

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

1959 • 50 • 2009

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 5591/07
by Trevor ALLEN and Others
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on
6 October 2009 as a Chamber composed of:

Lech Garlicki, *President*,
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having regard to the above application lodged on 15 January 2007,
Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Trevor Allen, Mr John Lewis and Mr David Venable, are British nationals. Mr Allen and Mr Venable live in Takeley and Mr Lewis lives in Dunmow. The applicants were represented before the Court by Mr R. Buxton, a lawyer practising in Cambridge.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

1. Background facts

3. The applicants are the owners of residential properties situated near Stansted Airport, in the south-east of England. Stansted Airport is owned and operated by Stansted Airport Limited ("BAA Stansted"), a private company which was at the relevant time a wholly-owned subsidiary of BAA Plc, a company then listed on the London stock exchange.

4. In December 2003, the Government published a White Paper, *The Future of Air Transport* (a White Paper outlines details of future policy on a particular subject and often leads to legislative proposals following responses to the paper). The White Paper set out a strategic framework for the development of airport capacity in the United Kingdom over the next 30 years and in that context, the Government expressed support for the construction of a new runway at Stansted Airport. The executive summary to the White Paper identified the Government's objectives as limiting and, where possible, reducing noise impact over time, as well as minimising other local environmental impacts. It noted:

"Where noise impacts cannot practically be limited, the White Paper sets out new measures which it expects airport operators to take to help those affected, by offering to insulate or, in more severe cases, purchase properties."

5. The executive summary also invited airport operators to bring forward plans to increase capacity, including, where appropriate, measures to address blight.

6. The White Paper explained generalised blight as follows:

"The prospect of airport development will in many cases have a wider impact on property values in the period before statutory protection is available. This is often referred to as 'generalised blight'."

7. The statutory protection available was set out briefly in the White Paper:

"Under existing planning law, residential and agricultural owner occupiers directly affected by airport development plans will have access in due course to statutory blight provisions, either when planning permission is granted for the airport

development, or when the local development plan has been revised to reflect development proposals.

In addition, the law provides for compensation in respect of loss of value arising from certain indirect effects of future airport development during construction such as noise or dust (under the Compulsory Purchase Act 1965) and for loss of value one year on from the opening of a new development and arising from its operation (under Part 1 of the Land Compensation Act 1973)."

8. The White Paper acknowledged that there would be no statutory remedy for generalised blight but accepted the need for some form of redress for property owners affected. It indicated that non-statutory schemes to deal with generalised blight were being developed by airport operators in respect of runways supported by the White Paper. Specifically, the White Paper stated that the Government expected such non-statutory schemes to minimise the impacts on local people. With regard to the Stansted expansion plans, the White Paper emphasised that:

"the airport operator will need to put in place a scheme to address the problem of generalised blight resulting from the runway proposal."

9. The White Paper also addressed separately the issue of noise mitigation. Based on research, the Government used 57dBALeq16 hour (equivalent continuous noise level) as the level of daytime noise marking the approximate onset of significant community annoyance. The White Paper set out the Government's expectation that relevant airport operators would, with immediate effect, offer households subject to levels of noise at 69 dBALeq16 hour or more assistance with the costs of relocating. As regards households subject to noise levels of 63 dBALeq16 hour or more, the Government expected relevant airport operators to offer acoustic insulation. In respect of future airport growth, the Government indicated their expectation that relevant airport operators would offer to purchase those properties suffering from noise levels of 69 dBALeq16 hour or more and which saw an increase in noise levels of 3dBALeq or more; and to offer acoustic insulation to those with noise levels of 63 dBALeq16 hour or more and which saw an increase in noise levels of 3dBALeq16 hour or more.

10. The Government undertook to monitor and evaluate the impact and effectiveness of the policies set out in the White Paper.

11. BAA Stansted subsequently announced its intention to seek approval for the construction of a second runway at Stansted Airport. In February 2004, it outlined, in a consultation document, various proposals to address the problem of generalised blight.

12. On 30 April 2004, in response to a letter from "Stop Stansted Expansion" (an interest group opposed to the expansion of Stansted Airport), the then Parliamentary Under Secretary of State for Transport indicated that:

"in introducing this voluntary scheme, BAA are taking forward policies set out in ... the White Paper ... BAA will wish to ... try to minimise the impacts on the local

community. We will monitor progress by airports in bringing forward blight and noise mitigation schemes ...”

13. In September 2004, BAA Stansted published details of the scheme selected to assist home owners suffering from generalised blight: the Home Owner Support Scheme (“HOSS”). Under the terms of the scheme, only properties falling within a contour line based on noise levels of 66 dBA_{Leq}16 hour (“66 Leq”) and above fell within the ambit of the HOSS. There was no flexibility as regards the contour line and properties outside the contour line were ineligible for the scheme. BAA Stansted accepted that in defining this boundary, a line was drawn between those who would qualify and those who would not and that the line might appear arbitrary in some places. However, it emphasised that the selection of the line contour was based on detailed research, adding:

“In confirming our intention to work on the basis of the 66 Leq contour, it is important to emphasise that this scheme is about addressing generalised blight and not noise mitigation. However, we intend to introduce specific noise compensation and mitigation packages in the future, including noise insulation programmes.”

