



COUR EUROPÉENNE DES DROITS DE L'HOMME  
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

**CASE OF HATTON AND OTHERS v. THE UNITED KINGDOM**

(Application no. 36022/97)

JUDGMENT

STRASBOURG

2 October 2001

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.



**In the case of Hatton and Others v. the United Kingdom,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,  
Mr L. LOUCAIDES,  
Mr P. KÛRIS,  
Mrs F. TULKENS,  
Mr K. JUNGWIERT,  
Mrs H.S. GREVE, *judges*,  
Sir Brian KERR, *ad hoc judge*,  
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 16 May 2000, 4 July 2000 and on 11 September 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

**PROCEDURE**

1. The case originated in an application (no. 36022/97) against the United Kingdom lodged on 6 May 1997 with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by eight United Kingdom nationals, Ruth Hatton, Peter Thake, John Hartley, Philippa Edmunds, John Cavalla, Jeffray Thomas, Richard Bird and Tony Anderson (“the applicants”).

2. The applicants, who had been granted legal aid, were represented by Mr Richard Buxton, a lawyer practising in Cambridge. The Government of the United Kingdom (“the Government”) were represented by their Agent, Mr Huw Llewellyn, Foreign and Commonwealth Office.

3. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with the provisions of Article 5 § 2 thereof, the case falls to be examined by the Court.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Sir Nicolas Bratza, the judge elected in respect of the United Kingdom, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Sir Brian Kerr to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. A hearing on admissibility and merits (Rule 54 § 4) took place in public in the Human Rights Building, Strasbourg, on 16 May 2000.

There appeared before the Court:

(a) *for the Government*

Mr H. LLEWELLYN,	<i>Agent,</i>
Mr J. EADIE,	<i>Counsel,</i>
Mr P. REARDON, Department of the Environment, Transport and the Regions,	<i>Adviser;</i>

(b) *for the applicants*

Mr D. ANDERSON QC,	<i>Counsel,</i>
Mr R. BUXTON,	
Mrs S. RING,	<i>Solicitors,</i>
Mr C. STANBURY,	<i>Adviser,</i>
Mrs R. HATTON,	
Mr J. THOMAS,	
Mr A. ANDERSON,	<i>Applicants.</i>

The Court heard addresses by Mr James Eadie and Mr David Anderson.

6. By a decision of 16 May 2000, following the hearing, the Chamber declared the application admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

8. On 30 May 2000, third-party comments were received from British Airways, which had been given leave by the President following the hearing to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

*The position of the individual applicants*

9. The noise levels experienced by each applicant, and the effect on each of them individually, are as follows:

10. Ruth Hatton was born in 1963 and, until 1997, lived in East Sheen with her husband and two children. From 1993, when the level of night noise increased, Mrs Hatton found the noise levels to be “intolerable” at night. The noise levels were greater when aircraft are landing at Heathrow from the east. When this happened, Mrs Hatton was unable to sleep without ear plugs and her children were frequently woken up before 6 a.m., and

sometimes before 5 a.m. If Mrs Hatton did not wear ear plugs, she would be woken by aircraft activity at around 4 a.m. She was sometimes able to go back to sleep, but found it impossible to go back to sleep once the “early morning bombardment” started which, in the winter of 1996/1997, was between 5 a.m. and 5.30 a.m. When she was woken in this manner, Mrs Hatton tended to suffer from a headache for the rest of the day. When aircraft were landing from the west the noise levels were lower, and Mrs Hatton’s children slept much better, generally not waking up until after 6.30 a.m. In the winter of 1993/1994, Mrs Hatton became so run down and depressed by her broken sleep pattern that her doctor prescribed anti-depressants. In October 1997, Mrs Hatton moved with her family to Kingston-upon-Thames in order to get away from the aircraft noise at night.

11. Peter Thake was born in 1965. From 1990 until 1998, he lived in Hounslow with his partner. His home in Hounslow was situated approximately 4 km from Heathrow airport and slightly to the north of the southern flight path. In about 1993, the level of disturbance at night from aircraft noise increased notably, and Mr Thake began to be woken or kept awake at night by aircraft noise. Mr Thake found it particularly difficult to sleep in warmer weather, when open windows increased the disturbance from aircraft noise, and closed windows made it too hot to sleep. Mr Thake found it difficult to go back to sleep after being woken by aircraft noise early in the morning. He was sometimes kept awake by aeroplanes flying until midnight or 1 a.m. and then woken between 4 a.m. and 5 a.m. Mr Thake was also sometimes woken by aeroplanes flying at odd hours in the middle of the night, for example when diverted from another airport. In 1997, Mr Thake became aware that he could complain to the Heathrow Noise Line about aircraft noise if he made a note of the time of the flight. By 30 April 1997, Mr Thake had been sufficiently disturbed to note the time of a flight, and made a complaint to the Heathrow Noise Line on 19 occasions. Mr Thake remained in Hounslow until February 1998 because his family, friends and place of work were in the Heathrow area. Mr Thake moved to Winchester, Hampshire, when a suitable job opportunity arose, even though it meant leaving his family and friends, in order to escape from the aircraft noise, which was “driving [him] barmy”.

12. John Hartley was born in 1948 and lives in Richmond with his wife. He has lived at his present address since 1989. His house is about 8 miles (13 km) from Heathrow airport, and is situated almost directly under the approach to the airport’s southern runway. The windows of the house are double-glazed. From 1993, Mr Hartley noticed a “huge” increase in the disturbance caused by flights between 6 a.m. and 6.30 a.m. (or 8 a.m. on Sundays). The British Airports Authority did not operate a practice of alternation (using only one runway for landings for half the day, and then switching landings to the other runway) during this period as it did during the day, and the airport regularly had aircraft landing from the east on both

runways. When the wind was blowing from the west and aeroplanes were landing from the east, which was about 70% of the time, aircraft noise would continue until about midnight, so that Mr Hartley was unable to go to sleep earlier than midnight. He would then find it impossible to sleep after 6 a.m. on any day of the week, and was usually disturbed by aircraft noise at about 5 a.m., after which he found he could not go back to sleep. When the aeroplanes were landing from the west, Mr Hartley was able to sleep.

13. Philippa Edmunds was born in 1954 and lives with her husband and two children in East Twickenham. She has lived at her present address since 1992. Ms Edmunds's house is approximately one kilometre from the Heathrow flight path. Before 1993, Ms Edmunds was often woken by aircraft noise at around 6 a.m. From 1993, she tended to be woken at around 4 a.m. In 1996, Ms Edmunds and her husband installed double-glazing in their bedroom to try to reduce the noise. Although the double-glazing reduced the noise, Ms Edmunds continued to be woken by aircraft. Ms Edmunds suffered from ear infections in 1996 and 1997 as a result of wearing ear plugs at night, and although she was advised by a doctor to stop using them, she continued to do so in order to be able to sleep. Ms Edmunds was also concerned about the possible long-term effects of using ear plugs, including an increased risk of tinnitus. Ms Edmunds's children both suffered from disturbance by aircraft noise.

14. John Cavalla was born in 1925. From 1970 to 1996, he lived in Isleworth. Mr Cavalla lives with his wife. Mr Cavalla's house in Isleworth was directly under the flight path of the northern runway at Heathrow airport. In the early 1990s, the noise climate deteriorated markedly, partly as a result of a significant increase in traffic, but mainly as a result of aircraft noise in the early morning. Mr Cavalla noticed that air traffic increased dramatically between 6 a.m. and 7 a.m. as a result of the shortening of the night quota period. Mr Cavalla found that, once woken by an aircraft arriving at Heathrow airport in the early morning, he was unable to go back to sleep. In 1996, Mr Cavalla and his wife moved to Sunbury in order to get away from the aircraft noise. After moving house, Mr Cavalla did not live under the approach tracks for landing aircraft, and aircraft used the departure route passing over his new home only very rarely at night. Consequently, Mr Cavalla was only very rarely exposed to any night-time aircraft noise following his move.

15. Jeffray Thomas was born in 1928 and lives in Kew with his wife and two sons, and the wife and son of one of those sons. Mr Thomas has lived at his present address since 1975. His house lies between the north and south Heathrow flight paths. Aircraft pass overhead on seven or eight days out of every ten, when the prevailing wind is from the west. Mr Thomas noticed a sudden increase in night disturbance in 1993. Mr Thomas would find that he was awoken at 4.30 a.m., when three or four large aircraft tended to arrive within minutes of each other. Once he was awake, one large aeroplane

arriving every half an hour was sufficient to keep him awake until 6 a.m. or 6.30 a.m., when the aeroplanes started arriving at frequencies of up to one a minute until about 11 p.m.

16. Richard Bird was born in 1933 and lived in Windsor for 30 years until he retired in December 1998. His house in Windsor was directly under the westerly flight path to Heathrow airport. In recent years, and particularly from 1993, he and his wife suffered from intrusive aircraft noise at night. Although Mr Bird observed that both take-offs and landings continued later and later into the evenings, the main problem was caused by the noise of early morning landings. He stated that on very many occasions he was woken at 4.30 a.m. and 5 a.m. by incoming aircraft, and was then unable to get back to sleep, and felt extremely tired later in the day. Mr Bird retired in December 1998, and he and his wife moved to Wokingham, in Surrey, specifically to get away from the aircraft noise which was “really getting on [his] nerves”.

17. Tony Anderson was born in 1932 and lives in Touchen End, which is under the approach to runway 09L at Heathrow airport, and approximately 9 or 10 nautical miles from the runway. Mr Anderson has lived in Touchen End since 1963. By 1994, Mr Anderson began to find that his sleep was being disturbed by aircraft noise at night, and that he was being woken at 4.15 a.m. or even earlier by aircraft coming in from the west to land at Heathrow airport.

#### *The regulatory regime for Heathrow airport*

18. Heathrow airport is the busiest airport in Europe, and the busiest international airport in the world. It is used by over 90 airlines, serving over 180 destinations world-wide. It is the United Kingdom’s leading port in terms of visible trade.

