that the court is accessible, fair and efficient, terms which are not dissimilar to the overall objective in CPR 1.1. There has been no modification of this overall objective such as was introduced by Part 79 of the CPR, however. Indeed, nothing in the 2009 Rules intimates an intention to accommodate a closed material procedure in any way.

120. Rule 27(1) states that every contested appeal shall be heard in open court except where it is necessary in the interests of justice or the public interest to sit in private for part of an appeal hearing. Rule 27(2) provides:

> "(2) Where the Court considers it necessary for a party and that party's representative to be excluded from a hearing or part of a hearing in order to secure that information is not disclosed contrary to the public interest, the Court must conduct the hearing, or that part of it from which the party and the representative are excluded, in private but the Court may exclude a party and any representative only if a person who has been appointed as a special advocate to represent the interests of that party is present when the party and the representative are excluded."

121. In my view, it is clear that this rule was made to allow an ex parte application to be made for the withholding of material as part of a public interest immunity exercise. To suggest that it was designed to cover the holding of a closed material procedure would be farfetched, given that there is no mention in any other part of the rules of such a procedure. Indeed, the very next rule, rule 28 states that a judgment of the court may be delivered in open court or, if the court directs, be promulgated by the Registrar.

122. But for the circumstance that the 2008 Act introduced a closed material procedure for the High Court, the Court of Appeal and the Court of Session and that appeals lie from those courts to the Supreme Court, there would be no argument that the Constitutional Reform Act and the Supreme Court rules even address, much less contemplate, the possibility of such a hearing taking place before this court. It is only by a process of ex post facto rationalisation that section 40(5) is said to permit a closed materials procedure in the Supreme Court. That cannot be said to have been its original purpose. In my view, the revised and expanded purpose which the respondent seeks to ascribe to it cannot be accepted. The contended for modification of the

court's powers and procedures involves simply too important, not to say too fundamental, a transformation to be countenanced.

123. It can be submitted that a steadfast refusal to allow some softening of the *Al-Rawi* line in relation to appeals is unrealistic; that the failure to admit closed material in an appeal before the Supreme Court when the same material had been before the courts against whose decisions the appeal is brought creates an asymmetrical anomaly. And indeed, it has been suggested by the advocate to the court, Mr Tam QC, that advantages in recognising at least the power of the Supreme Court to receive closed material can be detected. The primary advantage he identified was the assistance which such an exercise provided in enabling the court to arrive at the "correct" result. For the reasons that I gave in *Al-Rawi* and the associated case of *Tariq v Home Office* [2012] 1 AC 452, I consider that the assumption that a court, presented with all of what is claimed to be "relevant" material, will be in a better position to arrive at the right conclusion when some of that material is untested is, at least, misplaced and may prove in some cases to be palpably wrong. But I do not consider it profitable to renew the debate on that particular topic in the present case. For the sake of examining the claim that this court should recognise a power to examine closed material, let us assume that there is force in the argument that a court is, as a matter of principle and common experience, better placed to reach a more correct result if it receives all the material which one of the parties says is relevant to its decision, even though the other party is denied knowledge of its content. Does that circumstance warrant recognition of the power? In my view it does not.

124. Pragmatic considerations can – and, where appropriate, should – play their part in influencing the correct interpretation to be placed on a particular statutory provision. But pragmatism has its limits in this context and we do well to recognise them. As a driver for the interpretation of section 40(5) for which the respondent contends, pragmatism might seem, at first blush, to have much to commend it. After all, this is an appeal from courts where closed material procedures took place. How, it is asked, can justice be done to an appeal if the court hearing the appeal does not have equal access to a closed material procedure as was available to the courts whose decision is under challenge? And if one proceeds on the premise that the court will be more fully informed and better placed to make a more reliable decision, why should the Supreme Court not give a purposive interpretation to section 40(5)?

125. The answer to this deceptively attractive presentation is that this was never the purpose of section 40(5). It was not even a possible, theoretical purpose at the time that it was enacted. It was never considered that it would be put to this use. The plain fact is that Parliament introduced a closed material procedure for the High Court, the Court of Session and the Court of Appeal and did not introduce such a procedure for the Supreme Court. This court has said in *Al-Rawi* that it does not have the inherent power to introduce a closed material procedure. Only Parliament could do that. Parliament has not done that. And to attempt to graft on to a statutory provision a purpose which Parliament plainly never had in order to achieve what is considered to be a satisfactory pragmatic outcome is as objectionable as expanding the concept of inherent power beyond its proper limits.

126. A majority of this court has held that it does have power to hold a closed material procedure, however, and it is therefore necessary for me to address the question of whether it was right to hold a closed material procedure on this appeal.

127. It was not in dispute between the parties, the interveners and the advocate to the court that, as Mr Chamberlain on behalf of the special advocates put it, if section 40(5) confers on the court power to consider closed material, it does so only if, and to the extent that, closed material is relevant to a question whose determination is *necessary* for the purposes of doing justice in the appeal. Equally, it was not disputed that the obligation to show that the closed material was relevant and the extent to which it was relevant rested with the party so asserting, in this instance the respondent.