14. An applicant qualifying under the HOSS could either require BAA Stansted to enter into a legally binding and transferable option to purchase his property, allowing him to sell his property, together with the option to purchase, to a third party; or he could require BAA Stansted to buy his property once it had announced its intention to construct the runway (which was subject to the grant of planning permission). In addition, where an owner eligible for the HOSS was only able to sell his property for 15 per cent or more below the index-linked market price, an assisted relocation scheme would require BAA Stansted to purchase the property subject to terms and conditions. An early moving contribution was available for home owners who did not qualify for the assisted relocation scheme because they could sell their properties for within 15 per cent of the index-linked price.

15. In addition to the HOSS, BAA Stansted promulgated a Special Cases Scheme (“SCS”) aimed at individuals who could demonstrate that a severe medical condition, such as a chronic or degenerative disease, made it necessary for them to move at the earliest opportunity but who were having difficulty selling their homes. One criterion of the SCS was that the individual had been unable to sell his home within 15 per cent of the market price. The 66 Leq contour line did not apply to the SCS.

16. The applicants’ properties lie outside the 66 Leq contour line. Accordingly, they are not eligible to benefit from the HOSS. Nor are they eligible under the SCS. They nonetheless consider that their properties have been affected by generalised blight. They rely on statistics from the Land Registry Office which show that while house prices in the county of Essex increased by 25.5 per cent on average between April-June 2002 and the final quarter of 2003, house prices in Uttlesford, the district within Essex in

which Stansted Airport and their properties are situated, only increased by an average of 12.7 per cent.

17. By letter dated 5 November 2004, the then Parliamentary Under Secretary of State for Transport, responding to a letter from “Stop Stansted Expansion”, stated that:

“We recognise that the prospect of airport development can have an impact on property values during the period before statutory protection becomes available. We also accept that people should have access to some form of redress, which is why we made our view clear in *The Future of Air Transport* White Paper that non-statutory schemes should be brought forward locally, by airport operators, where new runways are supported in the White Paper or where land is safeguarded for future development. However, there is no obligation on BAA to do so as you suggest in your letter.

In the case of the proposed development of Stansted, BAA’s Home Owners Support Scheme (HOSS) is intended to provide financial support to homeowners close to the site of the proposed new runway, whose property values may be worst affected by the prospect of increased airport noise. I would emphasise that the HOSS is a BAA scheme, voluntarily entered into by them. The Government is not a party to it and cannot in any way guarantee it. That said we do consider BAA’s scheme to be consistent with the objectives we set out in ... the White Paper ...

Your letter also explains your organisation’s view that the BAA scheme does not adequately address all aspects of the generalised blight around Stansted. The noise level contours being used by BAA for its HOSS are not arbitrary values, but are research-based and have also formed the basis for past sound insulation schemes at Stansted and other airports. It is, however, an unavoidable feature of any amelioration scheme based on environmental noise impacts, whether forecast noise or actual and whatever the noise values used, that it will give rise to a boundary with people living just outside it.

... We consider that the only fair and practical basis for a voluntary blight compensation scheme is one referenced to a recognised level of environmental impact. There may be debate about what the boundary should be and what impacts should be taken into account, but a scheme that is not based on objective and measurable environmental criteria would be very difficult to administer in practice.

As we said in ... the White Paper, we will be monitoring the effectiveness of the policies we have set out, including voluntary blight schemes brought forward by airport operators, and will review progress along with other White Paper policies in 2006.”

18. Planning permission for the new runway has not yet been granted.

2. The domestic proceedings

19. The first applicant, together with Takeley Parish Council (“Takeley”), sought leave to apply for judicial review of the HOSS complaining that it compensated some home owners affected by generalised blight but not all; and that it was applied inflexibly. The defendants were BAA Stansted and BAA plc. In their summary grounds of defence the defendants sought GBP 23,585 by way of the costs of defending the application for leave to apply for judicial review. Permission to bring

judicial review proceedings was refused on the papers on 4 March 2005, with the judge commenting that the level of costs claimed by the defendants appeared disproportionate and that detailed assessment was therefore likely to be required.

20. The claim for permission to apply for judicial review was renewed at an oral hearing, with a substantially amended statement of facts and grounds which sought to introduce the Secretary of State for Transport as a third defendant. The argument developed at the oral hearing before the High Court was that the Secretary of State had acted unlawfully in positively supporting and continuing to support and endorse the HOSS scheme in circumstances in which the requirements of the policy set out in the White Paper were not met and/or in continuing to express policy support for the development of Stansted in circumstances where insufficient provision had been made to address generalised blight. Accordingly, it was argued, the Secretary of State had failed to comply with his duties under Articles 8 and 14 of the Convention and Article 1 of Protocol No. 1.

21. Takeley and Mr Allen also made a separate application for a protective costs order ("PCO"). Although Mr Allen was indemnified by Takeley in respect of costs, Takeley itself had limited financial resources. Accordingly, the terms of the PCO sought was that each party pay its own costs in relation to the judicial review proceedings, on the grounds that the case was one of general interest and that the prohibitive level of costs which could potentially be awarded against the claimants if unsuccessful would inevitably oblige them to discontinue the application for judicial review.