19. Restrictions on night flights at Heathrow airport were introduced in 1962 and have been reviewed periodically, most recently in 1988, 1993 and 1998.

20. Between 1978 and 1987, a number of reports into aircraft noise and sleep disturbance were published by or on behalf of the Civil Aviation Authority.

21. A Consultation Paper was published by the United Kingdom Government in November 1987 in the context of a review of the night restrictions policy at Heathrow. The Consultation Paper stated that research into the relationship between aircraft noise and sleep suggested that the number of movements at night could be increased by perhaps 25% without worsening disturbance, provided Leq were not increased (dBA Leq metric is a measurement of noise exposure).

22. It indicated that there were two reasons for not considering a ban on night flights: first, that a ban on night flights would deny airlines the ability to plan some scheduled flights in the night period, and to cope with

disruptions and delays; secondly, that a ban on night flights would damage the status of Heathrow airport as a 24-hour international airport (with implications for safety and maintenance and the needs of passengers) and its competitive position in relation to a number of other European airports.

23. From 1988 to 1993, night flying was regulated solely by means of a limitation upon the number of take-offs and landings permitted at night. The hours of restriction were as follows:

Summer	11.30 p.m. to 6 a.m. weekdays 11.30 p.m. to 6 a.m. Sunday landings 11.30 p.m. to 8 a.m. Sunday take-offs
Winter	11.30 p.m. to 6.30 a.m. weekdays 11.30 p.m. to 8 a.m. Sunday take-offs and landings

24. In July 1990, the Department of Transport commenced an internal review of the restrictions on night flights. A new classification of aircraft and the development of a quota count system were the major focus of the review. As part of the review, the Department of Transport asked the Civil Aviation Authority to undertake further objective study of aircraft noise and sleep disturbance.

25. The fieldwork for the study was carried out during the summer of 1991. Measurements of disturbance were obtained from 400 subjects living in the vicinity of Heathrow, Gatwick, Stansted and Manchester airports. The findings were published in December 1992 as the “Report of a Field Study of Aircraft Noise and Sleep Disturbance” (“the 1992 sleep study”). It found that, once asleep, very few people living near airports were at risk of any substantial sleep disturbance due to aircraft noise and that, compared with the overall average of about 18 nightly awakenings without any aircraft noise, even large numbers of noisy night-time aircraft noise movements would cause very little increase in the average person’s nightly awakenings. It concluded that the results of the field study provided no evidence to suggest that aircraft noise was likely to cause harmful after effects. It also emphasised, however, that its conclusions were based on average effects, and that some of the subjects of the study (2 to 3%) were over 60% more sensitive than average.

26. In January 1993, the Government published a Consultation Paper regarding a proposed new scheme for regulating night flights at the three main airports serving London: Heathrow, Gatwick and Stansted. In considering the demand for night flights, the Consultation Paper made reference to the fact that if restrictions on night flights were imposed in the United Kingdom, certain flights would not be as convenient or their costs would be higher than competitors abroad could offer, and that passengers would choose alternatives that better suited their requirements.

27. It also stated that various foreign operators were based at airports with no night restrictions, which meant that they could keep prices down by achieving a high utilisation of aircraft, and that this was a crucial factor in attracting business in what was a highly competitive and price sensitive market.

28. Further, the Consultation Paper stated that both scheduled and charter airlines believed that their operations could be substantially improved by being allowed more movements during the night period, especially landings.

It also indicated that charter companies required the ability to operate in the night period, as they operated in a highly competitive, price sensitive market and needed to contain costs as much as possible. The commercial viability of their business depended upon high utilisation of their aircraft, which typically required three rotations a day to nearer destinations, and which could only be fitted in using movements at night.

29. Finally, in reference to the demand for night flights, the Consultation Paper referred to the continuing demand for some all-cargo flights at night carrying mail and other time-sensitive freight such as newspapers and perishable goods, and referred to the fact that all-cargo movements are banned, whether arriving or departing, for much of the day at Heathrow airport.

30. The Consultation Paper referred to the 1992 sleep study stating that the 1992 sleep study found that the number of disturbances caused by aircraft noise was so small that it had a negligible effect on overall normal disturbance rates, and that disturbance rates from all causes were not at a level likely to affect people's health or well-being.

31. The Consultation Paper further stated that, in keeping with the undertaking given in 1988 not to allow a worsening of noise at night, and ideally to improve it, it was proposed that the quota for the next five years based on the new system should be set at a level so as to keep overall noise levels below those in 1988.

32. A considerable number of responses to the Consultation Paper were received from trade and industry associations with an interest in air travel (including the International Air Transport Association ["IATA"], the Confederation of British Industry and the London and Thames Valley Chambers of Commerce) and from airlines, all of which emphasised the economic importance of night flights. Detailed information and figures were provided by the associations and the airlines to support their responses.

33. On 6 July 1993 the Secretary of State for Transport announced his intention to introduce, with effect from October 1993, a quota system of night flying restrictions, the stated aim of which was to reduce noise at the three main London airports, which included Heathrow ("the 1993 Scheme").

34. The 1993 Scheme introduced a noise quota scheme for the night quota period. Under the noise quota scheme each aircraft type was assigned a “quota count” between 0.5 QC (for the quietest) and 16 QC (for the noisiest). Heathrow airport was then allotted a certain number of quota points, and aircraft movements had to be kept within the permitted points total. The effect of this was that, under the 1993 Scheme, rather than a maximum number of individual aircraft movements being specified, aircraft operators could choose within the noise quota whether to operate a greater number of quieter aeroplanes or a lesser number of noisier aeroplanes. The system was designed, according to the 1993 Consultation Paper, to encourage the use of quieter aircraft by making noisier types use more of the quota for each movement.

35. The 1993 Scheme defined “night” as the period between 11 p.m. and 7 a.m., and further defined a “night quota period” from 11.30 p.m. to 6 a.m., seven days a week, throughout the year, when the controls were strict. During the night, operators were not permitted to schedule the noisier types of aircraft to take off (8 QC – quota count – or 16 QC) or to land (16 QC). During the night quota period, aircraft movements were restricted by a movements limit and a noise quota, which were set for each season (summer and winter).

36. The 1993 Consultation Paper had proposed a rating of 0 QC for the quietest aircraft. This would have allowed an unlimited number of these aircraft to fly at night, and the Government took account of objections to this proposal in deciding to rate the quietest aircraft at 0.5 QC. Otherwise, the 1993 Scheme was broadly in accordance with the proposals set out in the 1993 Consultation Paper.

37. The local authorities for the areas around the three main London airports sought judicial review of the Secretary of State’s decision to introduce the 1993 Scheme, making four consecutive applications for judicial review and appealing twice to the Court of Appeal (see paragraphs 70-73 below) In consequence of the various judgments delivered by the High Court and Court of Appeal, the Government consulted on revised proposals in October and November 1993; commissioned a study by ANMAC (the Aircraft Noise Monitoring Advisory Committee of the Department of the Environment, Transport and the Regions [formerly the Department of Transport; “the DETR”]) in May 1994 into ground noise at night at Heathrow, Gatwick and Stansted airports; added to the quota count system an overall maximum number of aircraft movements; issued a further Consultation Paper in March 1995, and issued a supplement to the March 1995 Consultation Paper in June 1995.

38. The June 1995 supplement stated that the Secretary of State’s policies and the proposals based on them allowed more noise than was experienced from actual aircraft movements in the summer of 1988, and acknowledged that this was contrary to Government policy, as expressed in

the 1993 Consultation Paper. As part of the 1995 review of the 1993 Scheme, the Government reviewed the Civil Aviation Authority reports on aircraft noise and sleep disturbance, including the 1992 sleep study. The DETR prepared a series of papers on night arrival and departure statistics at Heathrow, Gatwick and Stansted airports, scheduling and curfews in relation to night movements, runway capacity between 6 a.m. and 7 a.m., Heathrow night arrivals for four sample weeks in 1994, and Heathrow night departures for four sample weeks in 1994. The DETR also considered a paper prepared by Heathrow Airport Limited on the implications of a prohibition on night flights between 12 a.m. and 5.30 a.m.

39. On 16 August 1995, the Secretary of State for Transport announced that the noise quotas and all other aspects of the night restrictions regime would remain as previously announced. In July 1996, the Court of Appeal decided that the Secretary of State had given adequate reasons and sufficient justification for his conclusion that it was reasonable, on balance, to run the risk of diminishing to some degree local people's ability to sleep at nights because of the other countervailing considerations to which he was, in 1993, willing to give greater weight, and that by June 1995 errors in the consultation papers had been corrected and the new policy could not be said to be irrational. On 12 November 1996, the House of Lords dismissed a petition by the local authorities for leave to appeal against the decision of the Court of Appeal.

40. The movement limits for Heathrow under the 1993 Scheme, introduced as a consequence of the legal challenges in the domestic courts, were set at 2,550 per winter season from 1994/1995 to 1997/1998, and 3,250 per summer season from 1995 to 1998 (the seasons being deemed to change when the clocks change from GMT to BST). The noise quotas for Heathrow up to the summer of 1998 were set at 5,000 for each winter season and 7,000 for each summer season. Flights involving emergencies were excluded from the restrictions. The number of movements permitted during the night quota period (i.e. from 11.30 p.m. to 6 a.m.) remained at about the same level as between 1988 and 1993. At the same time, the number of movements permitted during the night period (i.e. from 11 p.m. to 7 a.m.) increased under the 1993 Scheme due to the reduction in the length of the night quota period.

41. In September 1995, a trial was initiated at Heathrow airport of modified procedures for early morning landings (those between 4 a.m. and 6.00 a.m.). The aim of the trial, which was conducted by National Air Traffic Services Limited on behalf of the DETR, was to help alleviate noise over parts of central London in the early morning. An interim report, entitled "Assessment of Revised Heathrow Early Mornings Approach Procedures Trial", was published in November 1998.

