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

CASE OF HATTON AND OTHERS v. THE UNITED KINGDOM

(Application no. 36022/97)

GRAND CHAMBER

JUDGMENT

STRASBOURG

8 July 2003

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

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr J.-P. COSTA,
Mr G. RESS,
Mr G. BONELLO,
Mrs E. PALM,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mrs V. STRÁŽNICKÁ,
Mr V. BUTKEVYCH,
Mr B. ZUPANČIČ,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs E. STEINER,
Mr S. PAVLOVSCHI,
Sir Brian KERR, ad hoc *judge*,

and also of Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 13 November 2002 and 21 May 2003,

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 of Great Britain and Northern Ireland 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, Ms Ruth Hatton, Mr Peter Thake, Mr John Hartley, Ms Philippa Edmunds, Mr John Cavalla, Mr Jeffray Thomas, Mr Richard Bird and Mr Tony Anderson ("the applicants"). The applicants are all members of the Heathrow Association for the Control of Aircraft Noise (HACAN, now HACAN-ClearSkies), which itself is a member of the Heathrow Airport Consultative Committee**.**

2. The applicants were represented by Mr R. Buxton, a lawyer practising in Cambridge. The United Kingdom Government ("the Government") were represented by their Agent, Mr H. Llewellyn, of the Foreign and Commonwealth Office.

3. The applicants alleged that government policy on night flights at Heathrow Airport gave rise to a violation of their rights under Article 8 of the Convention and that they were denied an effective domestic remedy for this complaint, contrary to Article 13 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 16 May 2000, following a hearing on admissibility and the merits (Rule 54 § 4, former version), it was declared admissible by a Chamber of that Section, composed of Mr J. P. Costa, President, Mr L. Loucaides, Mr P. Kūris, Mrs F. Tulkens, Mr K. Jungwiert, Mrs H.S. Greve, judges, Sir Brian Kerr, *ad hoc* judge, and Mrs S. Dollé, Section Registrar.

6. On 2 October 2001 the Chamber delivered its judgment in which it held, by five votes to two, that there had been a violation of Article 8 of the Convention and, by six votes to one, that there had been a violation of Article 13. The Chamber also decided, by six votes to one, to award compensation for non-pecuniary damage of 4,000 pounds sterling (GBP) to each applicant, and a global sum of GBP 70,000 in respect of legal costs and expenses. The separate opinions of Mr Costa, Mrs Greve and Sir Brian Kerr were annexed to the judgment.

7. On 19 December 2001 the Government requested, in accordance with Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber. A panel of the Grand Chamber accepted this request on 27 March 2002.

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. Mr C.L. Rozakis and Mr P. Lorenzen, who were unable to take part in the final deliberations, were replaced by Mrs E. Steiner and Mr I. Cabral Barreto (Rule 24 § 3).

9. The applicants and the Government each filed written observations on the merits. In addition, third-party comments were received from Friends of the Earth and from British Airways (Article 36 § 2 of the Convention and Rule 61 § 3 of the Rules of Court).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 13 November 2002 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr H. LLEWELLYN, Foreign and Commonwealth Office, *Agent*,
Lord GOLDSMITH QC, Attorney General,
Mr P. HAVERS QC,
Mr J. EADIE, *Counsel*,
Mr G. GALLIFORD,
Mr P. REARDON,
Mr G. PENDLEBURY,
Ms M. CROKER, *Advisers*;

(b) *for the applicants*
Mr D. ANDERSON QC,
Ms H. MOUNTFIELD, *Counsel*,
Mr R. BUXTON,
Ms S. RING, *Solicitors*,
Mr C. STANBURY,
Mr M. SHENFIELD, *Advisers*.

The Court heard addresses by Mr Anderson and Lord Goldsmith.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The degree of disturbance caused to each applicant by night flights

11. Ruth Hatton was born in 1963. Between 1991 and 1997 she lived in East Sheen with her husband and two children. According to information supplied by the Government, her house was 11.7 km from the end of the nearest runway at Heathrow and fell within a daytime noise contour where the level of disturbance from aircraft noise was between 57 and 60 dBa Leq. According to the Government, dBA Leq measure the average degree of community annoyance from aircraft noise over a sixteen-hour daytime period and studies have shown that in areas where the daytime noise exposure is below 57 dBA Leq there is no significant community annoyance. The Government state that a daytime noise contour of 57 dBA Leq represents a low level of annoyance; 63 dBA Leq represent a

moderate level of annoyance; 69 dBA Leq correspond to a high level of annoyance; and 72 dBA Leq represent a very high level of annoyance.

12. According to Ms Hatton, in 1993 the level of night noise increased and she began to find noise levels to be "intolerable" at night. She believed that the noise was greater when aircraft were landing at Heathrow from the east. When this happened, Ms 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 Ms 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, Ms 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 Ms Hatton's children slept much better, generally not waking up until after 6.30 a.m. In the winter of 1993/1994, Ms Hatton became so run down and depressed by her broken sleep pattern that her doctor prescribed anti-depressants. In October 1997, she moved with her family to Kingston-upon-Thames in order to get away from the aircraft noise at night.

13. Peter Thake was born in 1965. From 1990 until 1998, he lived in Hounslow with his partner. His home in Hounslow was situated 4.4 km from Heathrow Airport and slightly to the north of the southern flight path, within a daytime noise contour of between 63 and 66 dBA Leq, according to the Government.

14. Mr Thake claims that in about 1993 the level of disturbance at night from aircraft noise increased notably and he 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, and he found it hard 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 nineteen occasions. He remained in Hounslow until February 1998 because his family, friends and place of work were in the Heathrow area, but moved to Winchester, in 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".

15. John Hartley was born in 1948 and has lived with his wife at his present address in Richmond since 1989. According to the information provided by the Government, Mr Hartley's house is 9.4 km from the end of the nearest Heathrow runway and, situated almost directly under the southern approach to the airport, within a daytime noise contour area of between 60 and 63 dBA Leq. The windows of the house are double-glazed.

16. From 1993, Mr Hartley claims to have 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). He states that 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 then. He would 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.

17. 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. According to information supplied by the Government, Ms Edmund's house is 8.5 km from the end of the nearest Heathrow runway and approximately 1 km from the flight path, within a daytime noise contour area of under 57 dBA Leq.

18. The applicant claims that before 1993 she 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. She 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.

19. John Cavalla was born in 1925. From 1970 to 1996 he lived with his wife in Isleworth, directly under the flight path of the northern runway at Heathrow Airport. According to information supplied by the Government, the applicant's house was 6.3 km from the end of the nearest Heathrow runway, within a daytime noise contour of between 63 and 66 dBA Leq.

20. The applicant claims that in the early 1990s the noise climate deteriorated markedly, partly because of a significant increase in traffic, but mainly as a result of aircraft noise in the early morning. Mr Cavalla

considers that air traffic increased dramatically between 6 a.m. and 7 a.m. as a result of the shortening of the night quota period. He found that, once woken by an aircraft arriving at Heathrow Airport in the early morning, he was unable to go back to sleep.

21. In 1996, Mr Cavalla and his wife moved to Sunbury in order to get away from the aircraft noise. According to the Government, the new house is 9.5 km from Heathrow, within a daytime noise contour area of under 57 dBA Leq. 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, he was only very rarely exposed to any night-time aircraft noise following his move.

22. 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. The family have lived at their present address since 1975, in a house lying between the north and south Heathrow flight paths. According to the Government, it is 10.7 km from Heathrow, within a noise contour area of 57 to 60 dBA Leq. Aircraft pass overhead on seven or eight days out of every ten when the prevailing wind is from the west.

23. Mr Thomas claims to have noticed a sudden increase in night disturbance in 1993. He complains of being woken 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 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.

24. Richard Bird was born in 1933 and lived in Windsor for thirty years until he retired in December 1998. His house in Windsor was directly under the westerly flight path to Heathrow Airport. According to the Government, it was 11.5 km from Heathrow, within a daytime noise contour area of 57 to 60 dBA Leq.

25. The applicant claims that 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. or 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 moved with his wife to Wokingham, in Surrey, specifically to get away from the aircraft noise which was “really getting on [his] nerves”.