22. By order dated 13 July 2005, Sir Andrew Collins declined to make an advance order on costs on the basis that the issue of costs should be dealt with on the relevant application for permission. He observed that the condition in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* (see relevant domestic law and practice below) that the claimant should have no private interest in the case in order for a PCO to be awarded "may be too restrictive but there are substantial arguments against a PCO, although some sort of capping may be appropriate".

23. On 14 December 2005, Mr Justice Lloyd Jones refused the renewed application for leave to apply for judicial review. He noted at the outset (at paragraph 24) that:

"The generalised blight is caused by the White Paper, or its implementation, not by the bringing forward of a voluntary scheme to mitigate its effects. The challenge to the vehicle intended to bring relief [i.e. the HOSS], whatever may be claimed to be its inadequacies, was aiming at the wrong target. Furthermore, it should be noted that the scheme does not affect statutory rights, it simply supplements those rights in the cases where it applies."

24. In respect of the argument that the balance struck between competing rights by the White Paper was not reflected in the HOSS, the

judge disagreed. He considered that the White Paper did not contemplate a voluntary scheme which would relieve all cases of generalised blight and that, accordingly, the HOSS scheme was not incompatible with the policy set out in the White Paper.

25. As regards the argument that in endorsing the scheme, the Secretary of State had infringed Convention rights, Lloyd Jones J considered in turn the various articles relied upon. In respect of Article 8, he concluded that the case involved the possible diminution in value of property and that, as a consequence, Article 8 was not engaged. In any case, the balance struck by the scheme did not raise an arguable claim under Article 8. As regards Article 1 of Protocol No. 1, he noted that it was common ground among the parties that the article was engaged and he considered that the case involved a control of the use of the property, rather than deprivation of ownership. He referred to the approach of the Court of Appeal in *R (Trailer and Marina (Leven) Ltd) v Secretary of the State for the Environment, Food and Rural Affairs and another* [2005] 1 WLR 1267 in which Neuberger LJ, citing *Allan Jacobsson v. Sweden (no. 1)*, 25 October 1989, § 55, Series A no. 163, explained that in such cases there had to be a reasonable relationship of proportionality between the means employed and the aim sought to be realised; and that in striking the fair balance between the general interest of the community and the requirements of the protection of the individual's fundamental rights, the authorities enjoyed a wide margin of appreciation. Lloyd Jones J concluded (at paragraph 30) that:

“[Counsel for Mr Allen] has to put his case very high. He has to say that a fair balance requires his mandatory scheme; that is one which requires compensation to be available regardless of the noise contour, taking account of and providing compensation for any diminution in value and doing so for all of those who are affected by the generalised blight. To my mind, it is not arguable that approving a voluntary scheme which does not go this far is disproportionate.”

26. As for the alternative argument that it would be disproportionate to base the scheme on the noise contour without incorporating some element of flexibility, Lloyd Jones J held (at paragraph 31):

“However, here again it does not appear to me that the use of the noise contour is a disproportionate response. Once it is accepted that it is justifiable to compensate only the severely disadvantaged, a line has to be drawn. It seems to me that this is an efficient and fair way of identifying those most severely affected by the generalised blight.”

27. Lloyd Jones J noted that the documents setting out the HOSS explained clearly why it was considered desirable to have a contour line and why the 66 Leq noise boundary had been adopted. The deliberate exclusion of discretion did not make drawing a line disproportionate. He concluded that there was an objective justification for the approach adopted, which was the need for legal certainty and a workable rule.

28. Finally, as regards Article 14, Lloyd Jones J held (at paragraph 34):

“I doubt that Article 14 is engaged in the circumstances of this case. This scheme does not discriminate between individuals and groups on the basis of personal characteristics. If it did, then that would be the case whenever a distinction is drawn between different categories of property owners. But, in any event, it seems to me that any discrimination will be justified for the reasons that have already been given.”

29. In the circumstances, Lloyd Jones J found that the issue of the protective costs order did not arise. However, having heard argument from the parties, he limited the extent of the costs order made in respect of the proceedings. No costs order was made against Mr Allen. Takeley was ordered to pay the first and second defendants’ assessed costs of acknowledging service and resisting the PCO, the latter costs to be limited to GBP 1,000, and the third defendant’s costs of lodging written submissions, limited to GBP 1,000. No costs were awarded in respect of the oral hearing.

30. Mr Allen and Takeley subsequently sought permission to appeal to the Court of Appeal against the refusal of leave on the ground that, *inter alia*, the judge had erred in law in concluding that there was no arguable case that the Secretary of State had acted, and continued to act, in breach of his obligations under Articles 8 and 14 of the Convention and Article 1 of Protocol No. 1.

31. By order dated 21 July 2006, Lord Justice Waller adjourned the application to be heard by the full court, with the appeal to follow if permission was granted. He commented that:

“I have doubts about the prospects of success but a refusal on paper will almost certainly lead to an oral hearing and this is one of those cases where arguing about prospects could take longer than tackling the points sought to be taken”.

32. Following a request for clarification from solicitors acting for Takeley and Mr Allen, Waller LJ confirmed on 12 October 2006 that he would not make a protective costs order.