42. In December 1997, a study, commissioned by the DETR and carried out by the National Physical Laboratory gave rise to a report, "Night noise

contours: a feasibility study”, which was published in December 1997. The report contained a detailed examination of the causes and consequences of night noise, and identified possible areas of further research. It concluded that there was not enough research evidence to produce “scientifically robust night contours that depict levels of night-time annoyance”.

43. In 1998, the Government conducted a two-stage consultation exercise on night restrictions at Heathrow, Gatwick and Stansted airports. In February 1998, a preliminary Consultation Paper on night restrictions at Heathrow, Gatwick and Stansted was published. The Preliminary Consultation Paper stated that most night movements catered primarily for different needs from those that took place during the daytime, and set out reasons for allowing night flights. These were essentially the same as those given in the 1993 Consultation Paper.

44. In addition, the Preliminary Consultation Paper referred to the fact that air transport was one of the fastest growing sectors of the world economy and contained some of the United Kingdom’s most successful firms. Air transport facilitated economic growth, world trade, international investment and tourism, and was of particular importance to the United Kingdom because of its open economy and geographical position. The Consultation Paper went on to say that permitting night flights, albeit subject to restrictions, at major airports in the United Kingdom had contributed to this success.

45. The Government set movement limits and noise quotas for winter 1998/99 at the same level as for the previous winter, in order to allow adequate time for consultation.

46. The British Air Transport Association (“BATA”) commissioned a report from Coopers & Lybrand into the economic costs of maintaining the restrictions on night flights. The report was published in July 1997 and was entitled “The economic costs of night flying restrictions at the London airports”. The report concluded that the economic cost of the then current restrictions being maintained during the period 1997/1998 to 2002/2003 was about £850 million. BATA submitted the report to the Government when it responded to the Preliminary Consultation Paper.

47. On 10 September 1998, the Government announced that the movement limits and noise quotas for summer 1999 would be the same as for summer 1998.

48. In November 1998, the Government published the second stage Consultation Paper on night restrictions at Heathrow, Gatwick and Stansted. The Consultation Paper stated that it had been the view of successive Governments that the policy on night noise should be firmly based on research into the relationship between aircraft noise and interference with sleep and that, in order to preserve the balance between the different interests, this should continue to be the basis for decisions. The Consultation Paper indicated that ‘interference with sleep’ was intended to cover both

sleep disturbance (an awakening from sleep, however short) and sleep prevention (a delay in first getting to sleep at night, and awakening and then not being able to get back to sleep in the early morning). The Consultation Paper stated that further research into the effect of aircraft noise on sleep had been commissioned, which would include a review of existing research in the United Kingdom and abroad, and a trial to assess methodology and analytical techniques to determine whether to proceed to a full scale study of either sleep prevention or total sleep loss.

49. The Consultation Paper repeated the finding of the 1992 sleep study that for noise events in the range of 90-100 dBA SEL (80-95 dBA Lmax), the likelihood of the average person being awakened by an aircraft noise event was about 1 in 75. It acknowledged that the 1 in 75 related to sleep disturbance, and not to sleep prevention, and that while there was a substantial body of research on sleep disturbance, less was known about sleep prevention or total sleep loss.

50. The Consultation Paper stated that the objectives of the current review were, in relation to Heathrow, to strike a balance between the need to protect local communities from excessive aircraft noise levels at night and to provide for air services to operate at night where they are of benefit to the local, regional and national economy; to ensure that the competitive factors affecting United Kingdom airports and airlines and the wider employment and economic implications were taken into account; to take account of the research into the relationship between aircraft noise and interference with sleep and any health effects; to encourage the use of quieter aircraft at night; to put in place at Heathrow, for the night quota period (11.30 p.m. to 6 a.m.), arrangements which would bring about further improvements in the night noise climate around the airport over time and to update the arrangements as appropriate.

51. The Consultation Paper stated that since the introduction of the 1993 Scheme, there had been an improvement in the noise climate around Heathrow during the night quota period, based on the total of the quota count ratings of aircraft counted against the noise quota, but that there had probably been a deterioration over the full night period between 11 p.m. and 7 a.m. as a result of the growth in traffic between 6 a.m. and 7 a.m.

52. The Consultation Paper found a strong customer preference for overnight long-haul services from the Asia-Pacific region.

53. The Consultation Paper indicated that the Government had not attempted to quantify the aviation and economic benefits of night flights in monetary terms. This was because of the difficulties in obtaining reliable and impartial data on passenger and economic benefits (some of which was commercially sensitive) and modelling these complex interactions. BATA had submitted a copy of the Coopers & Lybrand July 1997 report with its response to the Preliminary Consultation Paper, and the Consultation Paper noted that the report estimated the value of an additional daily long haul

scheduled night flight at Heathrow to be £20m to £30m per year, over half of which was made up of airline profits. The Consultation Paper stated that the financial effects on airlines were understood to derive from estimates made by a leading United Kingdom airline. Other parts of the calculation reflected assumptions about the effects on passengers and knock-on effects on other services, expressed in terms of an assumed percentage of the assumed revenue earned by these services. The Consultation Paper stated that the cost of restricting existing night flights more severely might be different, and that BATA's figures took no account of the wider economic effects which were not captured in the estimated airline and passenger impacts.

54. The Consultation Paper stated that, in formulating their proposals, the Government had taken into account both BATA's figures and the fact that it was not possible for the Government to test the estimates or the assumptions made by BATA. Any value attached to a "marginal" night flight had to be weighed against the environmental disadvantages. These could not be estimated in monetary terms, but it was possible, drawing on the 1992 sleep study, to estimate the numbers of people likely to be awakened. The Consultation Paper concluded that in forming its proposals, the Government must take into account, on the one hand, the important aviation interests involved and the wider economic considerations. It seemed clear that United Kingdom airlines and airports would stand to lose business, including in the daytime, if prevented by unduly severe restrictions from offering limited services at night; that users could also suffer, and that the services offered by United Kingdom airports and airlines would diminish, and with them the appeal of London and the United Kingdom more generally. On the other hand, these considerations had to be weighed against the noise disturbance caused by night flights. The proposals made in the Consultation Paper aimed to strike a balance between the different interests and, in the Government's view, would protect local people from excessive aircraft noise at night.

55. The main proposals in relation to Heathrow were: not to introduce a ban on night flights, or a curfew period; to retain the seasonal noise quotas and movement limits; to review the QC classifications of individual aircraft and, if this produced significant reclassifications, to reconsider the quota limits; to retain the QC system; to review the QC system before the 2002 summer season (when fleet compositions would have changed following completion of the compulsory phase-out in Europe of Chapter 2 civil aircraft, with the exception of Concorde, which began in April 1995), in accordance with the policy of encouraging the use of quieter aircraft; to reduce the summer and winter noise quotas; to maintain the night period as 11 p.m. to 7 a.m. and the night quota period as 11.30 p.m. to 6 a.m.; to extend the restrictions on aircraft classified as QC8 on arrival or departure to match those for QC16 and to ban QC4 aircraft from being scheduled to

land or take off during the night quota period from the start of the 2002 summer season (i.e. after completion of the compulsory Chapter 2 phase out).

56. The Consultation Paper stated that since the introduction of the 1993 scheme, headroom had developed in the quotas, reducing the incentive for operators to use quieter aircraft. The reduction in summer and winter noise quotas to nearer the level of current usage was intended as a first step to restoring the incentive. The winter noise quota level under the 1993 scheme was 5,000 QC points, and the average usage in the last two traffic seasons had been 3,879 QC points. A reduction to 4,000 was proposed. The summer noise quota level had been 7,000 points, and the average usage in the last two seasons was provisionally calculated at 4,472. A reduction to 5,400 was proposed. The new levels would remain in place until the end of the summer 2004 season, subject to the outcome of the QC review.

57. Part 2 of the Consultation Paper invited comments as to whether runway alternation should be introduced at Heathrow at night, and on the preferential use of Heathrow's runways at night.

58. On 10 June 1999, the Government announced that the proposals in the November 1998 Consultation Paper would be implemented with effect from 31 October 1999, with limited modifications. With respect to Heathrow, the only modification was that there was to be a smaller reduction in the noise quotas than proposed. The quotas were set at 4,140 QC points for the winter, and 5,610 QC points for the summer. The effect of this was to set the winter quota at a level below actual usage in winter 1998/99.

59. The 1999 Scheme came into effect on 31 October 1999.

60. On 10 November 1999, a report was published on "The Contribution of the Aviation Industry to the UK Economy". The report was prepared by Oxford Economic Forecasting and was sponsored by a number of airlines, airport operators and BATA, as well as the Government.

61. On 23 November 1999, the Government announced that runway alternation at Heathrow would be extended into the night "at the earliest practicable opportunity", and issued a further consultation paper concerning proposals for changes to the preferential use of Heathrow's runways at night.

62. In December 1999, the DETR and National Air Traffic Services Limited published the final report of the ANMAC Technical Working Group on "Noise from Arriving Aircraft". The purpose of the report was to describe objectively the sources of operational noise for arriving aircraft, to consider possible means of noise amelioration, and to make recommendations to the DETR.

63. In March 2000, DORA published a report, prepared on behalf of the DETR, entitled "Adverse effects of night-time aircraft noise". The report identified a number of issues for possible further research, and was intended

to form the background to any future United Kingdom studies of night-time aircraft noise. The report stated that gaps in knowledge had been identified, and indicated that the DETR was considering whether there was a case for a further full-scale study on the adverse effects of night-time aircraft noise, and had decided to commission two further short research studies to investigate the options. These studies were commissioned in the autumn of 1999, before the publication of the DORA report. One is a trial study to assess research methodology. The other is a social survey the aims of which included an exploration of the difference between objectively measured and publicly received disturbance due to aircraft noise at night. Both studies are being conducted by university researchers.

64. A series of noise mitigation and abatement measures is in place at Heathrow airport, in addition to restrictions on night flights. These include the following: aircraft noise certification to reduce noise at source; the compulsory phasing out of older, noisier jet aircraft; noise preferential routes and minimum climb gradients for aircraft taking off; noise abatement approach procedures (continuous descent and low power/low drag procedures); limitation of air transport movements; noise related airport charges; noise insulation grant schemes and compensation for noise nuisance under the Land Compensation Act 1973.