128. But the circumstances of this case immediately exemplified the inherent difficulty in applying that principle. In seeking to persuade the court that it was necessary to look at the closed judgment, the respondent felt unable to state what the closed judgment contained. This is, of course, a problem which will beset every application for a closed material procedure. And, ultimately, counsel for the respondent was driven to utter warnings couched in the most general terms of the danger of this court reaching a conclusion on the appeal in the appellant's favour when it *might* have been influenced to a different view had it seen the closed material. If the principle that the closed material procedure has to be shown to be necessary is to be something more than an empty aspiration, then the party asking for a closed material procedure must surely do more than merely assert that this is necessary. Here, however, the respondent did not even do that. The Treasury's final position was that, in a certain eventuality (the appellant's appeal succeeding), the material *might* cause the court to take a different view. That seems to me to be an impossibly far cry from showing that it was necessary that we should look at the closed judgment.

129. The difficulty is enhanced where, as here, article 6 of the European Convention on Human Rights and Fundamental Freedoms governed the proceedings. Where that is the case, nothing in the closed material, or the judge's conclusion on it, may be determinative of the outcome unless the gist of the material has been relayed to the appellant. So one must start the examination of whether it is necessary to examine the closed judgment on the basis that nothing in that judgment can have been determinative of the case against the bank. The examination of whether the necessity test has been satisfied then must include acknowledgment of Mitting J's single reference to his closed judgment in para 16 of his open judgment to the effect that there were closed reasons as well as those expressed in his open judgment for his finding that one of the bank's customers, Novin Energy Company, had imported materials which could be used to produce or facilitate the production of nuclear weapons. In the first place, the fact that open reasons for that finding had been given certainly does not help the case that it was necessary to look at the closed judgment. But that case was weakened further by the judge's statement that this was common ground between the parties and, in my view, it was demolished by the fact that this finding was not challenged by Bank Mellat before this court.

130. In truth, this court's decision to look at the closed judgment depended on nothing more than the plea of counsel for the Treasury that, against the possibility that we might be inclined to find for the appellant, we should look at the closed material just in case it might persuade us to a different view. That, in my opinion, comes nowhere near to showing that it was necessary to look at the closed judgment and sadly, but all too predictably, when the closed judgment was considered in the course of a closed material procedure, it became abundantly clear that it was quite unnecessary for us to have done so.

LORD REED (dissenting)

131. This appeal has raised several points of constitutional importance. The present judgment is concerned with the questions whether this court can adopt a closed material procedure in a case of this nature, and, if so, whether it ought to do so in this particular case. I agree with the judgments` of Lord Hope and Kerr, and add some observations only in view of the importance of these issues and the division in the court.

The issue of principle

132. The first question raised is whether this court has the power, when hearing an appeal relating to financial restrictions proceedings under Part 6 of the Counter-Terrorism Act 2008 ("the 2008 Act"), to exclude from the hearing the party challenging the Treasury's exercise of its powers, to consider a "closed judgment" which has not been disclosed to that party, and to give a closed judgment, containing part or all of the reasons for its decision, which is not disclosed to that party or to the public. I was of the opinion, when the issue arose at the end of the first day of the hearing, that the court has no such power. I remain of that opinion.

133. It is a fundamental principle of justice under the common law that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party (see for example *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 615 per Lord Mustill, and the other authorities cited in *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738, para 16 per Lord Bingham of Cornhill). That principle can only be qualified or overridden by statute. It is also a basic principle of justice that a party is entitled to be present during the hearing of his case by the court (subject to a number of established exceptions, none of which is germane to the present case), and to know the reasons for the court's decision.

134. Section 66 of the 2008 Act, read with section 73, makes special provision for rules of court regulating the practice and procedure to be followed in appeals relating to financial restrictions proceedings in the High Court, the Court of Appeal and the Court of Session. Section 66(4) permits such rules of court to make provision for a

closed material procedure. Section 67 imposes specific duties in relation to disclosure upon persons making rules of court in respect of those courts alone. The law relating to public interest immunity is by implication disapplied. It is plain beyond argument that Parliament did not apply those provisions to the court of last resort. If Parliament had intended the same procedures to be applied in this court, it would surely have said so.

135. The general powers conferred upon this court by the Constitutional Reform Act 2005 ("the 2005 Act") are silent on the matter. It is argued that they are to be construed as conferring the necessary powers, since the court cannot decide an appeal in a case where a "closed judgment" has been issued without knowing, and hearing argument upon, all the reasons for the decisions of the courts below, and must therefore hear argument upon the closed judgment, necessarily in a hearing from which the party challenging the Treasury's exercise of its powers is excluded. There is however a strong presumption that Parliament does not intend to interfere with the exercise of fundamental rights. It will be understood as doing so only if it does so expressly or by necessary implication (*R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 574 per Lord Browne-Wilkinson; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131 per Lord Hoffmann). The common law rights of a party to an appeal to be present throughout the hearing of the appeal, to see the material before the court, and to know the reasons for the court's decision of the appeal, are undoubtedly fundamental rights to which that principle applies. The argument advanced on behalf of the Treasury is directly contrary to that principle: reliance is placed upon general words to override a fundamental right. I find it particularly difficult to accept the argument against the background of the specific provision made by Parliament in respect of other courts in the 2008 Act. In so far as the argument seeks to rely upon the Supreme Court Rules made under the 2005 Act, it begs the anterior question as to the effect of the 2005 Act itself.