33. Takeley and Mr Allen subsequently sought the advice of leading and junior counsel. Counsel advised that although the case was arguable, the prospects of success on appeal were low and the prospects of success in the substantive judicial review application were even lower. In this respect, Waller LJ’s comments in his 21 July order that he had doubts about the prospects of success were significant. In view of Takeley’s limited financial resources and the likely considerable level of costs which would be awarded against them if their appeal was unsuccessful, counsel advised the withdrawal of the appeal.

34. The appeal was subsequently dismissed by consent.

B. Relevant domestic law and practice

1. *Compensation for development of land*

35. Under statutory planning law, residential occupiers directly affected by airport development plans have access to statutory blight provisions either when planning permission has been granted for airport development or when the local development plan has been revised to reflect the development proposals.

36. Under Part I of the Land Compensation Act 1973, those affected by airport development can claim compensation for the loss in the value of their property directly attributable to the operation of the new development. However, eligibility for compensation arises only after 12 months have passed since the new runway has entered in operation.

2. *Costs in civil proceedings*

37. The normal rule in civil proceedings in England and Wales, including judicial review proceedings, is that the unsuccessful party pays the reasonable costs of the successful party.

38. The court may, in certain circumstances, make a protective costs order. The relevant principles governing the making of PCOs in public law cases raising issues of general public importance were set out in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 260. In that case, the Court of Appeal held (at paragraph 74):

“We would therefore restate the governing principles in these terms: (1) a PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so. (2) If those acting for the appellant are doing so pro bono this will be likely to enhance the merits of the application for PCO. (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in light of the considerations set out above.”

COMPLAINTS

39. The applicants complained under Article 8 of the Convention that the endorsement of the plans for a second runway and the HOSS constituted an unjustified interference with their right to respect for their homes.

40. They further complained under Article 1 of Protocol No. 1 of the Convention that in endorsing the plans for the construction of a second runway at Stansted and failing to put in place measures to protect all those whose property values would be negatively affected by generalised blight the Government had failed to ensure that their right to peaceful enjoyment of their property was respected.

41. They complained under Article 1 of Protocol No. 1 together with Article 14 that the Government had failed to put in place measures to ensure that the applicants did not suffer discriminatory treatment in the enjoyment of their property rights.

42. Finally, under Article 6 § 1, the applicants complained that the refusal of the courts to award a protective costs order amounted to a denial of their right of access to court.

THE LAW

I. WHETHER THE APPLICANTS CAN CLAIM TO BE VICTIMS UNDER ARTICLE 34

43. The Court recalls that, in order to be able to lodge a petition in pursuance of Article 34, a person, non-governmental organisation or group of individuals must be able to claim “to be the victim of a violation ... of the rights set forth in the Convention ...”. In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure (see *Klass and Others v. Germany*, judgment of 6 September 1978, § 33, Series A no. 28; and *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, 29 April 2008). The Convention does not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (*Norris v. Ireland*, 26 October 1988, § 31, Series A no. 142).

44. Formal planning permission for the construction of the new runway at Stansted has not yet been granted. Accordingly, there is currently no increase in the noise levels in the area such that the applicants, who reside just outside the 66 Leq contour line, can claim to have been negatively affected by an increase in noise pollution. However, the Court emphasises that the applicants’ complaints concern the phenomenon of generalised blight, which is not dependent on an actual increase in noise levels. Generalised blight occurs where areas are earmarked for development at some point in the future. It is the prospect of development – and in this case the prospect of increased noise levels in the future – which has a negative

impact on house prices in the area, even though formal planning consent has not been, and may never be, granted. The Government acknowledged at domestic level, and the domestic courts accepted, that future plans for development may, even before formal approval, negatively affect the values of properties situated in proximity to the proposed development site (see paragraphs 6 to 8, 17 and 23 to 26 above).

45. It is clear that in the present case, a defined area of land near the applicants' properties has been earmarked for the construction of a new runway. Furthermore, although the project is still in its early stages, the new runway has the support of the Government. Financial compensation schemes have been devised in order to address the problem of generalised blight arising from the prospect of development. In the circumstances, the Court considers that the values of the applicants' properties were potentially affected by the proposed development, notwithstanding the fact that the properties fell outside the contour line agreed for the purposes of the compensation schemes. Accordingly, it is prepared to assume that the applicants were directly affected by the plans to construct a second runway at Stansted Airport and can therefore be considered victims for the purposes of Article 34.

II. ALLEGED VIOLATION OF ARTICLE 8

46. The applicants alleged that the Government's support for the construction of a second runway at Stansted Airport, which was likely to lead to an increase in the level of noise pollution affecting their homes, violated their rights under Article 8 of the Convention, which provides as follows:

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

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."

47. The Court recalls that there is no explicit right in the Convention to a clean and quiet environment. However, where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8 (see, *inter alia*, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 96, ECHR 2003-VIII; *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 40, Series A no. 172; and *Tătar v. Romania*, no. 67021/01, § 86, 27 January 2009).

48. In the present case, the Court notes that planning permission has not yet been granted and that construction work on the proposed second runway at Stansted Airport has not yet commenced. On current estimates, the

runway will not be operational before 2017. The Court further notes that, in the context of their Article 8 complaint, the applicants criticised the scope of the HOSS. However, as BAA Stansted has pointed out (see paragraph 13, above), the HOSS was concerned with addressing generalised blight and not noise mitigation.