65. The DETR and the management of Heathrow airport conduct continuous and detailed monitoring of the restrictions on night flights. Reports are provided each quarter to members of the Heathrow Airport Consultative Committee, on which local government bodies responsible for areas within the vicinity of Heathrow airport, and local residents' associations are represented.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Civil Aviation Act 1982 (“the 1982 Act”)

66. Section 76 (1) of the 1982 Act provides, so far as relevant:

“No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight, so long as the provisions of any Air Navigation Order ... have been duly complied with ...”

67. Air Navigation Orders made under the 1982 Act provide for Orders in Council to be made for the regulation of aviation. Orders in Council have been made to deal with, amongst other matters, engine emissions, noise certification and compensation for noise nuisance.

68. Section 78 (3) of the 1982 Act provides, so far as relevant:

“If the Secretary of State considers it appropriate for the purpose of avoiding, limiting or mitigating the effect of noise and vibration connected with the taking-off or landing of aircraft at a designated aerodrome, to prohibit aircraft from taking off or landing, or limit the number of occasions on which they may take off or land, at the aerodrome during certain periods, he may by a notice published in the prescribed manner do all or any of the following, that is to say–

(a) prohibit aircraft of descriptions specified in the notice from taking off or landing at the aerodrome (otherwise than in an emergency of a description so specified) during periods so specified;

(b) specify the maximum number of occasions on which aircraft of descriptions so specified may be permitted to take off or land at the aerodrome ... during the periods so specified; ...”

69. Restrictions on night flights at Heathrow airport are imposed by means of notices published by the Secretary of State under section 78 (3) of the 1982 Act.

### **B. The challenges to the 1993 Scheme**

70. The local authorities for the areas around the three main London airports sought judicial review of the Secretary of State’s decision to introduce the 1993 Scheme. They made four consecutive applications for judicial review, and appealed twice to the Court of Appeal. The High Court declared that the 1993 Scheme was contrary to the terms of section 78 (3) (b) of the 1982 Act, and therefore invalid, because it did not “specify the maximum number of occasions on which aircraft of descriptions so specified may be permitted to take off or land” but, instead, imposed controls by reference to levels of exposure to noise energy (*R. v. Secretary of State for Transport, ex parte Richmond upon Thames Borough Council and Others* [1994] 1 Weekly Law Reports, p. 74).

71. The Secretary of State decided to retain the quota count system, but with the addition of an overall maximum number of aircraft movements. This decision was held by the High Court to be in accordance with section 78 (3) (b) of the 1982 Act. However, the 1993 Consultation Paper was held to have been “materially misleading” in failing to make clear that the implementation of the proposals for Heathrow airport would permit an increase in noise levels over those experienced in 1988 (*R. v. Secretary of State for Transport, ex parte Richmond upon Thames Borough Council and Others* [1995] Environmental Law Reports, p. 390).

72. Following the publication of a further consultation paper in March 1995, and of a supplement to the March 1995 consultation paper in June 1995, the local authorities brought a further application for judicial review. In July 1996, the Court of Appeal decided that the Secretary of State had given adequate reasons and sufficient justification for his conclusion that it was reasonable, on balance, to run the risk of diminishing to some degree

local people's ability to sleep at night because of the other countervailing considerations to which he was, in 1993, willing to give greater weight, and that by June 1995 errors in the consultation papers had been corrected and the new policy could not be said to be irrational (*R. v. Secretary of State for Transport, ex parte Richmond LBC* [1996] 1 Weekly Law Reports, p. 1460).

73. On 12 November 1996, the House of Lords dismissed a petition by the local authorities for leave to appeal against the decision of the Court of Appeal.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

74. The applicants alleged a violation of Article 8 by virtue of the increase in the level of noise caused at their homes by aircraft using Heathrow airport at night after the introduction of the 1993 scheme.

Article 8 of the Convention provides, so far as relevant, as follows:

“1. Everyone has the right to respect for his private and family life, his home ...

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and necessary in a democratic society in the interests of ... the economic well-being of the country ... or for the protection of the rights and freedoms of others.”

75. The Government disagreed with the applicants' contention that there had been a violation of Article 8.

#### A. Arguments of the parties

##### *I. The applicants*

76. The applicants submitted that, after the 1993 scheme was introduced, the level of noise caused by aircraft taking off and landing at Heathrow airport between 4 a.m. and 7 a.m. increased significantly. They contended that they found it difficult to sleep after 4 a.m., and impossible after 6 a.m. They submitted that the levels of noise to which they were exposed at night were well in excess of those which were considered, internationally, to be tolerable. They contended that the evidence showed that almost all of them had suffered night noise levels in excess of 80 dB LA max, and in one case as high as 90 dB LA max. They referred to the World Health Organisation's guideline value for avoiding sleep disturbance at night, of a single noise event of 60 dB LA max, and argued that the Government had no adequate

research to support their contention that levels of 80 dB LA max were tolerable. The applicants submitted that, in these circumstances, there had been an interference with their right to respect for their private and family lives and their home, as guaranteed by Article 8 § 1 of the Convention.

77. The applicants contended that the interference was not “necessary in a democratic society”. They submitted that there was a great deal of first-hand evidence of the disruption, distress and ill-health caused by night flights. They underlined that the 1992 sleep study dealt only with awakenings from sleep, and reached no conclusions about the incidence or effects of sleep prevention (delay in first getting to sleep at night, and not being able to get back to sleep after being woken in the early morning). The applicants contended that sleep prevention has never been the subject of adequate scientific study. They submitted that basic factual information was needed to support an increase in night flights under the 1993 scheme, and that it was not assembled by the Government.

78. Although they accepted the general importance of Heathrow airport to the United Kingdom economy, the applicants contended that the Government had failed to adduce any evidence of the specific importance of night flights. They referred to the Oxford Economic Forecasting report of November 1999 on “The Contribution of the Aviation Industry to the UK Economy”, and noted that the report, which considered the economic importance of Heathrow airport as a whole, did not consider separately the economic importance of night flights. They also submitted a report by Berkeley Hanover Consulting which challenged the validity of the Oxford report and its conclusions. The applicants contended, further, that night flights are of benefit only to the airlines which operate them, and that many other major European airports have greater restrictions on night flights than those in operation at Heathrow.

79. The applicants submitted that, in these circumstances, the reasons for the continuation of night flights adduced by the Government, both in 1993 and subsequently, were not relevant and sufficient, and that it was open to the Court to find a violation of Article 8 on this basis alone.

80. The applicants submitted, further, that the interference with their rights under Article 8 was not “in accordance with the law”. They contended that, in order to be “in accordance with the law”, there must be protection in domestic law against arbitrary interference with the rights guaranteed by Article 8 § 1 of the Convention; the law must be accessible, and its consequences must be foreseeable. These features were not present when the Government departed from its statement of policy “not to allow a worsening of noise at night, and ideally to improve it” (the 1993 Consultation Paper, paragraph 34), and was held by the High Court to have been “devious” in its attempt to conceal the departure (*R. v. London Borough of Richmond and Others (No. 3)* [1995] Environmental Law Reports 409).

81. Finally, the applicants contended that Article 8 is capable of conferring upon individuals a right to have essential environmental information communicated to them regarding the extent of an environmental threat to their moral and physical integrity (relying on the judgment of the Court in *Guerra v. Italy*, 19 February 1998, *Reports of Judgments and Decisions*, 1998-I, § 60), and contended that, *a fortiori*, Article 8 required that such information be assembled by the national authorities. They claimed that the increase in night flights under the 1993 scheme in the absence of proper information constituted in itself a breach of Article 8 of the Convention.

## *II. The Government*

82. The Government acknowledged that the number of movements during the night quota period (11.30 p.m. to 6 a.m.) for the period from winter 1997/98 to summer 1999 was greater than that in 1992/93, and that the increase was greater if the period was taken to 6.30 a.m. They stated that the average QC per movement was significantly lower than the comparable figure prior to the introduction of the 1993 scheme, but that the quota count had increased due to the increased number of movements.

83. The Government's analysis of the current rate of arrivals during half hour slots from 4 a.m. to 6 a.m. was as follows:

	04.00- 04.29	04.30- 04.59	05.00- 05.29	05.30- 05.59
<b>Winter</b>	0.57	5.14	7.29	3.43
<b>Summer</b>	0.14	2.29	5.86	4.86

They stated that arrivals before 4 a.m. were so few as to be statistically insignificant, and that average arrivals between 6 a.m. and 6.30 a.m. were 17.86 in the winter and 19.14 in the summer.

84. The Government submitted that the applicants were exposed to lower noise levels than the applicants in the previous cases in which complaints were made concerning aircraft noise at Heathrow airport and which were declared admissible by the Commission (*Arrondelle v. the United Kingdom*, application no. 7889/97, decision of 15 July 1980, *Decision and Reports (DR)* 26, p. 5; *Baggs v. the United Kingdom*, application no. 9310/81, decision of 16 October 1985, *DR* 44, p. 13; *Rayner v. the United Kingdom*, application no. 9310/81, decision of 17 July 1986, *DR* 47, p. 5). With the exception of one of the applicants, Mr Cavalla, at his former address, all the applicants were exposed to the same or lower noise levels than Mr Glass at his former address. Mr Glass's application was declared inadmissible (application no. 28485/95, decision of 3 December 1997). They submitted that, in these circumstances, there had been no

interference with the applicants' rights under Article 8 § 1 of the Convention.

85. The Government submitted, alternatively, that in deciding to introduce the 1993 scheme they struck an appropriate and justified balance between the various interests involved and that, accordingly, any interference with the applicants' rights under Article 8 was justified. They referred to the 1992 sleep study which was in 1993, and remains, the most comprehensive study of its type. They stated that the 1992 sleep study was commissioned in July 1990 in order to inform the 1993 review of restrictions on night flights, but emphasised that it had been preceded by a number of earlier detailed reports into aircraft noise and sleep disturbance, also published by or on behalf of the Civil Aviation Authority. Further, the Government stated that research undertaken in the United States since the results of the 1992 sleep study were published had not cast any doubt on its validity.