26. Tony Anderson was born in 1932 and has lived since 1963 in Touchen End, under the approach to runway 09L at Heathrow Airport and, according to the Government, 17.3 km from the end of the nearest runway, within a daytime noise contour area of under 57 dBA Leq.

According to the applicant, by 1994 he 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.

27. The dBA Leq noise contour figures supplied by the Government and referred to above measure levels of annoyance caused by noise during the course of an average summer day. The Government state that it is not possible to map equivalent contours for night noise disturbance, because there is no widely accepted scale or standard with which to measure night-time annoyance caused by aircraft noise. However, the Government claim that the maximum "average sound exposure" levels, in decibels (dBA), suffered by each applicant as a result of the seven different types of aircraft arriving at Heathrow before 6 a.m. each morning is as follows: Ms Hatton – 88 dBA; Mr Thake – 88.8 dBA; Mr Hartley – 89.9 dBA; Ms Edmunds – 83.4 dBA; Mr Cavalla (at his previous address) – 94.4 dBA; Mr Thomas – 88.7 dBA; Mr Bird – 87.8 dBA; and Mr Anderson – 84.1 dBA.

The Government further claim that the average "peak noise event" levels, that is the maximum noise caused by a single aircraft movement, suffered by each applicant at night are as follows: Mrs Hatton – 76.3 dBA; Mr Thake – 77.1 dBA; Mr Hartley – 78.9 dBA; Ms Edmunds – 70 dBA; Mr Cavalla (at his previous address) – 85 dBA; Mr Thomas – 77.2 dBA; Mr Bird – 76 dBA; Mr Anderson – 71.1 dBA.

The Government claim that research commissioned before the 1993 review of night restrictions indicated that average outdoor sound exposure levels of below 90 dBA, equivalent to peak noise event levels of approximately 80 dBA, were unlikely to cause any measurable increase in overall rates of sleep disturbance experienced during normal sleep. The applicants, however, refer to World Health Organisation "Guidelines for Community Noise", which gave a guideline value for avoiding sleep disturbance at night of a single noise event of 60 dBA[1].

B. The night-time regulatory regime for Heathrow Airport

28. 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

[1] . The Government note that these guidelines were promulgated in 1999, and that they represent a target at which sleep will not be disturbed, rather than an international standard.

180 destinations world-wide. It is the United Kingdom's leading port in terms of visible trade.

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

30. 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.

31. 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 levels of dBA Leq were not increased.

32. It indicated that there were two reasons for not considering a ban on night flights: firstly, 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 twenty-four-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.

33. From 1988 to 1993, night flying was regulated solely by means of a limitation on 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.

34. 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. The objectives of the review included "to continue to protect local communities from excessive aircraft noise at night" and "to ensure that the competitive influences affecting UK airports and airlines and the wider employment and economic implications are taken into account".

35. 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 eighteen nightly awakenings without any aircraft noise, even large numbers of noisy night-time aircraft 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.

36. 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. The Consultation Paper set up four objectives of the review being undertaken (so far as Heathrow was concerned): to revise and update the existing arrangements; to introduce a common night flights regime for the three airports; to continue to protect local communities from excessive aircraft noise levels at night; and to ensure that competitive influences and the wider employment and economic implications were taken into account. In a section entitled "Concerns of local people", the Consultation Paper referred to arguments that night flights should be further restricted or banned altogether. In the authors' view, the proposals struck a fair balance between the different interests and did "protect local people from excessive aircraft noise at night". 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 those that competitors abroad could offer, and that passengers would choose alternatives that better suited their requirements.

37. 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.

38. Further, the Consultation Paper stated that both regular 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 on high utilisation of their aircraft, which typically required three rotations a day to nearer destinations, and this could only be fitted in by using movements at night.

39. Finally, as regards 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 pointed to the fact that all-cargo movements were banned, whether arriving or departing, for much of the day at Heathrow Airport.

40. The Consultation Paper referred to the 1992 sleep study, noting that it had 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.

41. 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 reduce it, it was proposed that the quota for the next five years based on the new system should be set at a level such as to keep overall noise levels below those in 1988.

42. 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.

43. 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").

44. 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). Each 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.

45. 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 (aircraft with a quota count of 8 QC or 16 QC) or to

land (aircraft with a quota count of 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).

46. 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.

47. 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 80-83 below). As a result 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 (DETR) formerly the Department of Transport) 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.

48. 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 midnight and 5.30 a.m.

49. 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 confirmed the lawfulness of the 1993 Scheme, as it had been amended (see paragraphs 82-83 below).

50. 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 changed from Greenwich Mean Time (GMT) to British Summer Time (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.

51. In September 1995, a trial was initiated at Heathrow Airport of modified procedures for early morning landings (those between 4 a.m. and 6 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.

52. 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 the same month. 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".

53. 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.

54. 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.

55. 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.

56. 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 pounds sterling (GBP). BATA submitted the report to the government when it responded to the Preliminary Consultation Paper.

57. 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.

58. 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.

59. 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.

60. 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 were 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; and 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 update the arrangements as appropriate.

61. 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.

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

63. The Consultation Paper indicated that the government had not attempted to quantify the aviation and economic benefits of night flights in financial terms. This was because of the difficulties in obtaining reliable and impartial data on passenger and economic benefits (some of which were 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 GBP 20 million to GBP 30 million 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.

64. The Consultation Paper stated that, in formulating its 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 financial terms, but it was possible, drawing on the 1992 sleep study, to estimate the number 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.

65. 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 re-classifications, 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 (that is, after completion of the compulsory Chapter 2 phase-out).

66. 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.

67. 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.

68. 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.

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

70. 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.

71. 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.

72. 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.

73. In March 2000, the Department of Operational Research and Analysis (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.

74. 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.

75. 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 in the vicinity of Heathrow Airport and local residents' associations are represented.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Civil Aviation Act 1982 ("the 1982 Act")

76. Section 76(1) of the 1982 Act provides, in its relevant part:

> "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 ..."

77. 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.

78. Section 78(3) of the 1982 Act provides, in its relevant part:

> "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;
>
> ..."

79. 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

80. 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 (see *R. v. Secretary of State for Transport, ex parte Richmond upon Thames Borough Council and Others* [1994] 1 Weekly Law Reports 74).

81. 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 (see *R. v. Secretary of State for Transport, ex parte Richmond upon Thames Borough Council and Others* [1995] Environmental Law Reports 390).

82. 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 (see *R. v. Secretary of State for Transport, ex parte Richmond LBC* [1996] 1 Weekly Law Reports 1460).

83. 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

84. The applicants complained that the government policy on night flights at Heathrow introduced in 1993 violated their rights under Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government denied that there had been any violation of the Convention in this case.

A. The general principles

1. The Chamber's judgment

85. In its judgment of 2 October 2001, the Chamber held that because Heathrow Airport and the aircraft which used it were not owned, controlled or operated by the government or its agents, the United Kingdom could not be said to have "interfered" with the applicants' private or family lives. Instead, the Chamber analysed the applicants' complaints in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under Article 8 § 1 (see paragraph 95 of the Chamber's judgment).

86. The Chamber further held that, whatever analytical approach was adopted, regard must be had to the fair balance that had to be struck between the competing interests of the individual and the community as a whole. In both contexts, the State enjoyed a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see paragraph 96 of the Chamber's judgment). However, the Chamber underlined 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 was not sufficient to outweigh the

rights of others. The Chamber considered that States were required to minimise, as far as possible, 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 order to do that, a proper and complete investigation and study, with the aim of finding the best possible solution which would, in reality, strike the right balance, should precede the relevant project (see paragraph 97 of the Chamber's judgment).

2. The parties' submissions

(a) The Government

87. In their letter requesting that the case be referred to the Grand Chamber, and in their written and oral observations to the Grand Chamber, the Government strongly objected to the "minimum interference" approach outlined by the Chamber in paragraph 97 of its judgment.

The Government argued that this test in the context of the present type of case was at odds with a consistent line of Convention jurisprudence and was unwarranted in principle. They submitted that the test reduced to vanishing-point the margin of appreciation afforded to States in an area involving difficult and complex balancing of a variety of competing interests and factors.