49. The Court therefore takes the view that the applicants' complaint does not relate to the future risk of noise pollution from the operation of a second runway and the effect of this on their right to respect for their homes and private and family lives. In reaching this conclusion, the Court observes that the present application does not seek to challenge the decision to construct the second runway but, instead, challenges the terms of the HOSS scheme which, as noted above, is directed at generalised blight and not noise mitigation. Specifically, the applicants complain about the fact that their properties have allegedly suffered a diminution of value as a result of generalised blight but are not eligible for compensation under the schemes unveiled by BAA Stansted. It follows that the complaint concerns the impact of the proposals for a second runway on the values of the applicants' properties and not on any implied right to a clean and quiet environment which may arise under Article 8 of the Convention.

50. Accordingly, the Court concludes that the matter falls to be examined under Article 1 of Protocol No. 1 and that the complaint under Article 8 is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected under Article 35 § 4.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

51. The applicants contended that the endorsement by the Government in their White Paper of the construction of a second runway at Stansted and their failure to ensure that measures were put in place to protect the applicants against the diminution in value of their properties as a result of generalised blight constituted a violation of Article 1 of Protocol No. 1, which provides as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Existence of an interference with property rights attributable to the State

52. The Court observes that the applicants' complaint comprises two elements: (i) the endorsement by the Government of the new runway; and (ii) the failure of the Government to put in place measures to protect individuals, including the applicants, from generalised blight. The applicants argued that these constituted a direct interference by the State with their Convention rights and also that the State's responsibility was engaged as a result of a failure to act to secure the effective protection of their rights under Article 1 of Protocol No. 1.

53. Before the domestic courts, it was common ground between the parties that Article 1 of Protocol No. 1 was engaged. It was not contested by the Secretary of State in the domestic proceedings that the applicants' properties were situated in close proximity to the proposed new runway, such that the values of the properties might be negatively affected by the development plans. However, the prospect of future development is only one of a number of factors which may impact on property prices. No detailed statistics have been provided and the statistics provided by the applicants showing movements in property prices over a period in 2002-2003 are therefore of limited value (see paragraph 16 above). The applicants do not allege that they have attempted to sell their properties and have experienced difficulties or financial disadvantage in doing so. Any detriment to the properties arising from the plans for a second runway and the limited scope of the HOSS is therefore merely hypothetical. However, the fact that the applicants have not tried to sell their properties is of itself insufficient to allow the Court to conclude that there has been no interference in the present case, given the general acceptance by the domestic authorities of the phenomenon of generalised blight and its uncertain effects and indeterminate duration (see in this connection *Sporrong and Lönnroth v. Sweden*, 23 September 1982, Series A no. 52 where the Court examined the effect of planning blight on the applicants' properties and did not consider it fatal to the Sporrong Estate's claim that it had not attempted to sell the property concerned, nor had it applied for and been refused exemptions from the prohibition on construction affecting the property).

54. Accordingly, the Court considers that the applicants' right to peaceful enjoyment of their possessions within the meaning of Article 1 of Protocol No. 1 was affected by plans to construct a second runway at Stansted Airport. The question arises as to whether the development plans should be analysed solely in terms of a direct interference by the respondent State through its endorsement of the second runway at Stansted or also in terms of a potential violation of the State's positive duties arising under Article 1 of Protocol No. 1.

55. It is clear that Article 1 of Protocol No. 1 may entail positive obligations which may require the State to take the measures necessary to protect the right of property (see *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96, ECHR 2002-VII; and *Broniowski v. Poland* [GC], no. 31443/96, § 143, ECHR 2004-V). The Court has previously considered that the Government's responsibility for acts was engaged indirectly where applicants were deprived of their possessions as a result of a law permitting acquisition of title on the basis of adverse possession (see *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 57, ECHR 2007-...) and resulting from a land reform law which allowed tenants to acquire their properties (see *James and Others v. the United Kingdom*, 21 February 1986, § 36, Series A no. 98).

56. Although the cases cited above in which the Court considered that positive obligations arose involved individuals taking action under provisions of legislation already enacted by the State, the Court sees no reason to adopt a different approach where the alleged positive obligation arises from the State's failure to put in place legislation protecting individuals' property rights. In this regard, the Court observes that in the context of complaints under Article 8 of the Convention, it has consistently held that there may arise, in certain cases, a positive obligation on the State to take reasonable and appropriate measures to secure applicants' rights under that Article which entails, above all, an obligation to put in place a legislative and administrative framework for the effective protection of applicants' rights (see, *mutatis mutandis*, *Tătar*, cited above, § 88).

57. In any event, similar principles apply whether a case is analysed in terms of a State's positive duty or in terms of an interference by a public authority with the applicants' rights (see, *mutatis mutandis*, *Hatton and Others*, cited above, § 119; and *Tătar*, cited above, § 87). The facts of the present case may be examined in terms of a hindrance to the effective exercise of the right protected by Article 1 of Protocol No. 1 or in terms of a failure to secure the implementation of that right. Having regard to the particular circumstances of the present case, the Court considers it unnecessary to categorise strictly its examination of the case as being under the head of the State's positive obligations or under the head of the State's negative duty to refrain from an unjustified interference with the peaceful enjoyment of property, or both (see, *inter alia*, *Broniowski*, cited above, § 146). The Court will determine whether the overall conduct of the United Kingdom authorities was justifiable in the light of the principles set out below.