86. The Government pointed out that, as they did not own or operate Heathrow airport or the aeroplanes which were causing the noise of which the applicants were complaining, their obligations under Article 8 were properly to be analysed as positive obligations. They submitted that, in these circumstances, they should be permitted a greater degree of leeway than in a case of direct interference by a public authority, although they recognised (referring to the Court's *Powell and Rayner v. the United Kingdom* judgment of 21 February 1990, Series A no. 172, § 41), that the applicable principles were broadly similar whichever analytical approach were to be adopted.

87. The Government referred to the series of noise mitigation and abatement measures which have been implemented at Heathrow airport or have otherwise contributed to the improvement of the noise climate around the airport, in addition to the restrictions on night flights. They provided detailed information in respect of each of these measures.

88. The Government also referred to the responses to the 1993 Consultation Paper received from trade and industry associations with an interest in air travel and from airlines, all of which emphasised the economic importance of night flights and provided detailed information and figures to support their responses. The Government submitted that night flights form an integral part of the global network of air services, and that they have a direct impact on the demand for daytime flights, due to operational constraints (geography, journey length time, number of time zones and direction of flight, turn-around time and efficient aircraft utilisation). A prohibition on night flights would therefore have severe implications for the competitiveness of Heathrow airport and of the airlines based there. These submissions were supported by the written comments received from British Airways.

89. The Government submitted that active and detailed consideration continues to be given to the issue of whether the research undertaken to date needs to be supplemented and, if so, in what areas and on what scientific basis. They pointed to the fact that they are continuing to fund research into sleep disturbance, in the form of further detailed fieldwork and a laboratory trial.

90. They contended that the central issue which they considered before deciding upon the 1993 scheme was the extent to which the economic well-being of the United Kingdom, as represented by the need to meet the requirements of the global market, justified the inconvenience of night noise to local residents. They submitted that before taking the relevant decisions, they had available, and considered, extensive and detailed information regarding the results of research into the effect of night noise on sleep, and regarding the economic importance of night flights at Heathrow airport. They claimed that it was not possible to separate the economic importance of night flights at Heathrow airport from the overall importance of Heathrow to the United Kingdom economy. They contended further that, given the range of interests involved, striking a balance is not a straightforward task, and that it is something which the national authorities are particularly well placed to do. Finally, the Government submitted that the balance which they had struck was a fair and reasonable one.

#### **B. Comments from British Airways plc**

91. In written comments, British Airways plc (“BA”) addressed the commercial significance of and need to schedule flights which arrive at Heathrow airport at night. BA indicated that its comments were endorsed by BATA. BA stated that in the last two seasons (summer 1999 and winter 1999/2000), BA’s night quota flights and those scheduled to operate in the period up to 6.30 a.m., together with their return leg flights, accounted for 16% of BA’s total revenue. It stated, further, that the loss of some or all of its night flights would have a serious effect on its ability to compete, and that this effect would be disproportionately great due to both the damage to the network and the scheduling difficulties which it would entail.

92. BA submitted that if its flights which were scheduled to arrive before 7.15 a.m. had not been permitted to operate at Heathrow airport during 1999, it would have lost 49% of its long haul flight output at its main airport base. It would not have been possible to retime night flights into the day due to the lack of spare terminal capacity at Terminals 3 and 4 (the terminals for long haul flights at Heathrow airport) and the fact that no runway slots were available during the morning period. BA would have suffered a very significant loss of revenue, with consequent large-scale redundancies.

93. The report by Berkeley Hanover Consulting submitted by the applicants challenged the validity of the information provided by BA.

### C. The Court's assessment

94. The Court considers that it is not possible to make a sensible comparison between the situation of the present applicants and that of the applicants in the previous cases referred to by the Government because, first, the present applicants complain specifically about night noise, whereas the earlier applicants complained generally about aircraft noise and, secondly, the present applicants complain largely about the increase in night noise which they say has occurred since the Government altered the restrictions on night noise in 1993, whereas the previous applications concerned noise levels prior to 1993. The Court concludes, therefore, that the outcome of previous applications is not relevant to the present case.

95. The Court notes that Heathrow airport and the aircraft which use it are not owned, controlled or operated by the Government or by any agency of the Government. The Court considers that, accordingly, the United Kingdom cannot be said to have “interfered” with the applicants’ private or family life. Instead, the applicants’ complaints fall to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants’ rights under Article 8 § 1 of the Convention (see the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, § 41, and the Guerra v. Italy judgment of 19 February 1998, *Reports* 1998-I, § 58).

96. Whatever analytical approach is adopted – the positive duty or an interference – the applicable principles regarding justification under Article 8 § 2 are broadly similar (the aforementioned Powell and Rayner v. the United Kingdom judgment *loc. cit.*). In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see, for example, the Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, § 37, as concerns Article 8 § 1, and the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, § 59, as concerns Article 8 § 2). Furthermore, even in relation to the positive obligations flowing from Article 8 § 1, in striking the required balance the aims mentioned in Article 8 § 2 may be of a certain relevance (see the Rees v. the United Kingdom judgment previously cited, *loc. cit.*; see also the Lopez Ostra v. Spain judgment of 9 December 1994, Series A no. 303-C, p. 54, § 51).

97. The Court would, however, underline that in striking the required balance, States must have regard to the whole range of material considerations. Further, in the particularly sensitive field of environmental

protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others. The Court recalls that in the above-mentioned *Lopez Ostra v. Spain* case, and notwithstanding the undoubted economic interest for the national economy of the tanneries concerned, the Court looked in considerable detail at “whether the national authorities took the measures necessary for protecting the applicant’s right to respect for her home and for her private and family life ...” (judgment of 9 December 1994, p. 55, § 55). It considers that States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.

98. The Court notes that the Government have acknowledged that, while the average quota count per movement is now lower than the average prior to the introduction of the 1993 scheme, the increased number of movements has led to an increased quota count in comparison with the position in 1992/93. This means that, overall, the level of noise during the quota period (11.30 p.m. to 6 a.m.) has increased under the 1993 scheme. In addition, the Court notes the accounts given by the applicants of the disturbance to their sleep caused by the increase in noise from night flights at Heathrow airport from about 1993.

99. The Court must establish whether, in permitting increased levels of noise over the years since 1993, the Government respected their positive obligation to the applicants.

100. The Court notes that the Government had, when the 1993 scheme was being introduced and in the period whilst it was under judicial challenge, a certain amount of information as to the economic interest in night flights. In particular, they had the responses of industry and commerce to the Consultation Papers of January and November 1993, and of 1995. However, they do not appear to have carried out any research of their own as to the reality or extent of that economic interest.

101. It is true that a measure of further information as to the economic effects of night flights has now been assembled. In particular, BATA commissioned the Coopers & Lybrand report of July 1999 into the economic costs of night flying. This information, however, came too late to be considered in the process leading up to the 1993 Scheme (as reviewed in 1995). The Government acknowledged in the November 1998 Consultation Paper that no attempt was made to quantify the aviation and economic benefits in monetary terms (paragraph 53 above).

102. The Court concludes from the above that whilst it is, at the very least, likely that night flights contribute to a certain extent to the national economy as a whole, the importance of that contribution has never been

assessed critically, whether by the Government directly or by independent research on their behalf.

103. As to the impact of the increased night flights on the applicants, the Court notes from the documents submitted that only limited research had been carried out into the nature of sleep disturbance and prevention when the 1993 Scheme was put in place. In particular, the 1992 sleep study, which was prepared as part of the internal Department of Transport review of the restrictions on night flights, was limited to sleep disturbance, and made no mention of the problem of sleep prevention – that is, the difficulties encountered by those who have been woken in falling asleep again. Further research is now under way, and while the conclusions may be valuable for future Schemes, the results will be too late to have any impact on the increase in night noise caused by the 1993 Scheme.

104. In determining the adequacy of the measures to protect the applicants' Article 8 rights, the Court must also have regard to the specific action which was taken to mitigate night noise nuisance as part of the 1993 Scheme, and to other action which was likely to alleviate the situation.

105. The Court notes that, although the 1993 Scheme did not achieve its stated aim of keeping overall noise levels below those in 1988, it represented an improvement over the proposals made in the 1993 Consultation Paper, in that no aircraft were exempt from the night restrictions (that is, even the quietest aircraft had a rating of 0.5 QC). Further, in the course of the challenges by way of judicial review to the 1993 Scheme, an overall maximum number of aircraft movements was set, and the Government did not accede to calls for large quotas and an earlier end to night quota restrictions.

106. However, the Court does not accept that these modest steps at improving the night noise climate are capable of constituting “the measures necessary” to protect the applicants' position. In particular, in the absence of any serious attempt to evaluate the extent or impact of the interferences with the applicants' sleep patterns, and generally in the absence of a prior specific and complete study with the aim of finding the least onerous solution as regards human rights, it is not possible to agree that in weighing the interferences against the economic interest of the country – which itself had not been quantified – the Government struck the right balance in setting up the 1993 Scheme.

107. Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the Court considers that in implementing the 1993 scheme the State failed to strike a fair balance between the United Kingdom's economic well-being and the applicants' effective enjoyment of their right to respect for their homes and their private and family lives.

There has accordingly been a violation of Article 8.

## II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

108. The applicants contended that judicial review was not an effective remedy in relation to their rights under Article 8 of the Convention, in breach of Article 13.

Article 13 provides:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

109. The Government disputed the applicants’ contention that there had been a violation of Article 13.

### A. Arguments of the parties

#### *I. The applicants*

110. The applicants contended that they had no private law rights in relation to excessive night noise, as a consequence of the statutory exclusion of liability in section 76 of the Civil Aviation Act 1982. They submitted that the limits inherent in an application for judicial review meant that it was not an effective remedy. They referred in particular to the fact that the issues arising under Article 8 could not be addressed in an application for judicial review, and that the arguments which had been raised by the local authorities concerning the substance of Article 8 in the four applications for judicial review were rejected on the grounds that they fell outside the scope of the court’s power of review. They also referred to the high costs involved in bringing an application for judicial review.

