In the case of Air Canada v. the United Kingdom (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr F. Gölcüklü,
Mr F. Matscher,
Mr B. Walsh,
Mr C. Russo,
Mr A. Spielmann,
Mr S.K. Martens,
Mr R. Pekkanen,
Sir John Freeland,

and also of Mr H. Petzold, Registrar,

Having deliberated in private on 23 November 1994 and 26 April 1995,

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

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Notes by the Registrar

1. The case is numbered 9/1994/456/537. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 March 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 18465/91) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Air Canada, a company incorporated under Canadian law and registered as an overseas company in the United Kingdom, on 2 May 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 (art. 6) of the Convention and Article 1 of Protocol No. 1 (P1-1) to the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that it wished to take part in the proceedings and designated the lawyers who would represent it (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 March 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr F. Matscher, Mr B. Walsh, Mr C. Russo, Mr A. Spielmann, Mr S.K. Martens and Mr R. Pekkanen (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence on 11 May 1994, the Registrar received the applicant's memorial on 29 August 1994 and the Government's memorial on 2 September 1994. On 6 October 1994 the Secretary to the Commission indicated that the Delegate would submit his observations at the hearing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 November 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr M.R. Eaton, Foreign and Commonwealth Office, Agent,
Mr D. Pannick, QC, Counsel,
Mr M. Maynard, HM Customs and Excise,
Mr W. Parker, HM Customs and Excise, Advisers;

(b) for the Commission

Sir Basil Hall, Delegate;

(c) for the applicant

Mr R. Webb, QC, Counsel,
Mr D. Clark, Solicitor.

The Court heard addresses by Sir Basil Hall, Mr Webb and Mr Pannick and also replies to questions put by the President and another judge.

AS TO THE FACTS

I. Particular circumstances of the case

A. Background to litigation

6. Between 1983 and 1987 a number of incidents gave rise to concern over the adequacy of the applicant company's security procedures at Heathrow Airport, London:

(1) Between November 1983 and September 1984 a series of consignments, believed by Customs and Excise to have contained drugs, disappeared from the Air Canada transit shed.

(2) In March 1986 809 kilograms of cannabis resin were discovered in a consignment from India (New Delhi).

(3) In May 1986 a consignment from Thailand which had been taken out of the controlled area, was intercepted and found to contain 300 kilograms of cannabis resin. Two Air Canada staff were subsequently convicted of offences connected to the importation of

cannabis resin.

(4) On 11 June 1986 Customs and Excise wrote to the applicant company's Cargo Terminal Manager expressing concern about the large quantities of drugs being smuggled into the country with the assistance of Air Canada staff. In its reply Air Canada promised to improve its security.

(5) On 15 December 1986 Customs and Excise wrote to all airline operators at Heathrow and Gatwick warning them about the possible penalties if illegal imports were discovered aboard their aircraft. The letter stated, inter alia, that where an aircraft was used for the carriage of anything liable to forfeiture the Commissioners "will consider exercising their powers under the law, including the seizure and forfeiture of aircraft or the imposition of monetary penalties in lieu of such forfeiture".

(6) On 31 December 1986 Customs and Excise wrote again to the applicant company informing it that £2,000 would be deducted from Air Canada's bond pursuant to section 152 of the Customs and Excise Management Act 1979 ("the 1979 Act") for earlier breaches of security.

(7) Between November 1986 and January 1987 another consignment was removed from the Air Canada transit shed without proper authority and the applicant company failed to inform Customs and Excise for a considerable time. It was decided to deduct £5,000 from Air Canada's bond.

B. Discovery of consignment of cannabis resin

7. On 26 April 1987 a Tristar aircraft owned and operated by the applicant company and worth over £60 million, landed at Heathrow Airport, London, where it discharged cargo including a container which, when opened, was found to contain 331 kilograms of cannabis resin valued at about £800,000. The airway bill number of the container was false, the applicant company's cargo computer did not hold any details of the consignment and no airway bill had been drawn up and despatched for it.

The aircraft was on a regular scheduled flight starting in Singapore and travelling to Toronto landing en route at Bombay and Heathrow. It was carrying both fare-paying passengers and cargo.

C. Action of the Customs and Excise Commissioners

8. On the morning of 1 May 1987 officers of the Commissioners of Customs and Excise ("the Commissioners") acting under powers conferred by section 139 (1) of the 1979 Act seized the aircraft as liable to forfeiture under section 141 (1) of the same Act. Passengers were waiting to board the aircraft.

9. On the same day the Commissioners, acting under powers contained in section 139 (5) and paragraph 16 of Schedule 3 to the 1979 Act, delivered the aircraft back to the applicant company on payment of a penalty, namely a bankers' draft for £50,000.