136. I accept of course, as a general proposition, that it is desirable that an appellate court should be able to consider all the reasoning of the courts below, and all the material which was before them. This court has not however in the past found it either necessary or appropriate to consider closed judgments of the courts below: *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 AC 110, para 3. I do not in any event regard these pragmatic considerations as conclusive.

137. It has to be borne in mind in the first place that it is a matter of great importance that proceedings in the highest court in the land should be conducted in accordance with the highest standards of justice: in particular, that the court should sit in public, and that all parties should be equally able to participate in the hearing. There is to my mind a very serious question whether secret justice at this level is acceptable. It also has to be borne in mind that there are other possible means of protecting national security in court proceedings besides the adoption of a closed material procedure, and that some of those means enable the court to sit in public and the parties to attend the whole of the hearing. One possibility, where a closed judgment

has been issued by a lower court, is to determine the appeal on the basis of the material which that court, exercising its judgment, has set out in its open judgment. That was the procedure followed in *RB (Algeria).* Another is to apply the law relating to public interest immunity, as the House of Lords did in the past. Another is to follow the approach adopted in a number of European courts, such as the German courts, where the court can examine the material for itself, without its being canvassed during the hearing. A comparative analysis might disclose other possibilities. That is not to say that the alternatives to closed material procedure are necessarily preferable: they may cause equal or greater concern for other reasons. The point of these considerations, however, is that there are choices to be made. Those choices are appropriately made by Parliament after full consideration and debate. They are too important to be left to judges.

138. The most serious difficulty with the Treasury's argument, however, is that for the court to conduct a closed hearing is contrary to a fundamental principle of the common law, and therefore requires clear statutory authority. Even interpreted as generously as possible, the 2005 Act cannot in my opinion be said to provide clear authority.

Whether this court should have adopted a closed material procedure in the present case

139. The second question raised is whether, given the view of the majority of the court that it did possess such a power, that power should have been exercised in the circumstances of the present case. I am emphatically of the opinion that it should not. The Treasury's argument, which I have already summarised, was one which would apply in every case in which a closed judgment had been given. In the present case, however, Mitting J had properly indicated in his open judgment ([2010] EWHC 1332, paras 16 and 18) the two specific findings that he had made for which his reasoning was set out in the closed judgment. Neither of those findings was challenged before this court. Counsel for the Treasury's assertion that it was nevertheless necessary for this court to hear submissions on the closed judgment, and for that purpose to sit in a closed session, was unsupported by any specific reasons why such an exceptional course should be adopted. No indication was given of the nature of the closed material, contrary to the requirement that a summary should be provided (*Secretary of State for the Home Department v AF* [2009] UKHL 28; [2010] 2 AC 269). The plea that, if there was any possibility that the court might otherwise allow the appeal, it ought to consider the closed judgment just in case anything in it might alter the court's view, falls far short of demonstrating that a departure from the fundamental principle of open justice was truly necessary.

140. When closed material procedure was first introduced in 1997, in proceedings before the Special Immigration Appeals Commission, it was said to be an exceptional measure justified by national security concerns. Having gained a foothold in the legal system, the procedure has spread progressively, initially to other specialist tribunals, and then to the courts. It has been used even where issues of national security are not

involved (as, for example, in *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738). Now that its use has been extended to proceedings before this court, it is of great importance, if a degradation of standards of justice at the highest level is to be avoided, that it should be resorted to only where it has been convincingly demonstrated to be genuinely necessary in the interests of justice.

LORD DYSON (dissenting in part)

141. I agree with Lord Neuberger that, for the reasons that he has given, this court has the power to adopt a closed material procedure in an appeal under the Counter-Terrorism Act 2008.

142. For the reasons given by Lords Hope, Kerr and Reed, I did not favour exercising the power in this case. In my view, the power should only be exercised where it has been convincingly demonstrated that it is necessary to do so in the interests of justice. I agree with what Lord Neuberger says about this at para 69 of his judgment.

143. The present case illustrates the danger of the court acceding too readily to an assertion by a party that a closed session could make a difference to the outcome of an appeal. That is what counsel for the Treasury asserted on instructions in the present case. He was unable to say more. As Lord Neuberger says at para 64, the court "strongly suspected" that nothing in the closed judgment would affect the outcome of the appeal, but we "could not be sure in the absence of seeing the closed judgment and hearing submissions on it". Our strong suspicions were amply borne out. The closed judgment contained nothing that it could reasonably have been thought would or might affect the outcome of the appeal.

144. In my view, if the court strongly suspects that nothing in the closed material is likely to affect the outcome of the appeal, it should not order a closed hearing.

145. I remain of the view that the power should not have been exercised in the present case. A bare plea for a closed hearing should not suffice. I agree with Lord Hope that convincing reasons should be given as to why closed material should be looked at. Anything less is likely to lead to closed hearings becoming routine. In my view, they should be exceptional.