

Clarity Required: US V. Banki

Law360, New York (January 09, 2012, 12:32 PM ET) -- On Oct. 24, 2011, a three-judge panel of the U.S. Court of Appeals for the Second Circuit released an opinion in *United States v. Banki*, No. 10-3381 (2d Cir. Oct. 24, 2011) that reversed convictions of defendant Mahmoud Reza Banki on charges of conspiring to violate the Iranian Transaction Regulations ("ITR") and aiding and abetting violations of the ITR.[1] In doing so, the court contradicted the position of the U.S. government in a manner that may have important consequences for how the government pursues sanctions enforcement matters going forward.

Background

With limited exceptions, the ITR prohibit most economic transfers between the United States and Iran, including exports of U.S. origin goods, technology, or services from the United States or U.S. persons to Iran. See 31 C.F.R. § 560.204. The ITR portion of the Iran sanctions have been in place since 1995, though the United States has periodically ratcheted up sanctions on Iran since that time, most recently in November 2011.

According to the opinion, Banki is an Iranian-born, naturalized U.S. citizen with family in Iran. Starting in May 2006, family members in Iran transferred \$3.4 million to Banki for personal use in the United States through the "hawala" system, a network of money brokers that is widely used to make international funds transfers in Middle Eastern and South Asian countries.

As described by the court, hawala brokers act as international economic go-betweens without ever making direct financial transactions across country boundaries. *Banki*, No. 10-3381, at 4-5. For example, for a transfer from Iran to the United States, a hawala broker in Iran would receive payment from an individual in Iran, then contact a broker in the United States who would pay the U.S. recipient.

To carry out these types of transactions, Banki's hawala broker based in Iran would search across a wide network of his U.S. contacts, none of whom Banki knew, for a matching amount of money moving from the United States to Iran at the same time the transfer from Banki's family was made to Banki. As a result, Banki received several deposits in his U.S. bank account as a result of monetary transfers involving a wide range of individuals and companies.

Banki typically emailed a family member to confirm receipt of funds in his Iranian account; some of which, according to the court, indicated that Banki knew money was moving from the United States to Iran related to his hawala transactions. Based on these facts, Banki was convicted of violating the prohibition in the ITR against exporting services to Iran, 31 C.F.R. § 560.204, and was sentenced to 30 months in prison. Banki, No. 10-3381, at 10, 12.

The Opinion

After first dismissing Banki's argument that money transfers to Iran qualified as "services" under the ITR only if undertaken for a fee, the court overturned his convictions related to the ITR on his second argument, that the district court erred by failing to instruct the jury that noncommercial remittances to Iran are exempt from the ban on export of services under 31 C.F.R. § 560.204.

In so ruling, the court relied on 31 C.F.R. § 560.516, which provides that "U.S. depository institutions are authorized to process transfers of funds to or from Iran" in certain circumstances, including where "[t]he transfer arises from an underlying transaction that is not prohibited by this part, such as a non-commercial remittance to or from Iran." Banki argued that this provision specifically permitted a noncommercial remittance to or from Iran, including a "family remittance."

The government, by contrast, argued that such remittances would be allowed only if processed through a U.S. depository institution. While the court demurred as to the precise meaning of the regulation, it held that "at a minimum, the regulation is ambiguous in this respect." Banki, No. 10-3381, at 20. Citing the U.S. Supreme Court decision *U.S. v. Santos*, 553 U.S. 507 (2008), the court held that it was required to interpret the ambiguous regulation in favor of Banki as a criminal defendant. *Id.* at 20-21.

Analysis

We think the key takeaway from Banki is how the court dealt with what it perceived (and many exporters would agree) as the ambiguity of the ITR. The court makes much of this ambiguity, and, at base, the holding suggests that the U.S. Department of Treasury's Office of Foreign Assets Control may have a high hurdle to demonstrate that its view of the regulations comports with the plain text of the regulations where criminal convictions are sought.

The court's analysis of the ITR is quite literal, as one might expect given that U.S. federal courts are rarely called upon to interpret OFAC's regulations. That view of the regulations could significantly affect U.S. sanctions enforcement precisely because many of the U.S. sanctions are relatively ambiguous on their face, even where OFAC may have an established view of their meaning to the point that outside counsel and industry have accepted that view.

A few provisions might be particularly limited by a literal reading. First, criminal prosecutions of the "facilitation" provisions of the ITR, 31 C.F.R. §§ 560.208; 560.417, prohibiting U.S. persons from approving, financing, facilitating or guaranteeing a transaction by a foreign person that would be prohibited if performed by a U.S. person, could be significantly constrained by this interpretive limitation.

Second, criminal applications of the "evading or avoiding" provisions found in many U.S. sanctions could potentially be significantly constrained if only allowed in circumstances where their application is not ambiguous. See, e.g., 31. C.F.R. § 560.203.

Of course, the impact of this aspect of Banki is limited somewhat by its application in the criminal context. For most OFAC enforcement activity, which occurs in a noncriminal context, the rule of lenity enumerated in Banki may not be particularly helpful to a defendant making its case against, for example, a civil fine. Even in those circumstances, however, the fact that the court found specific provisions of the ITR to be ambiguous where the government argued for a fixed meaning may embolden parties facing civil fines to press their own interpretation of the regulations.

Conclusion

Although Banki involved a relatively sophisticated fact pattern and a relatively narrow focus on the question of family remittances, its holding dismissing criminal charges based on the ambiguity of the criminal regulations has potentially wide-ranging effects.

While the ambiguity of U.S. sanctions regulations may at times seem to broaden their scope and application to persons seeking to comply with the laws, in this instance the court inverted that presumption by forcing the burden of clarity onto the government.

It seems somewhat unlikely that OFAC will seek to clarify otherwise ambiguous provisions of the regulations based on one holding, but the opinion does provide at least qualified comfort to persons dealing with relatively ambiguous regulations. We will be interested to see any broader impact of the holding on future or existing enforcement measures.

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[1] Banki was also convicted on charges of making materially false representations in response to a government subpoena, which were affirmed by the Second Circuit, and on charges of conspiring to operate an unlicensed money-transmitting business and aiding and abetting in an unlicensed money-transmitting business, which were vacated and remanded by the Second Circuit.