88. Not merely was there clear authority in favour of a wide margin, it was appropriate and right in principle that the State should be allowed such a margin in a context such as the present, since it involved the balancing of a number of competing rights and interests, the importance and sensitivity of some of which might be difficult accurately to evaluate. There was no single correct policy to be applied as regards the regulation of night flights; States could and did adopt a variety of different approaches. The Government reasoned that the present context was similar to the field of planning policy, where the Court had consistently recognised that by reason of their direct and continuous contact with the vital forces of their countries and because of the range of discretionary issues involved, the national authorities were in principle better placed than an international court to evaluate local conditions and needs.

89. They accepted that inherent in the striking of a fair balance was a need to be sufficiently informed in relation to the relevant issues, in order to avoid making or appearing to make an arbitrary decision. However, the decision-making process was primarily for the national authorities, in this case, the government, subject to judicial review by the domestic courts. The European Court's powers in this context were supervisory: in the absence of any indication of an arbitrary or clearly inadequate investigation, a detailed and minute critique of the information which the government should take into account was neither necessary nor appropriate.

(b) The applicants

90. The applicants argued that it was well established from previous case-law that aircraft noise was capable of infringing the Article 8 rights of those sufficiently affected by it and that national authorities owed a positive duty to take steps to ensure the effective protection of these rights. Relying on earlier environmental cases and also child-care and other cases under Article 8, they submitted that the duty could be breached in circumstances where, having regard to the margin of appreciation, the Court considered that the State had struck the wrong substantive balance between the interest it pursued and the individual's effective enjoyment of the Article 8 right, or where there had been a procedural failing, such as the failure to disclose information to an individual affected by environmental nuisance or a failure to base a decision-making process on the relevant considerations or to give relevant and sufficient reasons for an interference with a fundamental right.

91. The applicants accepted that any informed assessment of whether an interference with Article 8 rights was "necessary in a democratic society" would be accorded a margin of appreciation, the width of that margin depending on the context. However, they submitted that in the present case the margin should be narrow, because deprivation of sleep by exposure to excessive noise, like the infliction of inhuman or degrading treatment, was a matter which could and should be judged by similar standards in similar Contracting States.

92. Moreover, where a case – such as the present – could be decided on the basis of a procedural breach, namely the government's failure properly to assemble the evidence necessary for the decision-making process, the doctrine of the margin of appreciation had no role to play, since the international judge was well placed to assess the adequacy of the procedural safeguards applied by the State.

93. For the applicants, the approach of the Chamber – that the violation of Article 8 was based on the government's failure to assemble the evidence that would have been necessary for the decision to be made on the basis of the relevant considerations – was but one way of dealing with the case. A violation of Article 8 could also be established on the basis that the necessary steps to ensure protection of Article 8 rights were not taken, that "relevant and sufficient reasons" had not been given for the interference, or that the substantive balance of interests had not been properly struck.

3. The third parties

94. Friends of the Earth submitted that the Chamber's judgment in the present case was consistent with developments in national and international law concerning the relationship between human rights and the environment. In particular, it was consistent with requirements under general international law requiring decision-makers to satisfy themselves by means of proper,

complete, and prior investigation as to the factors which should be taken into account in order to achieve an appropriate balance between individual rights and the State's economic interests.

95. British Airways did not comment on the general principles to be applied by the Court.

4. The Court's assessment

96. Article 8 protects the individual's right to respect for his or her private and family life, home and correspondence. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8. Thus, in *Powell and Rayner v. the United Kingdom* (judgment of 21 February 1990, Series A no. 172, p. 18, § 40), where the applicants had complained about disturbance from daytime aircraft noise, the Court held that Article 8 was relevant, since "the quality of [each] applicant's private life and the scope for enjoying the amenities of his home [had] been adversely affected by the noise generated by aircraft using Heathrow Airport". Similarly, in *López Ostra v. Spain* (judgment of 9 December 1994, Series A no. 303-C, pp. 54-55, § 51) the Court held that Article 8 could include a right to protection from severe environmental pollution, since such a problem might "affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health". In *Guerra and Others v. Italy* (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I), which, like *López Ostra,* concerned environmental pollution, the Court observed that "[the] direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable" (p. 227, § 57).

97. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, for example, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 22, § 48). In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that the margin of appreciation "available to the legislature in implementing social and economic policies should be a wide one").

98. Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate

measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. 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; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance (see *Powell and Rayner*, p. 18, § 41, and *López Ostra* pp. 54-55, § 51, both cited above).

99. The Court considers that in a case such as the present one, involving State decisions affecting environmental issues, there are two aspects to the inquiry which may be carried out by the Court. First, the Court may assess the substantive merits of the government's decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual.

100. In relation to the substantive aspect, the Court has held that the State must be allowed a wide margin of appreciation. In *Powell and Rayner*, for example, it asserted that it was "certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere", namely the regulation of excessive aircraft noise and the means of redress to be provided to the individual within the domestic legal system. The Court continued that "this is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation" (p. 19, § 44).

101. In other cases involving environmental issues, for example planning cases, the Court has also held that the State must be allowed a wide margin of appreciation. The Court explained the reasons for this approach in *Buckley v. the United Kingdom*, where the applicant complained that she had been denied planning permission to install a residential caravan on land that she owned (judgment of 25 September 1996, *Reports* 1996-IV, pp. 1291-93, §§ 74-77):

> "74. 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 ... 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 ... Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned.
>
> 75. 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 ... 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 ... 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.
>
> 76. The Court cannot ignore, however, that in the instant case the interests of the community are to be balanced against the applicant's right to respect for her 'home', a right which is pertinent to her and her children's personal security and well-being ... The importance of that right for the applicant and her family must also be taken into account in determining the scope of the margin of appreciation allowed to the respondent State.
>
> Whenever discretion capable of interfering with the enjoyment of a Convention right such as the one in issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled case-law that, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 ...
>
> 77. The Court's task is to determine, on the basis of the above principles, whether the reasons relied on to justify the interference in question are relevant and sufficient under Article 8 § 2."

102. The Court has recognised that, where government policy in the form of criminal laws interferes with a particularly intimate aspect of an individual's private life, the margin of appreciation left to the State will be reduced in scope (see *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 21, § 52).

103. The Court is thus faced with conflicting views as to the margin of appreciation to be applied: on the one hand, the Government claim a wide margin on the ground that the case concerns matters of general policy, and, on the other hand, the applicants' claim that where the ability to sleep is affected, the margin is narrow because of the "intimate" nature of the right protected. This conflict of views on the margin of appreciation can be resolved only by reference to the context of a particular case.

104. In connection with the procedural element of the Court's review of cases involving environmental issues, the Court is required to consider all the procedural aspects, including the type of policy or decision involved, the

extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available.

B. Appraisal of the facts of the case in the light of the general principles

1. The Chamber's judgment

105. The Chamber found that, overall, the level of noise during the hours 11.30 p.m. to 6 a.m. had increased under the 1993 Scheme. It considered that, in permitting increased levels of noise from 1993 onwards, the government had failed to respect their positive obligation to the applicants, through omitting, either directly or through the commissioning of independent research, to assess critically the importance of the contribution of night flights to the United Kingdom economy. The Chamber further criticised the government for carrying out only limited research into the effects of night flights on local residents prior to the introduction of the 1993 Scheme, noting that the 1992 sleep study was limited to sleep disturbance and made no mention of the problem of sleep prevention. The Chamber did not accept that the "modest" steps taken to mitigate night noise under the 1993 Scheme were capable of constituting "the measures necessary" to protect the applicants. It concluded that "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".

2. The parties' submissions

(a) The Government

106. The Government recognised that night-time noise from aircraft had the capacity to disturb or prevent sleep, but urged the Court to assess critically the applicants' claims that each suffered from a high level of disturbance. In this connection they pointed out that there was a considerable variety in the geographical positions of the applicants and in the levels of night noise to which they were exposed. Furthermore, it was noteworthy that hundreds of thousands of residents of London and the home counties were in a similar position, that the property market in the affected

areas was thriving and that the applicants had not claimed that they were unable to sell their houses and move.