B. Nature of the interference

58. The measure about which the applicants complain is the proposed development of Stansted Airport, which they contend will have an impact

on the values of their properties. The Court will examine the case in light of the general rule in the first sentence of the first paragraph which lays down the right to peaceful enjoyment of possessions (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 133, ECHR 2004-XII; and *Sporrong and Lönnroth*, cited above, § 65).

59. In order to be compatible with Article 1 of Protocol No. 1, an interference with the right to the peaceful enjoyment of possessions must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (see *Beyeler v. Italy* [GC], no. 33202/96, § 107, ECHR 2000-I; *Pye*, cited above, § 53; and *Sporrong and Lönnroth*, cited above, § 69). The balance struck between competing interests in the present case is examined below.

C. Public interest and fair balance

1. General principles

60. The Court recalls the fundamentally subsidiary role of the Convention. National governments, which derive their authority from the people, are better placed than an international court to evaluate local needs and conditions (see, *inter alia*, *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24; and *Hatton and Others*, cited above, § 97). In cases involving environmental and planning issues, the Court recognises that the State enjoys a wide margin of appreciation in deciding whether to endorse a particular development in the general interest and, if so, what measures to put in place to ensure respect for the rights of individuals affected by the proposed development. It is not for the Court to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases (see *Buckley v. the United Kingdom*, 25 September 1996, § 75, *Reports of Judgments and Decisions* 1996-IV; *Pye*, cited above, § 75; *Powell and Rayner*, cited above, § 44; and *Hatton and Others*, cited above, § 100). In particular, in respect of 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 *Hatton and Others*, cited above, § 97; and *James and Others*, cited above, § 46). As regards social and economic policies, the Court has indicated that it will respect the legislature’s assessment as to what is in the “public” or “general” interest unless that judgment is manifestly without reasonable foundation (see *Hutten-Czapska v. Poland* [GC], no. 35014/97, §§ 165-166, ECHR 2006-...; and *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-...).

61. Any interference with the enjoyment of a right or freedom recognised by the Convention must pursue a legitimate aim in the public interest and be proportionate to that aim (*Beyeler*, cited above, § 111; *Broniowski*, cited above, § 136; *Sporrong and Lönnroth*, cited above, § 69; and *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 75, ECHR 1999-III). In determining whether an interference with the peaceful enjoyment of property is compatible with Article 1 of Protocol No. 1, the Court must have regard to the various interests in issue (see *Beyeler*, cited above, § 114). Furthermore, in each case, the Court must also ascertain whether by reason of the State's action or inaction the applicants had to bear a disproportionate and excessive burden (see *Sporrong and Lönnroth*, cited above, § 73; and *Broniowski*, cited above, § 150). Finally, in assessing whether the balance struck by the respondent State was a fair one, the Court must have regard to the scope of the margin of appreciation available to the State when taking policy decisions in such cases (see *Hatton and Others*, cited above, § 122). As previously indicated, the State's margin of appreciation in the present case is a wide one and the Court's role in assessing the proportionality of the State's actions and/or inaction, as a consequence, is primarily a subsidiary one (see *Fadeyeva v. Russia*, no. 55723/00, § 105, ECHR 2005-IV).

2. Application of the general principles in the present case

a. Legitimate aim

62. As noted above (at paragraph 60), the Court will respect the respondent State's conclusion that construction of a second runway at Stansted Airport is in the general interest unless it can be shown that that judgment is manifestly without reasonable foundation. In this regard, the Court recalls its previous findings regarding the link between night flights and the benefit to the general economy of maintaining competitiveness (see *Hatton and Others*, cited above, §126). Similarly, in the present case, there are no grounds for concluding that the respondent State's assessment of the general interest lacked reasonable foundation. The Court therefore considers that the proposed development pursued a legitimate aim.

b. Proportionality

63. The applicants argued that the Government failed to strike a fair balance between the legitimate aim and the effect of the development on the interests of neighbouring property owners. They alleged in particular that the Government had not respected the balance which they set out in their White Paper; that the failure to make provision for compensation meant that no fair balance could be said to have been struck; and that the absence of any flexibility in the scheme rendered it disproportionate.

64. The Convention organs have previously concluded that, unlike in the case of a deprivation of possessions, there is not necessarily a right to compensation where measures are adopted to control the use of property (see *Banér v. Sweden*, no. 11763/85, Commission decision of 9 March 1989, unreported). Similarly, the Court considers that the broad right to peaceful enjoyment of property does not generally require that compensation be available to all those who have suffered an interference with that right. However, this does not exclude that the law may provide for compensation in cases where an interference may have severe economic consequences to the detriment of the property owner. Accordingly, when assessing proportionality under the general rule on the right to peaceful enjoyment of possessions, it is of relevance whether compensation is available and to what extent a concrete economic loss was caused by the legislation or the absence thereof (see *Banér*, cited above; *Sporrong and Lönnroth*, cited above, § 73; and *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 94, ECHR 2005-VI). In this regard, the Court emphasises that, because of its direct knowledge of the society's needs and resources, the legislature's judgment as to the types of losses for which compensation will be offered will in principle be respected unless it is manifestly arbitrary or unreasonable (see *C.E.M. Firearms Limited and Others v. the United Kingdom* (dec.), no. 37674/97 and 37677/97, 26 September 2000); and *Chassagnou*, cited above, § 75).

