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Human Rights and More Runways: Don't Sleep on Your Rights, if You Claim the Right to Sleep

By Piers Gardner
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The Government's six Regional Consultation Papers published on Wednesday address the expected increase in demand for passenger flights and the resulting increase in size of airports, number of runways and total flight movements; they predict an eighty percent rise in passenger movements at Heathrow alone by 2030, with over 500 extra flights per day.

Unless extra flight frequency, and shorter allocated slots, are to absorb the whole increase, this prediction must imply more night flights, and so more sleep disturbance for those living in the flight paths, which will widen further with additional runways.

Less widely read than these predictions may be the Government's submissions to the European Court of Human Rights, due on Wednesday 31 July 2002, in the case of *Hatton and others v UK*, concerning noise nuisance from night flights at Heathrow between 1993 and 1997. This is one legal destination worth revisiting.

Mrs Hatton and seven others complained that the noise from night flights at Heathrow made sleep impossible and so badly interfered with their lives that their right to respect for "home and private life" protected by the European Convention on Human Rights was breached. The complaint was upheld by a Chamber of the Court in Strasbourg on 2 October last year, in a decision described as establishing the right to a "good night's sleep".

The Government is appealing that decision, the first time that such an appeal has ever been made by the UK, so a Grand Chamber of the European Court of Human Rights, consisting of twenty (seventeen judges and three substitutes) will decide whether night flight noise nuisance gives a right to compensation following a hearing on 13 November 2002.This delay of more than a year after the original decision, not only delays payment of the £4000 compensation plus costs which the Chamber awarded to Mrs Hatton and each of the other applicants; in addition it raises a tricky procedural problem for any other would be claimants under the limitation provisions of the HRA.

Since the *Hatton* case was brought, the Human Rights Act has introduced the opportunity for "Hattton claims" before the English (and Scottish) courts. Mrs Hatton and the other applicants were able to argue in Strasbourg that they had no domestic remedies to

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exhaust, before lodging their European applications. Local authorities had challenged the night flying regulations by judicial review on narrow rationality grounds, but failed (*R. v. Secretary of State for Transport, ex parte Richmond LBC* [1996] 1 WLR 1460). Now, under the HRA, anyone who can claim to be a "victim" of a breach of the right to "respect" for their home and private life, which is the HRA Convention right at issue, can bring a claim.

The shift in claimant is significant. Local authorities may struggle to fulfil the victim requirement, whereas anyone whose sleep is affected may have an HRA claim. Individuals may be less willing or able to take on the litigation burden, but, as section 8 HRA gives a potential claim to damages, which *Hatton* underlines, individuals can better show loss than a local authority and so be more appropriate claimants.

The *Hatton* criteria for recovery appear generous, even if the quantum is modest. The critical feature of the first instance judgment is its emphasis on the inadequate material available on which to assess the Government's contention that night flights represented an important economic benefit, outweighing the noise nuisance disamenity to the applicants. Future HRA claims will have to develop procedures for litigating these issues as well as more familiar problems, such as remoteness criteria and whether claimants can recover for special damage.

More difficult to determine is the policy question, how the "polluter pays" approach is to be reconciled with the structure of the HRA. Applying *Hatton* as matter of economics, under the "polluter pays" approach, those authorising night flights must pay compensation to those affected, and may then carry on authorising the polluting. However, section 6(1) HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right; this may mean that a public authority could not authorise such flights, even if it were prepared to compensate those affected who complained about them.

Before these questions are resolved, HRA claimants following *Hatton* will need to remember the one year maximum limitation period under the HRA. Although the outcome of the appeal may be uncertain and will remain open beyond 1 October 2002, for the present, Hatton is an authority to which the English courts should have regard under Section 2(1) HRA.

Claimants will do well not to sleep on their rights.

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