Help

Because of the difficulties involved in the application of the necessity/proportionality test, in its different variants outlined previously, there has been a tendency in human rights monitoring to focus, less on the substance of the restrictive measures adopted, and more on the procedure through which the choice was made.

Consider, for instance, the case of *Hatton and others v. United Kingdom* before the European Court of Human Rights, in which the applicants challenged the implementation in 1993 by the British authorities of the new scheme for regulating night flights at Heathrow airport in London. With a view to striking a balance between the activity of Heathrow airport and the need to limit disturbances to the population residing in the area, the new scheme gave aircraft operators a choice, through a quota count, as to whether to fly fewer noisier aircraft, or fly more often, but with more silent aircraft. The 1993 scheme accepted the conclusions of a 1992 sleep study that found 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 2–3 per cent) were more sensitive than others. On this basis, disturbances caused by aircraft noise were regarded as negligible in relation to overall normal disturbance rates.

No one contested that the new 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 (respect for the home, respect for private and family life) protected by Article 8 of the European Convention on Human Rights. But was the restriction acceptable? Did it remain within the limits of what is "necessary in a democratic society" for the "economic well-being of the country", as prescribed under Article 8, para. 2, of the European Convention?

In a judgment of 8 July 2003, the Grand Chamber of the Court answers that it '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' (para. 104). It continued :

128. On the procedural aspect of the case, the Court notes that a governmental decisionmaking 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 [an association of inhabitants of the Heathrow Airport region], 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.

Help

This approach substitutes a **procedural test**, asking *who* was consulted, through *which means*, and *who could voice concerns* or make suggestions, to a **substantive test**, "second-guessing" whether the restrictive measures are sound.

Is this an appropriate approach? What are the advantages and disadvantages to this "procedural" approach? Does it make the work of human rights bodies easier? If so, is this at the cost of a robust protection of individuals' human rights? And what are the implications of this test on the relationship between the protection of human rights and democracy?

Please share your views with the other participants in the forum below.

INSTRUCTIONS: In responding to the above questions, **DO NOT click on 'New Post'**. Click on '**Show discussion**', and then, in the first discussion thread, called **'[3.5.3] Airport Nuisance and the necessity test - Debate!'**, click on '**View discussion**' and then on '**Add a response**' to propose your views to the community. If you want to comment on a peer's opinions in that thread then click on '**Add a comment**' in his response. You can also watch the tutorial (http://youtu.be/SINSJKdez6g) (see also, the updated (http://youtu.be/TNoOB8q19kQ) version) in order to make the best use of the interface.

Show Discussion

New Post

COMPLETION CHECKBOXES (1/1 point)

- [x] I have read the excerpts from the European Court judgment and participated in the discussion forum.

Check Hide Answer(s)