10. No reasons were given to the applicant company at the time for the decision either to seize the aircraft or to levy the penalty. It was only during the course of proceedings before the European Commission of Human Rights that the Government offered the earlier security problems (see paragraph 6 above) as an explanation for the actions of the Commissioners.

D. Proceedings before the High Court

11. On 20 May 1987 the applicant company gave notice of a claim disputing that the aircraft was liable to forfeiture. The

Commissioners therefore brought condemnation proceedings before the court to confirm, inter alia, that the aircraft was liable to forfeiture at the time of seizure in accordance with paragraph 6 of Schedule 3 (see paragraph 18 below).

12. On 18 June 1988 an order was made by a Master of the High Court with the consent of the parties that the preliminary issues to be decided were as follows:

> "(1) Whether the facts that (a) cannabis resin was found in container ULD6075AC; and (b) that container had been carried by aircraft on Flight AC859 on 26 April 1987, alone constitute 'use of the aircraft for the carriage of a thing liable to forfeiture' within the meaning of section 141 (1) (a) of the Customs and Excise Management Act 1979, such as to justify its subsequent seizure on 1 May 1987;
>
> (2) Whether it is a defence to the Plaintiffs' [the Commissioners] claim in this action if the Defendants establish that they did not know that the aforesaid container contained cannabis resin and were not reckless in failing so to discover;
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> (3) Whether it is a defence to the Plaintiffs' claim in this action if the Defendants establish that they could not with reasonable diligence have discovered that cannabis had been secreted and hidden or was being carried in the container, nor could they by the exercise of reasonable diligence have prevented its being secreted and hidden in the container;
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> (4) Whether it is necessary for the Plaintiffs to prove in this action:
>
> > (i) that the Defendants knew or ought to have known that cannabis resin was on board the aircraft on 26 April 1987; and/or
> >
> > (ii) that the aircraft was on other than a regular scheduled and legitimate flight."

13. On 7 November 1988 giving judgment in the High Court ([1989] 2 Weekly Law Reports 589), Mr Justice Tucker concluded:

> "I cannot think that the draughtsman of the 1979 Act had the present situation in mind. I cannot believe that it was the intention of Parliament that the innocent and bona fide operator of an extremely valuable aircraft on an international scheduled flight should be at risk of having the aircraft forfeited if, unknown to him and without any recklessness on his part, some evil-minded person smuggles contraband or prohibited goods aboard the aircraft."
>
> He answered the preliminary questions as follows:
>
> "1. No. Those facts alone do not constitute 'use of the aircraft for the carriage of a thing liable to forfeiture'.
>
> 2. Yes. It is a defence.
>
> 3. Yes. It is a defence.
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> 4. It is necessary for the Plaintiffs to prove in this action:
>
> > (i) that the defendants knew or ought to have known that cannabis resin was on board the aircraft on 26 April 1987; or (but not and)
> >
> > (ii) that the aircraft was on other than a regular

scheduled and legitimate flight."

E. Proceedings before the Court of Appeal

14. On 14 June 1990 the Court of Appeal overruled the decision of the High Court (Customs and Excise Commissioners v. Air Canada, [1991] 2 Queen's Bench Division 446). Lord Justice Purchas stated as follows (at pp. 467-68):

> "The wording of section 141 is, in my view, clear and unambiguous and does not permit of any implication or construction so as to import an element equivalent to mens rea [criminal intent] nor does it involve in any way any person in the widest sense whether as user, proprietor or owner but depends solely on 'the thing' being used in the commission of the offence which rendered the goods liable to forfeiture ... In my judgment the mitigating provisions included in section 152 and paragraph 16 of Schedule 3, indicate clearly that Parliament intended to trust to the Commissioners the exercise of these matters of discretion. Apart from this the exercise of this discretion will be readily open to review by the court under R.S.C. Order 53 ... I would only comment that there may well be a case to exclude inter-continental or large passenger jet aircrafts flying on scheduled flights from section 141 (1) in the same way as vessels over a certain size have been excluded and to provide for them in section 142 ..."

The preliminary questions were answered as follows:

1. Yes
2. No
3. No
4. No

15. Although the Court of Appeal condemned the aircraft as forfeited this did not have the effect of depriving Air Canada of ownership since it had paid the sum required for the return of the aircraft (see Schedule 3, paragraph 7 at paragraph 19 in fine below).