107. The Government stressed that all other principal European hub airports had less severe restrictions on night flights than those imposed at the three London airports. Paris-Charles de Gaulle and Amsterdam-Schiphol had no restrictions at all on the total number of "Chapter 3" aircraft which could operate at night, while Frankfurt had restrictions on landings by Chapter 3 aircraft between 1 a.m. and 4 a.m. If restrictions on night flights at Heathrow were made more stringent, UK airlines would be placed at a significant competitive disadvantage. Since 1988 they had used the scarce night slots permitted at Heathrow for two purposes: a small number were late evening departures on flights which had been delayed but the majority, typically thirteen to sixteen flights a night, were early morning arrivals between 4 a.m. and 6 a.m. of long-haul scheduled flights, mainly from South-East Asia, North America and southern Africa. In recent years the airlines concerned had taken steps to ensure that these arrivals did not land before 4.30 a.m.

The Government submitted that these flights formed an integral part of the network of connecting air services. If they were forced to operate during the day they could provide fewer viable connections with regional services at both ends, making London a less attractive place in which to do business. In any event, daytime capacity at all of London's airports was close to full, and it would be impracticable to re-schedule flights out of the night period.

108. The Government asserted that before 1993 detailed reviews were conducted into a number of aspects of the night restrictions regime. Thus, in July 1990 the Department of Transport commenced an internal review into the restrictions then applying and, in January, October and November 1993, and also in March and June 1995, published Consultation Papers to seek the views of the public and the industries concerned on the need for and effects of night flights and on various proposed modifications to the regime.

The respondents from the airline industry stressed the economic importance of night flights, as set out above. They provided information showing that, in 1993, a typical daily night flight would generate an annual revenue of between GBP 70 and 175 million and an annual profit of up to GBP 15 million. The loss of this revenue and profit would impact severely on the ability of airlines to operate and the cost of air travel by day and night. The Government submitted that the basic components of the economic justification for night flights have never been substantially challenged, either by other respondents to the Consultation Papers or since. Despite accepting the force of the economic justification, the authorities did not go as far as they were invited to by the industry; for example, they did not grant the repeated requests for much larger night noise quotas or a night quota period ending at 5 a.m. Instead, they struck a genuine balance between the interests of the industry and of local residents.

109. The Government stressed that they had also had available, in December 1992, the results of research commissioned in July 1990 into aircraft noise disturbance amongst people living near to Gatwick, Heathrow, Stansted and Manchester Airports ("the 1992 sleep study" – see paragraph 35 above). This study was, and remained, the most comprehensive of its type, and had been preceded by a number of other reports into aircraft noise and sleep disturbance, including detailed interviews with some 1,636 people living near the airports ("the social survey"). The purpose of all this research, culminating in the 1992 sleep study, was to provide information, on as reliable a scientific basis as possible, as to the effects of night-time aircraft noise on sleep. The sleep study showed that external noise levels below 80 dBA were very unlikely to cause any increase in the normal rate of disturbance of someone's sleep; that with external noise levels between 80 and 95 dBA the likelihood of an average person being awakened was about 1 in 75; and that the number of disturbances caused by aircraft noise was so small that it had a negligible effect on overall disturbance rates, although it was possible that the 2 to 3% of the population who were more sensitive to noise disturbance were twice as likely to be woken. According to the social survey, approximately 80% of those living in the Heathrow area had said that they were never or only sometimes woken up for any cause. Of those that were woken, 17% gave aircraft noise as the cause, 16% blamed a partner or a child and another 28.5% gave a variety of different reasons. Approximately 35% of those living near Heathrow said that if woken, for any reason, they found it difficult to get back to sleep.

110. The Government submitted that the changes to the hours of restriction, the extension of the quota restrictions to place limits on many previously exempt types of aircraft and the restrictions on the scheduling for landing or taking off of the noisiest categories of aircraft over a longer night period made an exact comparison between the regimes before and after 1993 impossible.

They recognised that there had been an increase in the number of movements between 6 a.m. and 6.30 a.m. in winter, since this time slot had been subject to restriction before 1993 and now fell outside the quota period. However, the Government contended that, during the core quota period of 11.30 p.m. to 6 a.m., there had been an improvement in the noise environment because of the measures taken, notably the introduction of the quota count system, to encourage the use of quieter aircraft at night.

(b) The applicants

111. The applicants, who accepted the Chamber's judgment as one way of applying the Convention to the facts of the case, underlined that only a very small percentage of flights take place between 11.30 p.m. and 6 a.m., and that there are hardly any flights before 4 a.m. at all, with an average of

four aircraft landing between 4 a.m. and 4.59 a.m. in 2000, and eleven between 5 a.m. and 5.59 a.m.. They maintained that the disturbance caused by these flights was extensive because the applicants and large numbers of others were affected, and it is the nature of sleep disturbance that once people are awake even a few flights will keep them awake.

112. The applicants also pointed out that the night noise they are subjected to is frequently in excess of international standards: the World Health Organisation sets as a guideline value for avoiding sleep disturbance at night a single noise event level of 60 dBA Lmax; almost all the applicants have suffered night noise events in excess of 80 dBA Lmax, and in one case as high as 90 dBA Lmax. Because of the logarithmic nature of the decibel scale, noise energy at 80 dBA Lmax is one hundred times the noise energy at 60 dBA Lmax, and in terms of subjective loudness is four times as loud.

113. The applicants contended that the 1993 Scheme was bound to, and did, result in an increase in night flights and deterioration in the night noise climate, regardless of whether the position was measured by reference to the official night period from 11 p.m. to 7 a.m. or the night quota period from 11.30 a.m. to 6 a.m..

114. The applicants pointed to the absence of any research into sleep prevention before the 1993 Scheme, and added that post-1993 studies and proposals did not amount to an assessment of the effect of night noise on sleep prevention. They further noted the absence of any government-commissioned research into the economic benefits claimed for night flights, seeing this omission as particularly serious given that many of the world's leading business centres (for example, Berlin, Zürich, Munich, Hamburg and Tokyo) have full night-time passenger curfews of between seven and eight hours.

3. The third parties

115. British Airways, whose submissions were supported by the British Air Transport Association (BATA) and the International Air Transport Association (IATA), submitted that night flights at Heathrow play a vital role in the United Kingdom's transport infrastructure, and contribute significantly to the productivity of the United Kingdom economy and the living standards of United Kingdom citizens. They contended that a ban on, or reduction in, night flights would cause major and disproportionate damage to British Airways' business, and would reduce consumer choice. The loss of night flights would cause significant damage to the United Kingdom economy.

4. The Court's assessment

116. The case concerns the way in which the applicants were affected by the implementation in 1993 of the new scheme for regulating night flights at

Heathrow. The 1993 Scheme was latest in the series of restrictions on night flights which began at Heathrow in 1962 and replaced the previous five-year 1988 Scheme. Its aims included, according to the 1993 Consultation Paper (see paragraph 36 above), both protection of local communities from excessive night noise, and taking account of the wider economic implications. The undertaking given by the government in 1988 "not to allow a worsening of noise at night, and ideally to improve it" was maintained (see paragraphs 41 and 43 above). Specifically, the scheme replaced the earlier system of movement limitations with a regime which gave aircraft operators a choice, through the quota count, as to whether to fly fewer noisier aircraft, or more less noisy types (for details, see paragraphs 44-46 above). Although modified in some respects following various judicial review proceedings (see paragraphs 47-50 and 80-83 above) and as a result of further studies and consultations (see paragraphs 51-69 above), the quota count system introduced in 1993 has remained in place to the present day, the authorities continuing to monitor the situation with a view to possible improvements (see paragraphs 70-75 above).

117. The 1993 Scheme accepted the conclusions of the 1992 sleep study (see paragraph 35 above) that for the large majority of people living near airports there was no risk of substantial sleep disturbance due to aircraft noise and that only a small percentage of individuals (some 2 to 3%) were more sensitive than others. On this basis, disturbances caused by aircraft noise were regarded as negligible in relation to overall normal disturbance rates (see paragraph 40 above). The 1992 sleep study continued to be relied upon by the government in their 1998/99 review of the regulations for night flights, when it was acknowledged that further research was necessary, in particular as regards sleep prevention, and a number of further studies on the subject were commissioned (see paragraphs 58-59 and 73 above).