65. The Court notes that the HOSS established a scheme whereby those worst affected by generalised blight were entitled to compensation and other assistance in selling their properties. The contour line was fixed on the basis of objective research. A second scheme, the SCS, ensured that those who suffered from a medical condition which made it necessary for them to relocate and who were unable to sell their properties for a sum within 15 per cent of the market value were provided with assistance to relocate. While the level of 57 dBA Leq16 hour considered by the Government as marking the onset of significant community annoyance may well be significant in the assessment of those who ought to be assisted through the provision of acoustic insulation or compensation once the new runway is in operation, the Court does not consider it determinative for the assessment of whether the property is affected by generalised blight to the degree that the Government should ensure that compensation is available. The Court further observes that legislation provides for statutory compensation once planning permission has been awarded. The legislature has therefore determined that a broad statutory entitlement to compensation should only arise where the planned development is sufficiently certain and should not extend to the period where the development is a mere proposal. In so doing, the Court does not find that the legislature has acted in a manifestly arbitrary or unreasonable manner such that it has exceeded its margin of appreciation and failed to strike a balance between the competing interests at play.

66. As regards the alleged lack of flexibility in the HOSS, the Court notes that the parallel SCS imported an element of flexibility in the application of the 66 Leq contour line by allowing a category of individuals with a special demonstrated need to benefit from the assistance available. The Court is sympathetic to the applicants who, in light of their residence just outside the 66 Leq boundary, are unable to benefit from assistance which is available to neighbours resident within that boundary. However, the Court does not consider that the absolute nature of the rule and the absence of discretion in its application is necessarily inconsistent with Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Twizell v. the United Kingdom*, no. 25379/02, § 24, 20 May 2008; and *Amato Gauci v. Malta*, no. 47045/06, § 71, 15 September 2009). In opting for an inflexible contour line, BAA Stansted pointed to the need for certainty and to avoid arbitrary application of the rules under the scheme. As the High Court pointed out, once the decision has been taken to compensate only the severely disadvantaged, the drawing of a contour line is a fair and efficient way of identifying such properties. The Court has previously emphasised the importance of ensuring legal certainty and avoiding problems of arbitrariness and inconsistency inherent in weighing interests on a case by case basis (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 89, ECHR 2007-....). Accordingly, the Court, like the High Court, does not consider that the use of a non-flexible noise contour is disproportionate in light of the need to set boundaries for the awarding of compensation.

67. Finally, the Court observes that the applicants have not attempted to sell their properties. The hypothetical nature of any loss which would potentially be suffered by them were they to seek to do so cannot be considered to constitute a disproportionate and excessive burden which would weigh in favour of their individual interests and against the general interest of the community in the development plans in the present case.

68. In the circumstances, and in light of the State's wide margin of appreciation in this field, the Court considers that the authorities did not exceed their margin of discretion in endorsing the plans for a second runway at Stansted Airport or in failing to put in place a mandatory compensation scheme for all those affected by generalised blight. The solution adopted strikes a fair balance between individuals whose property values may have been affected by airport expansion and the conflicting interests of BAA Stansted, the applicants and the community as a whole.

69. The applicants' complaint under Article 1 of Protocol No. 1 of the Convention is therefore manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TOGETHER WITH ARTICLE 14

70. The applicants claim to have been victims of discrimination in the enjoyment of their possessions, in that their residence outside the 66 Leq contour line rendered them ineligible for compensation and assistance under the HOSS while those resident inside the scheme were eligible. They alleged a breach of Article 1 of Protocol No. 1 together with Article 14, which provides that:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

1. General principles

71. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14 (*Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56, Series A no. 23). Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007; and *Burden v. the United Kingdom*, cited above, § 60). Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Burden v. the United Kingdom*, cited above, § 60). The scope of this margin will vary according to the circumstances, the subject-matter and the background. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation” (*Stec and Others v. the United Kingdom*, [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006).

2. Application of the general principles in the present case

72. The High Court considered that Article 14 was not engaged as, in its view, the scheme did not discriminate between individuals and groups on the basis of personal characteristics.

73. The Court recalls that it has previously found categories of property owners (see *James and Others*, cited above, § 74; and *Jahn*, cited above, 121) to constitute “other status” for the purposes of Article 14. Accordingly, the Court is content to proceed on the basis that Article 14 is engaged in the present case.

74. As noted above (paragraph 71), in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in relevantly similar situations. It is thus clear that discrimination under Article 14 involves a failure to treat like cases alike and that there can be no discrimination where cases are relevantly different.

75. The applicants contend that they are in a relevantly similar position to those resident within the 66 Leq contour line. However, the Court observes that the contour line was intended to include within it those most seriously disadvantaged, in terms of their ability to sell their properties, by the prospect of the second runway at Stansted Airport. Those most seriously disadvantaged are identified by considering which property owners would suffer most from increased noise pollution were the second runway to come into operation. A noise contour line appears to be a reasonable means of identifying the persons concerned. The Court is therefore hesitant to find an analogy between the position of the applicants, who live outside the line selected, and those who live within it.