#### *II. The Government*

111. The Government submitted that the applicants had no arguable claim of a violation of Article 8 and that, accordingly, no issue of entitlement to a remedy under Article 13 arose. Alternatively, they submitted that as the requirements of Article 13 are less strict than and are absorbed by those of Article 6, and as Article 6 would have applied had it not been for the exclusion of liability in section 76 of the 1982 Act, no separate issue arose under Article 13.

112. The Government contended that, in any event, the remedy of judicial review was available to the applicants. They referred to the wide margin of discretion available to the national authorities in relation to the decision to implement the 1993 scheme. They claimed that judicial review was an effective remedy because, although the English courts could not substitute their view as to where the appropriate balance lay between the competing interests concerned, the courts had power to set aside schemes on

a variety of administrative law grounds (for example, irrationality, unlawfulness or patent unreasonableness). Indeed, the courts had exercised that power in relation to the 1993 scheme.

The Government contended, further, that judicial review would have allowed a challenge to be made on the basis of a failure to take relevant material into account, or the taking into account of irrelevant material. Finally, they observed that Article 8 was considered by the Court of Appeal in *R. v. Secretary of State for Transport, ex parte Richmond LBC* [1996] 1 Weekly Law Reports, p. 1460, at p. 1481E, where it was held that the Secretary of State had given adequate reasons and sufficient justification for his conclusion that it was reasonable, on balance, to run the risk of diminishing to some degree local people's ability to sleep at night because of the other countervailing considerations to which he was, in 1993, willing to give greater weight.

### **B. The Court's assessment**

113. Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, the *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, § 54). In the present case, there has been a finding of a violation of Article 8, and the complaint under Article 13 must therefore be considered.

114. Section 76 of the 1982 Act prevents actions in nuisance in respect of excessive noise caused by aircraft at night. The question which the Court must address is whether the applicants had a remedy at national level to "enforce the substance of the Convention rights ... in whatever form they may happen to be secured in the domestic legal order" (*Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, Series A no. 215, §§ 117 to 127). The scope of the domestic review in the *Vilvarajah* case, which concerned immigration, was relatively broad because of the importance domestic law attached to the matter of physical integrity. It was on this basis that judicial review was held to comply with the requirements of Article 13. In contrast, however, in its judgment in the case of *Smith and Grady v. the United Kingdom* of 27 September 1999 (§§ 135 to 139, ECHR 1999-VI [Section 3]), the Court concluded that judicial review was not an effective remedy on the grounds that the domestic courts defined policy issues so broadly that it was not possible for the applicants to make their Convention points regarding their rights under Article 8 of the Convention in the domestic courts.

115. The Court notes that judicial review proceedings were capable of establishing that the 1993 scheme was unlawful because the gap between Government policy and practice was too wide (see *R. v. Secretary of State for Transport, ex parte Richmond LBC (No. 2)* [1995] Environmental Law

Reports p. 390). However, it is clear that the scope of review by the domestic courts was limited to the classic English public law concepts, such as irrationality, unlawfulness and patent unreasonableness, and did not allow consideration of whether the increase in night flights under the 1993 scheme represented a justifiable limitation on their right to respect for the private and family lives or the homes of those who live in the vicinity of Heathrow airport.

116. In these circumstances, the Court considers that the scope of review by the domestic courts in the present case was not sufficient to comply with Article 13.

There has therefore been a violation of Article 13 of the Convention.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

117. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

#### A. Damages

118. The applicants submitted that they had each suffered considerable non-pecuniary damage as a result of noise caused by night flights and, in particular, the increase in night flights since 1993. They suggested that an award of 2,000 to 4,000 pounds sterling (GBP) each would be an appropriate starting point for an award of non-pecuniary damage.

119. The Government did not comment on the applicants’ submissions.

120. Having regard to the accounts given by the applicants of the impact on each of them of the increase in night flights since 1993, and making its award on an equitable basis, the Court awards the applicants the sum of GBP 4,000 each in respect of non-pecuniary damage.

#### B. Costs and expenses

121. The applicants submitted a claim for costs and expenses of the proceedings before the Commission and the Court in the sum of GBP 153,867.56, plus GBP 24,929.55 value added tax (“VAT”). They submitted that although their application was almost identical to that made by Mr Glass (the annexes to which were simply reproduced for the purposes of the present application), they should recover the cost of preparation of the application because their representative had represented Mr Glass on a contingency (no-win no-fee) basis, and therefore had not recovered a fee for

the work done on his behalf. They indicated that they had excluded from their claim costs incurred solely in connection with Mr Glass's application, and that they had further reduced the sums claimed by 25% in order to ensure that there was no element of double recovery.

122. The Government expressed some doubt as to whether the applicants were in fact liable for the costs, as the basis for the retention of the applicants' lawyers was not clear. In any event, they considered that the rates and the time charged were excessive, and that the travel expenses were, to a certain extent, not necessary. They put an appropriate figure for costs at GBP 56,739.44 including VAT. They subsequently added that they understood that up to GBP 80,000 had been raised by a pressure group to fund costs.

123. Making its assessment on an equitable basis, the Court awards the applicants by way of costs and expenses the global sum of GBP 70,000, including VAT.

### **C. Default interest**

124. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

## **FOR THESE REASONS, THE COURT**

1. *Holds* by five votes to two that there has been a violation of Article 8 of the Convention;
2. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;
3. *Holds* by six votes to one
  - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
    - (i) in respect of non-pecuniary damage, 4,000 (four thousand) pounds sterling each;
    - (ii) for costs and expenses, 70,000 (seventy thousand) pounds sterling, including any value added tax that may be chargeable;
  - (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English and notified in writing on 2 October 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ  
Registrar

J.-P. COSTA  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

- (a) separate opinion of Mr Costa;
- (b) partly dissenting opinion of Mrs Greve;
- (c) dissenting opinion of Sir Brian Kerr.

J.-P.C.  
S.D.

## SEPARATE OPINION OF JUDGE COSTA

*(Translation)*

On mature reflection, and not without having hesitated a great deal, I voted in favour of finding that there had been a violation of Article 8 of the Convention. (I concluded more easily that there had been a violation of Article 13, so shall confine my comments to Article 8.)

This case, which gave rise to a public hearing, is far from easy. On the one hand there is the principle, established by the Court as early as the *Marckx* judgment of 13 June 1979, that the State has positive duties, and that the right to a healthy environment is included in the concept of the right to respect for private and family life (see, for example, the *Powell and Rayner* against the United Kingdom judgment of 21 February 1990, quoted in the instant judgment (see paragraph 95), which also concerned noise disturbance inflicted on the communities near Heathrow by aircraft noise). On the other hand there is the margin of appreciation which must be left to the States in this sphere, particularly as to the choice of means by which to reduce aircraft noise (see the *Powell and Rayner* judgment, § 45), and the economic well-being of the country, referred to in Article 8 § 2 of the Convention, which relates to the general interest, a matter towards which I am personally very sensitive. (I refer in this connection to my dissenting opinion in the case of *Chassagnou* against France: judgment of 29 April 1999.)

There were therefore serious reasons for considering, as did the judges forming the minority, that the inconvenience caused to the applicant as a result of their proximity to Heathrow airport was not disproportionate.

It seems to me, however, that the inconvenience was very substantial and, all in all, excessive. As stated in paragraphs 10 to 17 of the judgment, the eight applicants lived very near the runways, and four of them had to move house. They certainly did not do so merely to satisfy a whim, but because they and their families had been finding it extremely difficult to bear the noise, and, in particular, to sleep. It should not be forgotten that, unlike the cases which were the subject of the *Powell and Rayner* judgment, and the decisions of the Commission such as *Arrondelle* (DR 26, p. 5) or *Baggs* (DR 44, p. 13), what was at issue here were night flights, with aeroplanes landing or taking off between 4 a.m. and 6 a.m. Anyone who has suffered for a long period from noise disturbance such as to disrupt their sleep (or prevent them from getting back to sleep once awake) is well aware that the effects of this on the nerves and on one's physical and mental well-being are extremely unpleasant and even harmful. Furthermore, again unlike the earlier cases, the applications lodged by Mrs Hatton and the other applicants concern the period subsequent to 1993, and the Government have acknowledged that since 1993 the number of night flights has

substantially increased (see, for example, the admissibility decision of 16 May 2000, p. 13, and the present judgment, paragraph 98).

Moreover, the issues raised by the case do not necessarily boil down to macro economic considerations requiring radical solutions which would compromise the economic well-being of the country (or of the airline companies, the airport authorities, or all three categories at once). In accordance with its positive obligations, could the State not have explored less drastic solutions, such as subsidies (from the State or from the Heathrow management authorities) to soundproof the applicants' homes? The objection may be raised that they are not the only residents suffering from the noise and that, consequently, that solution would have opened the floodgates to multiple requests for subsidies or compensation, whereupon the macro economy would again be in issue and would subsume the individual nature of the applications and violations.

That is certainly true, but it has to be one thing or the other: either the number of potential victims of night flight noise is limited and the "beneficiaries" of those flights can compensate them, or it is too high for the level of compensation to be financially viable for the beneficiaries, whereupon night flights need to be reviewed in their entirety.

It therefore appears to me that, having regard to the Court's case-law on the right to a healthy environment (see, for example, the Lopez Ostra against Spain judgment of 9 December 1994, or the Guerra against Italy judgment of 19 February 1998), maintaining night flights at that level meant that the applicants had to pay too high a price for an economic well-being, of which the real benefit, moreover, is not apparent from the facts of the case. Unless, of course, it is felt that the case-law goes too far and overprotects a person's right to a sound environment. I do not think so. Since the beginning of the 1970s, the world has become increasingly aware of the importance of environmental issues and of their influence on people's lives. Our Court's case-law has, moreover, not been alone in developing along those lines. For example, Article 37 of the Charter of Fundamental Rights of the European Union of 18 December 2000 is devoted to the protection of the environment. I would find it regrettable if the constructive efforts made by our Court were to suffer a setback.