118. The Court has no doubt that the implementation of the 1993 Scheme was susceptible of adversely affecting the quality of the applicants' private life and the scope for their enjoying the amenities of their respective homes, and thus their rights protected by Article 8 of the Convention. Each of the applicants has described the way in which he or she was affected by the changes brought about by the 1993 Scheme at the relevant time (see paragraphs 11-26 above), and the Court sees no reason to doubt the sincerity of their submissions in this respect. It is true that the applicants have not submitted any evidence in support of the degree of discomfort suffered, in particular they have not disproved the Government's indications as to the "objective" daytime noise contour measured at each applicant's home (ibid.). However, as the Government themselves admit, and as is evident from the 1992 sleep study on which they rely, sensitivity to noise includes a subjective element, a small minority of people being more likely than others to be woken or otherwise disturbed in their sleep by aircraft noise at night. The discomfort caused to the individuals concerned will therefore depend

not only on the geographical location of their respective homes in relation to the various flight paths, but also on their individual disposition to be disturbed by noise. In the present case the degree of disturbance may vary somewhat from one applicant to the other, but the Court cannot follow the Government when they seem to suggest that the applicants were not, or not considerably, affected by the scheme at issue.

119. It is clear that in the present case the noise disturbances complained of were not caused by the State or by State organs, but that they emanated from the activities of private operators. It may be argued that the changes brought about by the 1993 Scheme are to be seen as a direct interference by the State with the Article 8 rights of the persons concerned. On the other hand, the State's responsibility in environmental cases may also arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention. As noted above (see paragraph 98), broadly similar principles apply whether a case is analysed in terms of a positive duty on the State or in terms of an interference by a public authority with Article 8 rights to be justified in accordance with paragraph 2 of this provision. The Court is not therefore required to decide whether the present case falls into the one category or the other. The question is whether, in the implementation of the 1993 policy on night flights at Heathrow Airport, a fair balance was struck between the competing interests of the individuals affected by the night noise and the community as a whole.

120. The Court notes at the outset that in previous cases in which environmental questions gave rise to violations of the Convention, the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic regime. Thus, in *López Ostra*, the waste-treatment plant at issue was illegal in that it operated without the necessary licence, and was eventually closed down (*López Ostra*, cited above, pp. 46-47, §§ 16-22). In *Guerra and Others*, the violation was also founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the State was under a statutory obligation to provide (*Guerra and Others*, cited above, p. 219, §§ 25-27).

This element of domestic irregularity is wholly absent in the present case. The policy on night flights which was set up in 1993 was challenged by the local authorities, and was found, after a certain amount of amendment, to be compatible with domestic law. The applicants do not suggest that the policy (as amended) was in any way unlawful at a domestic level, and indeed they have not exhausted domestic remedies in respect of any such claim. Further, they do not claim that any of the night flights which disturbed their sleep violated the relevant regulations, and again any such claim could have been pursued in the domestic courts under section 76(1) of the Civil Aviation Act 1982.

121. In order to justify the night flight scheme in the form in which it has operated since 1993, the Government refer not only to the economic interests of the operators of airlines and other enterprises as well as their clients, but also, and above all, to the economic interests of the country as a whole. In their submission these considerations make it necessary to impinge, at least to a certain extent, on the Article 8 rights of the persons affected by the scheme. The Court observes that according to the second paragraph of Article 8 restrictions are permitted, *inter alia*, in the interests of the economic well-being of the country and for the protection of the rights and freedoms of others. It is therefore legitimate for the State to have taken the above economic interests into consideration in the shaping of its policy.

122. The Court must consider whether the State can be said to have struck a fair balance between those interests and the conflicting interests of the persons affected by noise disturbances, including the applicants. Environmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights. In this context the Court must revert to the question of the scope of the margin of appreciation available to the State when taking policy decisions of the kind at issue (see paragraph 103 above).

123. The Court notes that the introduction of the 1993 Scheme for night flights was a general measure not specifically addressed to the applicants in this case, although it had obvious consequences for them and other persons in a similar situation. However, the sleep disturbances relied on by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in *Dudgeon* to call for an especially narrow scope for the State's margin of appreciation (see *Dudgeon*, cited above, p. 21, § 52, and paragraph 102 above). Rather, the normal rule applicable to general policy decisions (see paragraph 97 above) would seem to be pertinent here, the more so as this rule can be invoked even in relation to individually addressed measures taken in the framework of a general policy, such as in *Buckley*, cited above (see paragraph 101). Whilst the State is required to give due consideration to the particular interests, the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation. The Court's supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance.

124. In the present case the Court first notes the difficulties in establishing whether the 1993 Scheme actually led to a deterioration of the night noise climate. The applicants contend that it did; the Government disagree. Statements in the 1998 Consultation Paper suggest that, generally,

the noise climate around Heathrow may have improved during the night quota period, but probably deteriorated over the full night period (see paragraph 61 above). The Court is not able to make any firm findings on this point. It notes the dispute between the parties as to whether aircraft movements or quota counts should be employed as the appropriate yardstick for measuring night noise. However, it finds no indication that the authorities' decision to introduce a regime based on the quota count system was as such incompatible with Article 8.

125. Whether in the implementation of that regime the right balance has been struck in substance between the Article 8 rights affected by the regime and other conflicting community interests depends on the relative weight given to each of them. The Court accepts that in this context the authorities were entitled, having regard to the general nature of the measures taken, to rely on statistical data based on average perception of noise disturbance. It notes the conclusion of the 1993 Consultation Paper that due to their small number sleep disturbances caused by aircraft noise could be treated as negligible in comparison to overall normal disturbance rates (see paragraph 40 above). However, this does not mean that the concerns of the people affected were totally disregarded. The very purpose of maintaining a scheme of night flight restrictions was to keep noise disturbance at an acceptable level for the local population living in the area near the airport. Moreover, there was a realisation that in view of changing conditions (increase of air transport, technological advances in noise prevention, development of social attitudes, etc.) the relevant measures had to be kept under constant review.

126. As to the economic interests which conflict with the desirability of limiting or halting night flights in pursuance of the above aims, the Court considers it reasonable to assume that those flights contribute at least to a certain extent to the general economy. The Government have produced to the Court reports on the results of a series of inquiries on the economic value of night flights, carried out both before and after the 1993 Scheme. Even though there are no specific indications about the economic cost of eliminating specific night flights, it is possible to infer from those studies that there is a link between flight connections in general and night flights. In particular, the Government claim that some flights from Far-East destinations to London could arrive only by departing very late at night, giving rise to serious passenger discomfort and a consequent loss of competitiveness. One can readily accept that there is an economic interest in maintaining a full service to London from distant airports, and it is difficult, if not impossible, to draw a clear line between the interests of the aviation industry and the economic interests of the country as a whole. However, airlines are not permitted to operate at will, as substantial limitations are put on their freedom to operate, including the night restrictions which apply at Heathrow. The Court would note here that the 1993 Scheme which was

eventually put in place was stricter than that envisaged in the 1993 Consultation Paper, as even the quietest aircraft were included in the quota count system. The Government have in addition resisted calls for a shorter night quota period, or for the lifting of night restrictions. The Court also notes subsequent modifications to the system involving further limitations for the operators, including, *inter alia*, the addition of an overall maximum number of permitted aircraft movements (see paragraph 50 above) and reduction of the available quota count points (see paragraph 66 above).

127. A further relevant factor in assessing whether the right balance has been struck is the availability of measures to mitigate the effects of aircraft noise generally, including night noise. A number of measures are referred to above (see paragraph 74). The Court also notes that the applicants do not contest the substance of the Government's claim that house prices in the areas in which they live have not been adversely affected by the night noise. The Court considers it reasonable, in determining the impact of a general policy on individuals in a particular area, to take into account the individuals' ability to leave the area. Where a limited number of people in an area (2 to 3% of the affected population, according to the 1992 sleep study) are particularly affected by a general measure, the fact that they can, if they choose, move elsewhere without financial loss must be significant to the overall reasonableness of the general measure.