76. In any event, even if the applicants could be said to be in an analogous position to residents inside the contour line, the Court considers that the difference in treatment has objective and reasonable justification. The applicants’ complaint must be examined in light of the Court’s finding under Article 1 of Protocol No. 1 that the scheme adopted by BAA Stansted and the absence of legislation establishing a mandatory scheme covering all individuals whose property values suffered from generalised blight struck a fair balance between the competing rights and interests of the parties involved. The selection of a contour line was a fair and reasonable way of defining eligibility for the scheme and, as the Court has reiterated above, the fact that the rule adopted was absolute did not necessarily render it disproportionate. The Court concludes that in view of the legitimate objectives being pursued in the general interest and having regard to the respondent State’s margin of appreciation, the policy of different treatment cannot be considered as unreasonable or as imposing a disproportionate burden on the applicants.

77. It follows that the complaint under Article 14, taken together with Article 1 of Protocol No. 1 is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 6

78. The applicants complain that the refusal of the domestic courts to make a protective costs order (“PCO”) breached their right of access to court under Article 6, which provides insofar as relevant as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

79. The Court observes that only Mr Allen was a party to the domestic proceedings. Furthermore, the Court notes that Mr Allen was indemnified by Takeley Parish Council in the domestic proceedings and that, as a result, he was not exposed to costs liability in the domestic proceedings. However, it is clear that the decision not to make a PCO, and the subsequent decision by Takeley to withdraw from the proceedings, had an impact on the applicant’s ability to continue with his judicial review application. Accordingly, the Court must consider whether the refusal of the domestic courts to make a PCO violated Mr Allen’s right of access to court.

80. The Court reiterates at the outset that the right of access to Court is not absolute. Limitations on the right can be justified where they pursue a legitimate aim and are not so wide ranging as to impair the very essence of the right of access to court (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93; and *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 50, Reports 1996-IV).

81. The Court considers that the general approach adopted in the United Kingdom whereby the unsuccessful party bears the costs of the successful party pursues a legitimate aim – namely, to provide a disincentive for unmeritorious applications and to protect a successful party which has been required to spend money in order to assert its claim or defend its position. The Court must therefore consider whether the refusal to make a PCO in the present case impaired the very essence of Mr Allen’s right of access to court.

82. The Court recalls that in assessing whether there has been a restriction on the right of access to court, account must be taken of the entirety of the proceedings in the domestic legal order. The Court’s task is not to substitute its own views for those of the competent British authorities in determining the most appropriate policy for regulating access to the court in judicial review proceedings, nor to assess the facts which led that court to adopt one decision rather than another. The Court’s role is to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see, *inter alia*, *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 59, Series A no. 316-B).

83. In this regard, the Court observes that the application for leave to seek judicial review was considered on the papers and arguments were heard at an oral hearing before the High Court, at which the claimants were able to make and develop their arguments in support of their application. At

the conclusion of that hearing, the judge found that no arguable case was made out. The claimants' appeal was subsequently considered on the papers by the Court of Appeal, where it was referred to a further oral hearing, despite the judge's doubts about the prospects of success.

84. Moreover, although the claimants were potentially exposed to liability for costs in any oral hearing before the Court of Appeal, the Court notes that in making the order for costs in respect of the earlier stages of proceeding, the judge had limited the costs awarded against Takeley in light of submissions from counsel, and that no costs were awarded in respect of the oral hearing. The Court also considers it significant that in respect of the complaint against the Secretary of State for Transport, which forms the basis of the present application, costs were limited to GBP 1,000 in the High Court proceedings. The Court observes that the applicants provided no evidence that Mr Allen sought legal aid to bring the judicial review proceedings.

85. As to the complaint that the domestic courts refused to consider the claimants' request for a PCO, the Court notes that the claimants lodged a detailed witness statement by their solicitor setting out in writing their arguments as to why such an order would be appropriate in their case. It was not disproportionate, in light of the High Court's decision to refuse permission to bring the proceedings, that the court declined to hear oral argument on whether a PCO would be appropriate. Waller LJ's confirmation by letter of 12 October 2006 that he would not make a protective costs order was not an order of the court and the applicants have not satisfied this Court that a subsequent request for a PCO, particularly had leave to bring the proceedings been granted by the Court of Appeal, would not have been considered by the domestic courts.

86. In light of the foregoing, and taking into account the proceedings as a whole, the Court does not consider that the failure of the court to make a PCO or to allow Mr Allen to develop, in the context of an oral hearing regarding permission to seek judicial review, his arguments in favour of the making of a PCO impaired the very essence of Mr Allen's right of access to court.

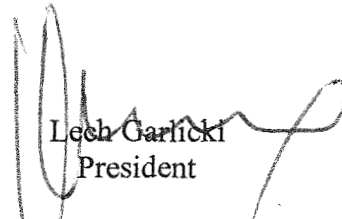
87. The Court therefore finds the complaint under Article 6 § 1 of the Convention to be manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be rejected under Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.



Fatoş Aracı
Deputy Registrar



Lech Garlicki
President