That is why I have finally subscribed, in the main, to the reasoning of the majority of my colleagues, and fully to their conclusion.

## PARTLY DISSENTING OPINION OF JUDGE GREVE

In the present case I have not found a violation of Article 8.

In reaching this finding I share essentially the views expressed by Sir Brian Kerr in his dissenting opinion relating to Article 8. I am, however, unlike Sir Brian, prepared to accept the applicants' allegation that the night flights' noise did interfere substantially with their sleep.

In the following I shall limit myself to elaborating on the main points on which I take a different view from that of the majority of my colleagues in this case.

### *Introductory remark*

Article 8 §1 reads:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

In relation to the notion of “home”, the essence of the protection under the provision is to secure the inviolability of one's home, that is to safeguard private individuals against arbitrary interference with their homes. The Convention being a living instrument, the provision has gradually been interpreted to include also environmental rights. There are limits as to the kind of environmental problems – pollution in the widest sense of the word – which people will have to accept before these problems give rise to a violation of Article 8. These environmental rights are nonetheless of a different character from the core right not to have one's home raided without a warrant. Environmental problems may lead to State responsibility under Article 8 as a consequence of the impact of planning decisions, and potentially also when a State refrains from adequately addressing serious environmental problems.

### *The State's inquiry into night flights*

Unlike the majority, I find no major shortcomings in the State's inquiry into night flights' noise and the decision-making process used in this case by the authorities in the United Kingdom. On the contrary, I find that the procedures were reasonable and adequate.

### *The margin of appreciation*

An interference with the right to respect for one's home will infringe Article 8 of the Convention, unless it is “in accordance with the law”, pursues one or more legitimate aims under paragraph 2 and is “necessary in a democratic society” to achieve those aims. In the present case, the main issue turns on whether the latter requirement was satisfied.

The majority's understanding of the margin of appreciation left to the national courts is, in my opinion, in conflict with the Court's established case-law.

The standard relied on by the majority requiring States "to minimise, as far as possible, the interference with [Article 8] rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights" (paragraph 97 of the judgment) is, in my opinion, incompatible with the wide margin of appreciation left by the European Court to Contracting States in other planning cases.

The general principles in this respect are laid down in the *Buckley v. the United Kingdom* judgment (25 September 1996, *Reports of Judgments and Decisions 1996-IV*, pp. 1291-1293, §§ 74-77), and read:

"As is well established in the Court's case-law, it is for the national authorities to make the initial assessment of the 'necessity' for an interference, as regards both the legislative framework and the particular measure of implementation (see, *inter alia* and *mutatis mutandis*, the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 25, § 59, and the *Miailhe v. France* (no. 1) judgment of 25 February 1993, Series A no. 256-C, p. 89, § 36). Although a margin of appreciation is thereby left to the national authorities, their decision remains subject to review by the Court for conformity with the requirements of the Convention.

The scope of this margin of appreciation is not identical in each case but will vary according to the context (see, *inter alia* and *mutatis mutandis*, the above-mentioned *Leander* judgment, *ibid.*). Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned.

The Court has already had occasion to note that town and country planning schemes involve the exercise of discretionary judgment in the implementation of policies adopted in the interest of the community (in the context of Article 6 § 1, see the *Bryan* judgment cited above, p. 18, § 47; in the context of Article 1 of Protocol No. 1, see the *Sporrong and Lönnroth v. Sweden* judgment of 23 September 1982, Series A no. 52, p. 26, § 69; the *Erkner and Hofauer v. Austria* judgment of 23 April 1987, Series A no. 117, pp. 65-66, §§ 74-75 and 78; the *Poiss v. Austria* judgment of 23 April 1987, Series A no. 117, p. 108, §§ 64-65, and p. 109, § 68; the *Allan Jacobsson v. Sweden* judgment of 25 October 1989, Series A no. 163, p. 17, § 57, and p. 19, § 63). It is not for the Court to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases (see, *mutatis mutandis*, the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 23, § 49). By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation."

These principles have most recently been followed by the Court's Grand Chamber in its judgments of 18 January 2001 in the cases of *Chapman v. the United Kingdom* (application no. 27238/95), *Beard v. the United Kingdom* (application no. 24882/94), *Coster v. the United Kingdom*

(application no. 24876/94), *Lee v. the United Kingdom* (application no. 25289/94) and *Jane Smith v. the United Kingdom* (application no. 25154/94); and in the inadmissibility decision of 25 May 2000 by the Court (Fourth Section) in the *Noack and Others v. Germany* case (application no. 46346/99). The latter case is of particular interest as it involved no less than the transfer of an entire village – members of the Sorbian minority included. The Court (Fourth Section) described the background to the case as follows:

“The case concerns the transfer – scheduled to take place at the end of 2002 – of the inhabitants of Horno, a village in the *Land* of Brandenburg fifteen kilometres north of the town of Cottbus, near the Polish border. Horno has a population of 350, approximately a third of whom are from the Sorbian minority, of Slav origin. The first twelve applicants say that they are members of the Sorbian minority. [The other applicants were the Domowina, an association for the protection of Sorbian interests, and the Horno Protestant community.] Approximately 20,000 Sorbs (*Sorben*) live in the *Land* of Brandenburg. They have their own language and culture. They have their own customs (*šorbisches Brauchtum*), which are kept alive by groups performing Sorbian songs or wearing traditional costumes and by drama societies, literary circles and drawing classes. The majority of Sorbs are Protestants.

The inhabitants of Horno are to be transferred to a town some twenty kilometres away because of an expansion of lignite-mining operations (*Braunkohleabbau*) in the area, as the Jänschwalde open-cast lignite mine (*Braunkohletagebau*) is just a few kilometres from Horno.”

The Court (Fourth Section) concluded that the impugned interference, though indisputably painful for the inhabitants of Horno, was not disproportionate to the legitimate aim pursued (economic well-being) in view of the margin of appreciation which States are afforded in this area.

The reasons for a wide margin of appreciation in planning and environmental cases are in my opinion no less valid today. In modern society, environmental problems are not discreet and only of concern to those who may invoke Article 8, given their proximity to the source of the given problem. One of the functions of planning is, to the extent possible, to protect people against the negative impact on the environment of, for instance, and as *in casu*, the transport infrastructure; another function is to ensure that no group of people is disproportionately affected by what is considered necessary to meet the needs of modern urban society. The amount and complexity of the factual information needed to strike a fair balance in these respects is more often than not of such a nature that the European Court will be at a marked disadvantage compared to the national authorities in terms of acquiring the necessary level of understanding for appropriate decision-making. Moreover, environmental rights represent a new generation of human rights. How the balance is to be struck will therefore affect the rights not only of those close enough to the source of the environmental problem to invoke Article 8, but also the rights of those

members of the wider public affected by the problem and who must be considered to have a stake in the balancing exercise.

Furthermore, the general principle concerning the assessment of facts argues in favour of a wide margin of appreciation in these cases.

*The general principle concerning the assessment of facts*

It is normally not within the province of the Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them (see, *inter alia*, the Klaas v. Germany judgment of 22 September 1993, Series A no. 269, p. 17, § 29).

The arguments listed above in favour of a wide margin of appreciation in planning cases also have as a consequence that the Court ought to be reluctant to substitute its own assessment of facts in these cases unless there are relatively clear and substantiated indications that the national authorities have got the facts wrong. In my opinion, there are no such indications in the present case which would make the Court a more competent fact-finder than the national authorities. I consider that the majority moves beyond what appears to me advisable in this respect.

## DISSENTING OPINION OF SIR BRIAN KERR

I regret that I am unable to agree with my fellow judges in their conclusion that there have been violations of Articles 8 and Article 13 of the Convention in this case.

### **Article 8**

Article 8 prohibits unjustified State interference with an individual's "right to respect for his private ... life [and] his home". The opportunity for undisturbed sleep is an important aspect of one's private life. The flying of aircraft at night can interfere with the sleep of those who live in its flight path. It scarcely requires to be said, however, that, by allowing night flights, (even those which cause sleep interference) the State is not automatically guilty of an unjustified interference with the right to respect for private life and home. Before that conclusion can be reached, a close examination is required of (i) the nature of the alleged interference, (ii) the State's inquiry into the effects of night flights' noise and (iii) the assessment that the State has made of the consequences of curtailing night flights.

#### *The nature of the interference*

The applicants' claims that their sleep has been disturbed have not been subjected to any critical challenge. The account that they have given in documents submitted to the court cannot be accepted without reservation, therefore. Nor can the assumption be made that these accounts are necessarily representative of a general experience of those who live in the same areas as the applicants. In making an assessment of whether the State has been guilty of a failure to have respect for the applicants' private life and home, it must be borne in mind that the extent of the claimed disturbance has not been established to any significant degree.

It may be considered that it is not easy to prove that one's sleep has been disturbed. This difficulty does not alone justify the weight given by the Chamber to an alleged absence of scientific study into the problem. There can be no substitute for a discussion of the facts of the specific case before the Court. This is after all an application under Article 34 of the Convention, and not Article 33.

It is relevant that none of the applicants has been prevented from moving away from the area. None claims that their house became unsaleable or that they lost value to such an extent that equivalent property elsewhere was not affordable. This point does not, of course, deprive the applicants of the status required to claim to be victims of a violation of the Convention within the meaning of Article 34, but it is highly material in determining whether, overall, the government's policy was so wide-ranging and unreasonable as to render it incompatible with Article 8 of the Convention. It is well known

that pressure on property prices around London is so great that they are not seriously affected by aircraft noise. In such circumstances, those who claim sleep disturbance from night flying have a genuine choice as to whether to remain or to move elsewhere.