128. On the procedural aspect of the case, the Court notes that a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided. In this respect it is relevant that the authorities have consistently monitored the situation, and that the 1993 Scheme was the latest in a series of restrictions on night flights which stretched back to 1962. The position concerning research into sleep disturbance and night flights is far from static, and it was the government's policy to announce restrictions on night flights for a maximum of five years at a time, each new scheme taking into account the research and other developments of the previous period. The 1993 Scheme had thus been preceded by a series of investigations and studies carried out over a long period of time. The particular new measures introduced by that scheme were announced to the public by way of a Consultation Paper which referred to the results of a study carried out for the Department of Transport, and which included a study of aircraft noise and sleep disturbance. It stated that the quota was to be set so as not to allow a worsening of noise at night, and ideally to improve the situation. This paper was published in January 1993 and sent to bodies representing the aviation industry and people living near

airports. The applicants and persons in a similar situation thus had access to the Consultation Paper, and it would have been open to them to make any representations they felt appropriate. Had any representations not been taken into account, they could have challenged subsequent decisions, or the scheme itself, in the courts. Moreover, the applicants are, or have been, members of HACAN (see paragraph 1 above), and were thus particularly well-placed to make representations**.**

129. In these circumstances the Court does not find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole, nor does it find that there have been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights.

130. There has accordingly been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

131. 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 [the] 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."

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

A. The Chamber's judgment

133. In its judgment of 2 October 2001, the Chamber held that the scope of review by the domestic courts did not allow consideration of whether the increase in night flights under the 1993 Scheme represented a justifiable limitation on the Article 8 rights of those who live in the vicinity of Heathrow Airport (see paragraphs 115 and 116 above).

B. The parties' submissions

1. The Government

134. In their letter requesting that the case be referred to the Grand Chamber, the Government made no reference to Article 13 of the

Convention. In subsequent communications they referred back to the pleadings before the Commission and the Chamber, summarised at paragraphs 112 and 113 of the Chamber's judgment, in which they contended that Article 13 was not applicable or, in the alternative, that the scope of judicial review was sufficient to satisfy the requirements of that provision. At the hearing of 13 November 2002 the Government underlined that the present case concerned positive rather than negative obligations, and pointed to similarities between the judicial review proceedings in the United Kingdom and the Convention approach.

2. The applicants

135. The applicants contended, as they had before the Chamber, 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 added that in *R. (Daly) v. Secretary of State for the Home Department* ([2001] 2 Appeal Cases 532), the House of Lords had confirmed the inadequacy of the approach in *R. v. Minister of Defence, ex parte Smith* ([1996] Queen's Bench Reports 517).

C. The third parties

136. The third parties did not comment on the Article 13 issues.

D. The Court's assessment

137. As the Chamber observed, 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, *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, pp. 23-24, § 54). In the present case, it has not found a violation of Article 8, but the Court considers that confronted with a finding by the Chamber that the Article 8 issues were admissible and indeed that there was a violation of that provision, it must accept that the claim under Article 8 was arguable. The complaint under Article 13 must therefore be considered.

138. The Court would first reiterate that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws to be challenged before a national authority on the ground of being contrary to the Convention (see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 62, § 40). Similarly, it does not allow a challenge to a general policy as such. Where an applicant has an

arguable claim to a violation of a Convention right, however, the domestic regime must afford an effective remedy (ibid., p. 62, § 39).

139. As the Chamber found, section 76 of the 1982 Act prevents actions in nuisance in respect of excessive noise caused by aircraft at night. The applicants complain about the flights which were permitted by the 1993 Scheme, and which were in accordance with the relevant regulations. No action therefore lay in trespass or nuisance in respect of lawful night flights.

140. 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" (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, pp. 38-40, §§ 117-27). The scope of the domestic review in *Vilvarajah*, 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, in *Smith and Grady v. the United Kingdom* (nos. 33985/96 and 33986/96, §§ 135-39, ECHR 1999-VI), the Court concluded that judicial review was not an effective remedy on the ground 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 in the domestic courts.

141. The Court observes 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 390). However, it is clear, as noted by the Chamber, 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 at the time (that is, prior to the entry into force of the Human Rights Act 1998) allow consideration of whether the claimed increase in night flights under the 1993 Scheme represented a justifiable limitation on the right to respect for the private and family lives or the homes of those who live in the vicinity of Heathrow Airport.

142. 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

143. 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. Damage

144. The applicants, referring to the Chamber's judgment, considered that a modest award should be made in relation to non-pecuniary damage.

145. The Government took the view that a finding of a violation would constitute in itself sufficient just satisfaction in respect of a violation of either Article 8 or Article 13.

146. The Chamber awarded the applicants the sum of 4,000 pounds sterling (GBP) each for non-pecuniary damage in respect of the violations it found of Articles 8 and 13.

147. The Court has found a violation of the procedural right to an effective domestic remedy under Article 13 of the Convention in respect of the applicants' complaints under Article 8, but no violation of the substantive right to respect for private life, family life, home and correspondence under Article 8 itself.

148. The Court notes that in *Camenzind v. Switzerland* (judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2897-98, § 57) the Court found a violation of Article 13 in relation to the applicant's claim under Article 8, but no substantive violation of the Convention. In that case the Court considered that the judgment constituted in itself sufficient just satisfaction for the alleged non-pecuniary damage.

Furthermore, in the present case, the violation of Article 13 derived, not from the applicants' lack of any access to the British courts to challenge the impact on them of the State's policy on night flights at Heathrow Airport, but rather from the overly narrow scope of judicial review at the time, which meant that the remedy available under British law was not an "effective" one enabling them to ventilate fully the substance of their complaint under Article 8 of the Convention (see paragraphs 140-42 above).

This being so, the Court considers that, having regard to the nature of the violation found, the finding of a violation constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage.

B. Costs and expenses

149. The applicants claimed a total of GBP 153,867.56 plus GBP 24,929.55 value-added tax (VAT) in respect of the costs before the

Chamber, and an additional GBP 154,941.48 plus GBP 23,976.82 VAT (totalling GBP 178,918.30) before the Grand Chamber.

150. The Government made a number of comments on the costs and expenses before the Grand Chamber. They challenged the rates charged by the solicitors involved, and considered that the time billed by the solicitors was excessive. They also considered that the fees charged by counsel and the applicants' experts were excessive. Overall, they suggested GBP 109,000 as an appropriate figure for the Grand Chamber costs and expenses.

151. The Chamber reduced the costs and expenses claimed by the applicants in the proceedings up to then from GBP 153,867.56 to GBP 70,000.

152. Costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are also reasonable as to quantum (see The Sunday Times *v. the United Kingdom (no. 1)* (Article 50), judgment of 6 November 1980, Series A no. 38, p. 13, § 23). Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002).

153. The Court notes that whilst the Chamber found a violation of both Articles 8 and 13 of the Convention, the Grand Chamber has found solely a violation of Article 13 in relation to the applicants' claim under Article 8. Whilst this difference between the findings should be reflected in the award of costs, the Grand Chamber should not lose sight of the fact that Article 13 cannot stand alone. Without an "arguable claim" in respect of the substantive issues, the Court would have been unable to consider Article 13 (see, for example, *Boyle and Rice*, cited above, pp. 23-24, §§ 52 and 54). The award of costs should therefore reflect the work undertaken by the applicants' representatives on the Article 8 issues to a certain extent, even if not to the same extent as if a violation of Article 8 had also been found.

154. The Court awards the applicants the sum of 50,000 euros, including VAT, in respect of costs and expenses.

C. Default interest

155. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by twelve votes to five that there has been no violation of Article 8 of the Convention;

2. *Holds* by sixteen votes to one that there has been a violation of Article 13 of the Convention;

3. *Holds* by fifteen votes to two that the finding of a violation of Article 13 of the Convention constitutes in itself sufficient just satisfaction for any damage sustained by the applicants;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, within three months, EUR 50,000 (fifty thousand euros) in respect of costs and expenses, to be converted into pounds sterling at the rate applicable on the date of settlement, including any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* by thirteen votes to four the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 2003.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

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

(a) joint dissenting opinion of Mr Costa, Mr Ress, Mr Türmen, Mr Zupančič and Mrs Steiner;

(b) dissenting opinion of Sir Brian Kerr.

L.W.
P.J.M.

JOINT DISSENTING OPINION OF JUDGES COSTA, RESS, TÜRMEN, ZUPANČIČ AND STEINER

I. Introduction

We regret that we cannot adhere to the majority's view that there has been no violation of Article 8 of the European Convention on Human Rights in this case. We have reached our joint dissenting standpoint primarily from our reading of the current stage of development of the pertinent case-law. In addition, the close connection between human rights protection and the urgent need for a decontamination of the environment leads us to perceive health as the most basic human need and as pre-eminent. After all, as in this case, what do human rights pertaining to the privacy of the home mean if, day and night, constantly or intermittently, it reverberates with the roar of aircraft engines?

1. It is true that the original text of the Convention does not yet disclose an awareness of the need for the protection of environmental human rights[2]. In the 1950s, the universal need for environmental protection was not yet apparent. Historically, however, environmental considerations are by no means unknown to our unbroken and common legal tradition[3] whilst, thirty-one years ago, the Declaration of the United Nations Conference on the Human Environment stated as its first principle:

> "... Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being ..."[4]

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2 . The idiom "environmental protection" appears in fifty-seven of our cases. The phrase "environmental human rights" appears for the first time in the majority judgment.

3 . For example, the extraordinarily sensitive doctrine concerning environmental nuisances goes back to Roman law. Roman law classified these nuisances as *immissiones in alienum*. Dig.8.5.8.5 Ulpianus 17 ad ed.; see http://www.thelatinlibrary.com/justinian/digest8.shtml

4 . *Declaration of the United Nations Conference on the Human Environment*, 1972; see http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503. It is interesting that from the very beginning environmental protection has been linked to personal well-being (health). See note 3, p. 45.

The European Union's Charter of Fundamental Rights (even though it does not at present have binding legal force) provides an interesting illustration of the point. Article 37 of the Charter provides:

> "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

These recommendations show clearly that the member States of the European Union want a high level of protection and better protection, and expect the Union to develop policies aimed at those objectives. On a broader plane the Kyoto Protocol makes it patent that the question of environmental pollution is a supra-national one, as it knows no respect for the boundaries of national sovereignty[5]. This makes it an issue *par excellence* for international law – and a fortiori for international jurisdiction. In the meanwhile, many supreme and constitutional courts have invoked constitutional vindication of various aspects of environmental protection – on these precise grounds[6]. We believe that this concern for environmental protection shares common ground with the general concern for human rights.

II. Development of the case-law

2. As the Court has often underlined: "The Convention is a living instrument, to be interpreted in the light of present-day conditions" (see, among many other authorities, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-16, § 26, and *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, pp. 26-27, § 71). This "evolutive" interpretation by the Commission and the Court of various Convention requirements has generally been "progressive", in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the "European public order". In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 embraces the right to a healthy environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on.

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5 . Kyoto Protocol to the United Nations Framework Convention on Climate Change, see "the Convention and Kyoto Protocol" at http://unfccc.int/resource/convkp.html.

6 . See, for example, *Compendium of summaries of judicial decisions in environment related cases* (SACEP/UNEP/NORAD Publication Series on Environmental Law and Policy no. 3), Compendium of summaries at http://www.unescap.org/drpad/vc/document/compendium/index.htm; EPA search results at http://oaspub.epa.gov/webi/meta_first_new2.try_these_first.

3. In previous cases concerning protection against aircraft noise the Commission did not hesitate to rule that Article 8 was applicable and declared complaints of a violation of that provision admissible – in *Arrondelle* and *Baggs*, for example. In *Arrondelle v. the United Kingdom* (no. 7889/77, Commission decision of 15 July 1980, Decisions and Reports (DR) 19, p. 186) the applicant's house was just over one and a half kilometres from the end of the runway at Gatwick Airport. In *Baggs v. the United Kingdom* (no. 9310/81, Commission decision of 16 October 1985, DR 44, p. 13) the applicant's property was 400 metres away from the south runway of Heathrow Airport. These two applications, which were declared admissible, ended with friendly settlements. While that does not mean that there was a violation of the Convention, it does show that the respondent Government accepted at that time that there was a real problem. And it was for purely technical reasons that the Court itself, in *Powell and Rayner v. the United Kingdom* (judgment of 21 February 1990, Series A no. 172), which also concerned flights in and out of Heathrow, refused to look into the Article 8 issue.

4. The Court has given clear confirmation that Article 8 of the Convention guarantees the right to a healthy environment: it found violations of Article 8, on both occasions unanimously, in *López Ostra v. Spain* (judgment of 9 December 1994, Series A no. 303-C) and *Guerra and Others v. Italy* (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I). The first of those cases concerned nuisances (smells, noise and fumes) caused by a waste-water treatment plant close to the applicant's home which had affected her daughter's health. The other concerned harmful emissions from a chemical works which presented serious risks to the applicants, who lived in a nearby municipality.

5. The Grand Chamber's judgment in the present case, in so far as it concludes, contrary to the Chamber's judgment of 2 October 2001, that there was no violation of Article 8, seems to us to deviate from the above developments in the case-law and even to take a step backwards. It gives precedence to economic considerations over basic health conditions in qualifying the applicants' "sensitivity to noise" as that of a small minority of people (see paragraph 118 of the judgment). The trend of playing down such sensitivity – and more specifically concerns about noise and disturbed sleep – runs counter to the growing concern over environmental issues all over Europe and the world. A simple comparison of the above-mentioned cases (*Arrondelle*, *Baggs* and *Powell and Rayner*) with the present judgment seems to show that the Court is turning against the current.

III. The positive obligation of the State

6. The Convention protects the individual against direct abuses of power by the State authorities. Typically, the environmental aspect of the

individual's human rights is not threatened by direct government action. Indirectly, however, the question is often whether the State has taken the necessary measures to protect health and privacy. Even assuming it has, direct State action may take the form of permitting, as here, the operation of an airport under certain conditions. The extent of permissible direct State interference and of the State's positive obligations is not easy to determine in such situations, but these difficulties should not undermine the overall protection which the States have to ensure under Article 8.

7. Thus, under domestic law, the regulatory power of the State is involved in protecting the individual against the macroeconomic and commercial interests that cause pollution. The misleading variation in this indirect juxtaposition of the individual and the State therefore derives from the fact that the State is under an obligation to act and omits to do so (or does so in violation of the principle of proportionality). In this respect, we have come a long way from the situation considered by this Court in *Powell and Rayner* (cited above, pp. 9-10, § 15), in which the Noise Abatement Act specifically exempted aircraft noise from its protection. The issue in the context of domestic law is, therefore, whether the State has done anything or enough.

8. At least since *Powell and Rayner* (p. 18, § 41), the key issue has been the positive obligation of the State.

9. The majority tries to distinguish the present case from *Dudgeon v. the United Kingdom* (judgment of 22 October 1981, Series A no. 45), which dealt with the sexual intimacy aspect of the applicant's private life. In *Dudgeon* (p. 21, § 52) it is said: “The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8.” The majority judgment differentiates this case from *Dudgeon* by saying: “the sleep disturbances relied on by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in *Dudgeon* to call for an especially narrow scope for the State's margin of appreciation” (see paragraph 123 of the judgment).

10. It is logical that there be an inverse relationship between the importance of the right to privacy in question on the one hand and the permissible intensity of the State's interference on the other hand. It is also true that sexual intimacy epitomises the innermost concentric circle of private life where the individual should be left in peace unless he interferes with the rights of others. However, it is not logical to infer from this that the proportionality doctrine of inverse relationship between the importance of the right to privacy and the permissible interference should be limited to sexual intimacy. Other aspects of privacy, such as health, may be just as “intimate”, albeit much more vital.

11. Privacy is a heterogeneous prerogative. The specific contours of privacy can be clearly distinguished and perceived only when it is being defended against different kinds of encroachments. Moreover, privacy is an aspect of the person's general well-being and not necessarily only an end in itself. The intensity of the State's permissible interference with the privacy of the individual and his or her family should therefore be seen as being in inverse relationship with the damage the interference is likely to cause to his or her mental and physical health. The point, in other words, is not that the sexual life of the couple whose home reverberates with the noise of aircraft engines may be seriously affected. The thrust of our argument is that "health as a state of complete physical, mental and social well-being" is, in the specific circumstances of this case, a precondition to any meaningful privacy, intimacy, etc., and cannot be unnaturally separated from it[7]. To maintain otherwise amounts to a wholly artificial severance of privacy and of general personal well-being. Of course, each case must be decided on its own merits and by taking into account the totality of its specific circumstances. In this case, however, it is clear that the circles of the protection of health and of the safeguarding of privacy do intersect and do overlap.