Modern life is beset with inconveniences. It is an inevitable incident of our changing world that land use plans change and that those changes have an impact on the lives of individuals. From time to time motorways are extended, roads are re-routed or public buildings are erected near private property. Those who are directly affected by such developments are naturally most likely to oppose them. So it is with night flights. But the mere fact that one's private life is interfered with by such developments is not enough to attract the protection of Article 8. It must be demonstrated that, in trying to balance the individual's rights and society's needs and interests, the State has not afforded the rights enshrined in that provision the requisite respect. In addressing that question, the possibility of removing oneself from the source of the inconvenience cannot be ignored.

Having considered all the available evidence, I have concluded that it has not been established that there was a significant interference with the applicants' right to private life.

*The State's inquiry into night flights' noise*

The majority has concluded that the State did not conduct a sufficient inquiry into the effects of night flying on the sleep of those affected by it (paragraph 106). Since the introduction of the 1993 scheme, however, the Government has taken the following steps, among others, (i) consulted on revised proposals in October and November 1993; (ii) commissioned a study by ANMAC in May 1994; (iii) issued a Consultation paper in March 1995 and a supplement in June 1995; (iv) initiated a trial of modified procedures for early morning landings and published the results in November 1998; (v) commissioned a study to be carried out by the National Physical Laboratory in December 1997; (vi) engaged in a two stage consultation exercise in 1998, publishing the second stage in November of that year; (vii) as a result of the consultation exercise, introduced a new scheme in 1999, and (viii) published a report in March 2000 identifying a number of issues for further possible research.

I cannot subscribe to the view that the Government have been unwarrantably inactive in this area, therefore. On the contrary, the amount of research that has been conducted into the problem of night noise has been substantial, in my opinion. Furthermore, as the judgment records, (paragraph 64) a series of noise mitigation and abatement measures is in place at Heathrow airport, in addition to restrictions on night flights. The DETR and the management of Heathrow airport conduct continuous and detailed monitoring of the restrictions of night flights. These measures

betoken a concern that the right to a private life should not be unduly interfered with rather than a failure to accord that right the requisite respect.

*The consequences of curtailing night flights*

The majority has concluded that “mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others”. I agree. In the present case, however, it is surely misconceived to characterise the case made on behalf of the United Kingdom as a “mere reference” to the economic well being of the country. As the judgment has acknowledged, (paragraph 90) the United Kingdom Government had available to them detailed information regarding the economic importance of night flights at Heathrow. The applicants have challenged the accuracy and validity of that information. In particular, they claim that the Oxford Economic Forecasting report did not consider separately the economic importance of night flights. I am not persuaded, however, that it is possible to segregate the night flights factor in the way suggested by the applicants and I do not consider that it has been shown that the economic effects of curtailing night flights will be other than substantial.

The importance to the national economy of the aircraft industry as a whole, and of Heathrow airport in particular, is self-evident. As to the specific role of night flights at Heathrow, some 3% of air movements take place between 23.30 and 6.30; flights between 6.00 and 6.30 are almost exclusively long haul arrivals. British Airways have informed the Court that this sector of the market is particularly important for them for a number of reasons – customer preference, the need to use aircraft as intensively as possible and the lack of runway and terminal capacity at other times – and there is every reason why the same should apply to other airlines. It is, in my view, beyond plausible dispute that night flights form part of that national economic interest. The preponderance of the evidence available to the Court strongly favours the conclusion that there will be considerable adverse effect to the economy if night flights are curtailed.

*Striking the balance*

In reaching the conclusion that the economic well-being of the country did not outweigh the rights of the applicants, the majority referred to the Lopez Ostra case in which the Court found State responsibility for nuisances created by a waste-treatment plant. It has been pointed out that, notwithstanding the undoubted economic interest for the national economy of the tanneries concerned in Lopez Ostra, the Court looked in considerable detail at “whether the national authorities took the measures necessary for protecting the applicant’s right to respect for her home and for her private and family life...” I would again respectfully agree that this is an entirely appropriate approach. But the fact that the interest for the national economy

of the enterprise concerned did not outweigh the State's obligation to have respect for the applicant's rights under Article 8 in the Lopez Ostra case, does not diminish the potential importance of that factor in other cases in considering whether, if there has been interference with the right to respect for private life and home, that interference may be said to be unjustified. Each case must be considered on its individual merits. In some cases, the economic argument may be pivotal where the interference is not substantial; in others it may be weak, particularly where the interference is considerable. The case of Lopez Ostra does not purport to lay down a general principle that the interest for the national economy is a factor which is to be disregarded or that it must always yield to the need to protect the right to respect for private and home life, especially if the interference with those rights is peripheral or illusory.

Moreover, I would point to a number of significant differences between that case and the present. In Lopez Ostra, the domestic courts accepted that it had been established that the operation of the waste treatment plant created nuisances that "impaired the quality of life of those living in the plant's vicinity" (p. 54, § 50). In the present case, the applicants were not parties in the only court proceedings in the domestic courts. No domestic court has evaluated the actual impact on their lives of the night flights complained of, therefore. Moreover, such proceedings as have been undertaken have concerned procedural aspects of the policy-making process rather than the assessment of any actual nuisance.

By contrast, the waste-treatment plant at issue in Lopez Ostra had started to operate recently (it was built in 1988), was patently illegal in that it was operating without the necessary licences (p. 43, § 8), and the authorities (in re-housing residents, p. 53, § 53) and the courts (p. 44, § 11) accepted that the operation caused actual nuisance. In the present case, Heathrow had been a major international airport long before any of the applicants took up residence at the addresses where they lived when the application was introduced, none of the night flights has been established to be illegal, and the authorities have never taken any measures specific to the applicants.

The majority decision does not address these issues. Rather, it relies on what appears to be a wholly new test for the application of Article 8 in proclaiming that States are required "to minimise, as far as possible, the interference with [Article 8] rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights" (paragraph 97). I am not aware of any other Convention case in which such a test has been applied. Indeed, it is difficult to see how it can be reconciled with the principle that States should have a margin of appreciation in devising measures to strike the proper balance between respect for Article 8 rights and the interests of the community as a whole. This margin of appreciation was expressly acknowledged in the Lopez Ostra case (p. 54, § 51; p. 56, § 58). The test enunciated by the

majority denies to States any discretion as to how they wish to address socio-economic issues, and instead requires that all policy decisions be dictated by a strict “minimum interference with fundamental rights” rule. Such a rule can form part of domestic law, and is not out of place in the case-law of the European Court of Justice, which is itself an essential part of domestic law for the member States of the European Union. It appears to me to be in conflict with the essential subsidiarity of the Convention system<sup>1</sup>, however, and cannot therefore be appropriate to the present case.

Looking at the balance that has to be struck between competing interests (the cases are cited at paragraph 96 of the judgment), one evidently must bear in mind all the factors in a case. The Chamber sets against an increase in permitted levels of night noise from 1993 the following factors: an absence of scientific and/or independent information on the economic interest in night flights (paragraphs 100-102); a limited amount of research as to sleep disturbance and prevention (paragraph 103), and specific action taken to mitigate night noise (paragraph 105). Requiring, as the Chamber in effect does, specific research into the extent of the obvious seems to me to be placing a very substantial, and retroactive, burden on the Government.

A further point to be considered in striking the balance between the various interests is that the applicants are challenging not a specific decision which affected them, but a macro-economic policy. It is open to the Court to consider the effect of general policies or laws on individuals, but it must be aware that to make an assessment of a general policy on the basis of a specific case is an exercise that is fraught with difficulty.

Article 8 § 2 includes in the list of justifications for an interference with Article 8 § 1 rights “the rights of others”. In a case involving night flights, the rights and freedoms of air carriers and of passengers must be brought into the equation. It is difficult to envisage how the Government may do so in any meaningful way if they are obliged “to minimise, as far as possible, the interference with [Article 8] rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights”.

In performing the balancing exercise under Article 8 in this case, one should also consider the consequences of a finding that there has been a violation. The mere fact that a finding of a violation in a particular case might give rise to a large number of applications is not a reason to shirk from that finding. If Convention standards are not met in an individual case, it is the role of the Court to say so, regardless of how many others are in the same position. But when, as here, a substantial proportion of the population of south London is in a similar position to the applicants, the Court must

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<sup>1</sup> See, for example, the *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24, ¶ 48 and *Z. and Others v. the United Kingdom* [GC], no. 29392/95, ¶ 103, ECHR 2001.

consider whether the proper place for a discussion of the particular policy is in Strasbourg, or whether the issue should not be left to the domestic political sphere.

It will be apparent from the above that I consider that there are so many factors weighing against the applicants, and so few in their favour, that I cannot subscribe to a conclusion that the balance required by Article 8 was not struck in this case.

### **Article 13**

I have concluded that there was no violation under Article 8. As the majority have pointed out, Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law only in respect of grievances that can be regarded as “arguable” in terms of the Convention. I take the view that the Article 8 claims must so clearly be decided in the Government’s favour, that they cannot be considered to be “arguable”. Therefore, I must also conclude that there has not been a violation of Article 13.

Had I concluded that the Article 8 claim was arguable, I would still have had doubts as to whether there was a violation of Article 13. The English courts recognise that the intensity of review in a public law case will depend on the subject matter (*R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 WLR 840, at page 847, approved by Lord Steyn in *R v. Secretary of State of the Home Department, ex parte Daly* [2001] 3 All ER 433 at page 477). While this Chamber in its *Smith and Grady* judgment found that judicial review did not satisfy the requirements of Article 13, that case involved matters of an intensely personal nature for the applicants which put it clearly within the scope of Article 8, and the national security considerations reduced the scope of the review. The present case is different in that the interference with the applicants’ right to respect for their Article 8 rights is, as I have outlined above, difficult to define. In these circumstances, I consider that the possibility of a judicial review of the Minister’s policy by way of a challenge to the reasonableness, lawfulness and arbitrariness of the policy is precisely the sort of remedy Article 13 envisages in cases involving not a specific decision, or a decision directly affecting an individual, but a challenge to a general policy on night flights.