12. We do not agree with the majority's position taken in paragraph 123 of the Grand Chamber judgment and especially not with the key language *in fine* where the majority considers: "Whilst the State is required to give due consideration to the particular interests the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation. The Court's supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance." When it comes to such intimate personal situations as the constant disturbance of sleep at night by aircraft noise there is a positive duty on the State to ensure as far as possible that ordinary people enjoy normal sleeping conditions. It has not been demonstrated that the applicants are capricious, and even if their "sensitivity to noise" and "disposition to be disturbed by noise" may be called "subjective", the Court agreed that they were affected in their ability to sleep "considerably ... by the scheme at issue" (see paragraph 118 of the judgment).

13. It is significant in this respect that under Article 3 sleep deprivation may be considered as an element of inhuman and degrading treatment or even torture[8]. Already, in the inter-State case of *Ireland v. the United*

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7 . WHO definition of health, see http://www.who.int/about/definition/en/.

8 . In *Selmouni v France*, judgment of 28 July 1999, § 97, we decided to adhere to the definition of torture given in Article 1 of the United Nations Convention against Torture. It therefore makes sense to take into account that excessive noise may in fact amount to "severe pain or suffering, whether physical or mental". See, for example, paragraph 257 referring to "sounding of loud music for prolonged periods, sleep

Kingdom (judgment of 18 January 1978, Series A no. 25, p. 41, § 96), the Court held, *inter alia*, that "... holding the detainees in a room where there was a continuous loud and hissing noise ..." constituted a practice of inhuman and degrading treatment[9]. In the light of the subsequent development of our case-law in *Selmouni v. France* ([GC], no. 25803/94, § 97, ECHR 1999-V), the same treatment would now most probably be considered as torture. The present case does not involve torture or inhuman and degrading treatment, and we do not suggest that the complaint could possibly be reclassified under Article 3 of the Convention. Nevertheless, we think that the problem of noise, when it seriously disturbs sleep, does interfere with the right to respect for private and, under specific circumstances, family life, as guaranteed by Article 8, and may therefore constitute a violation of said Article, depending in particular on its intensity and duration.

14. We also find it inconsistent that the judgment (in paragraph 126) should take into account "serious passenger discomfort" whereas it downgrades (see paragraph 118) the discomfort of all the residents, who are exposed to aircraft noise to a "subjective element [of] a small minority of people being more likely than others to be woken or otherwise disturbed in their sleep ...". We do not find it persuasive to engage in the balancing exercise employing the proportionality doctrine in order to show that the abstract majority's interest outweighs the concrete "subjective element of a small minority of people". According to the World Health Organisation (WHO) Guidelines[10], measurable effects of noise on sleep start at noise levels of about 30 dBLA. These criteria are objective. They show that this susceptibility to noise is not "subjective" in the sense of being due to over-sensitivity or capriciousness[11]. Indeed, one of the important functions of human rights protection is to protect "small minorities" whose "subjective element" makes them different from the majority.

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deprivation for prolonged periods" in "Concluding observations of the Committee against Torture: Israel. 09.05.97. A/52/44, paras. 253-260. (Concluding Observations/Comments) at http://www.unhchr.ch/tbs/doc.nsf/9c663e9ef8a0d080c12565a9004db9f7/69b6685c93d9f25180256498005063da?OpenDocument.

9. Similar considerations played a role in *Kalashnikov v. Russia*, no. 47095/99, ECHR 2002-VI.

10. Guidelines for Community Noise – Chapter 4 at http://www.who.int/environmental _information/Noise/Commnoise4.htm; see also Environmental Protection Agency of Ireland at http://www.epa.ie/Noise/default.htm.

11. The guidelines are based on a combination of values of 30 dBLA and 45 dBLA maximum. To protect sensitive persons, a still lower guideline value would be preferred when the background level is low. In the case before the Court, however, almost all the applicants have suffered from night noise events in excess of 80 dBLA and in one case as high as 90 dBLA max. It is noteworthy that the judgment in its assessment did not take into account these international standards concerning the effects noise has on sleep, although the relevant data were available in the file.

15. According to the Consultation Paper published by the government in November 1998, "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 a 1992 sleep study, to estimate the numbers of people likely to be awakened". The 1992 sleep study was limited to sleep disturbances and did not even take into account the problems of those who had been unable to get to sleep in the first place. It is noteworthy that the government's claims in respect of the country's economic well-being are based on reports prepared by the aviation industry. The government did not make any serious attempt to assess the impact of aircraft noise on the applicants' sleep. When the 1993 Scheme was introduced, only very limited research existed on the nature of sleep disturbance and prevention. In this respect, we agree with the findings in the Chamber's judgment (paragraphs 103-06). Nor has the government really shown that it has explored all the alternatives, such as using more distant airports.

16. In principle, the general reference to the economic well-being of the country is not sufficient to justify the failure of the State to safeguard an applicant's rights under Article 8. In *Berrehab v. Netherlands* (judgment of 21 June 1988, Series A no. 138), for example, the Court found that the actions of the authorities could not be justified by the alleged economic well-being of the Netherlands. In *López Ostra* (cited above), too, the Court held, after examining the Government's argument, that "... the State did not succeed in striking a fair balance between the interests of the town's economic well-being ...and the applicant's effective enjoyment of her right to respect for her home and her private and family life" (p. 56, § 58).

17. Although we might agree with the judgment when it states: "the Court must consider whether the State can be said to have struck a fair balance between those interests [namely, the economic interests of the country] and the conflicting interests of the persons affected by noise disturbances" (see paragraph 122 of the judgment), the fair balance between the rights of the applicants and the interests of the broader community must be maintained. The margin of appreciation of the State is narrowed because of the fundamental nature of the right to sleep, which may be outweighed only by the real, pressing (if not urgent) needs of the State. Incidentally, the Court's own subsidiary role, reflected in the use of the "margin of appreciation", is itself becoming more and more marginal when it comes to such constellations as the relationship between the protection of the right to sleep as an aspect of privacy and health on the one hand and the very general economic interest on the other hand.

18. As stated above, reasons based on economic arguments referring to "the country as a whole" without any "specific indications of the economic cost of eliminating specific night flights" (see paragraph 126 of the judgment) are not sufficient. Moreover, it has not been demonstrated by the

respondent State how and to what extent the economic situation would in fact deteriorate if a more drastic scheme – aimed at limiting night flights, halving their number or even halting them – were implemented.

IV. Realistic assessment under Article 41

19. Finally, and in view of the powers of the Court under Article 41 and the alleged importance of the macroeconomic interests at stake, indemnification of the "small minority" should be less of a problem rather than more. The applicants' rights could have been treated much more realistically than they were by the majority. In other words, the issue could have been circumscribed to the "small minority's" entitlement to just satisfaction for the real pecuniary and non-pecuniary damage incurred. Since we do not believe that the "subjective element" referred to in paragraph 118 of the judgment is simply a euphemism for "capricious hyper-sensitivity", the applicants in our opinion ought to have been awarded just satisfaction.

DISSENTING OPINION OF JUDGE Sir Brian KERR

In *Christine Goodwin v. the United Kingdom* ([GC], no. 28957/95, § 113, ECHR 2002-VI), the Grand Chamber held that "Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention". That ruling relates to the "state of domestic law", and seems to me to go beyond the traditional view that Article 13 does not guarantee a remedy against "legislation" (as in, for example, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 47, § 85). It corresponds closely to the ideas I expressed on Article 13 in my dissenting opinion to the Chamber's judgment of 2 October 2001.

I would here wish simply to record that it is my view, given the nature of the applicants' complaints, the state of domestic law at the time and the role of Article 13 in the Convention structure, that there has been no violation of Article 13 in this case.