16. In the course of his judgment Lord Justice Purchas added (at pp. 464 and 467):

> "Mr Webb, for Air Canada, relying upon the above authorities, made the following submissions ... that in effect if not in form section 141 was a criminal provision under which severe penalties could in practice be inflicted upon the owner or proprietor of vessels, particularly large aircraft and that, therefore, under the authorities just cited there should be implied in the terms of that section a requirement that the Commissioners must establish in their condemnation proceedings knowledge of some sort in the airline by their servants or agents so as to comply with the presumption of mens rea in criminal provisions.
>
> ...
>
> In my judgment, the answer to this submission which demonstrates its fallacy is that the process which is invoked as a result of sections 141 (1), 139 and Schedule 3 is by description a civil process. This of itself would not, if all other matters militated to the contrary, prevent it from being in its nature a criminal provision. Mere words would not necessarily be conclusive although the procedure in the civil courts outlined in Schedule 3 must carry considerable weight. The matter is, however, put beyond argument by the earlier cases ... [which decide that] section 141 and its predecessor sections in the 1952 Act and the 1876 Act provided a process in rem against any vehicle, container or similar article which was in fact used in

the process of smuggling ..."

In their judgments, Lord Justice Balcombe and Sir David Croom-Johnson agreed that section 141 (1) did not create a criminal offence (at pp. 468 and 469).

17. Leave to appeal to the House of Lords was refused by the Court of Appeal on that occasion and on 7 November 1990 by the House of Lords.

II. Relevant domestic law and practice

A. Customs and Excise Management Act 1979

18. Liability to forfeiture

Section 141 (1)

"... where any thing has become liable to forfeiture under the Customs and Excise Acts -

(a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purpose of the commission of the offence for which it later became so liable; ... shall also be liable to forfeiture."

Schedule 3, paragraph 6

"Where notice of claim in respect of any thing is duly given in accordance with [paragraphs 3 and 4 above] the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited."

19. Powers of Commissioners after seizure

Section 139 (5)

"Subject to subsections (3) and (4) and to Schedule 3 to [the] Act any thing seized or detained under the Customs and Excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct."

Section 152

"The Commissioners may, as they see fit -

(a) stay, sist or compound any proceedings for an offence or for the condemnation of any thing as being forfeited under the Customs and Excise Acts; or

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts; or

(c) after judgment mitigate or remit any pecuniary penalty imposed under those Acts ..."

Schedule 3, paragraph 16

> "Where any thing has been seized as liable to forfeiture the Commissioners may at any time if they see fit and notwithstanding that the thing has not yet been condemned, or is not yet deemed to have been condemned, as forfeited -
>
> > (a) deliver it up to any claimant upon his paying to the Commissioners such sum as they think proper, being a sum not exceeding that which in their opinion represents the value of the thing, including any duty or tax chargeable thereon which has not been paid ..."

Schedule 3, paragraph 7

> "Where any thing is in accordance with either of paragraphs 5 or 6 above condemned or deemed to have been condemned as forfeited, then, without prejudice to any delivery up or sale of the thing by the Commissioners under paragraph 16 ..., the forfeiture shall have effect as from the date when the liability to forfeiture arose."

B. Judicial review

20. The exercise of the powers conferred on the Commissioners of Customs and Excise are subject to judicial review. The three traditional grounds for judicial review as described by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service ([1985] Appeal Cases 375 (House of Lords)) are illegality, irrationality and procedural impropriety.

"Illegality" means that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

"Irrationality" or what is often also referred to as "Wednesbury unreasonableness" applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

"Procedural impropriety" covers failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision, as well as failure to observe procedural rules that are expressly laid down even where such failure does not involve any denial of natural justice.

21. In the case of R. v. Secretary of State for the Home Department, ex parte Brind ([1991] 1 Appeal Cases 696) the House of Lords held that lack of proportionality is not normally treated as a separate ground of review under English administrative law.

Lord Ackner, while considering that an administrative decision which suffered from a total lack of proportionality would be unreasonable in the Wednesbury sense, indicated that until Parliament incorporates the Convention into domestic law, there was no basis at present upon which the proportionality doctrine applied by the European Court of Human Rights could be followed by the courts of the United Kingdom (at pp. 762-63).

Lord Lowry (at p. 767) cited with approval the following statement from Halsbury's Laws of England (vol. 1 (1) at paragraph 78):

> "Proportionality: The courts will quash exercises of discretionary power in which there is not a reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of

proportionality is well established in European law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground of review in English law, but is regarded as one indication of manifest unreasonableness."

22. Judicial review proceedings in respect of decisions of the Commissioners have been brought in two cases. In R. v. Commissioners of Customs and Excise, ex parte Haworth (judgment of 17 July 1985), the High Court found that the Commissioners had acted unreasonably in that they had failed to give the owner of goods seized in a smuggling attempt the necessary information about matters held against him and no opportunity to reply thereto.

Similarly in R. v. Commissioners of Customs and Excise, ex parte Tsahl (judgment of 11 December 1989), the High Court required the Commissioners to take as the date of valuation of diamonds which they had seized, for the purpose of determining the amount of the payment for their return, the date of return rather than the date of import.

PROCEEDINGS BEFORE THE COMMISSION

23. The applicant company lodged its application (no. 18465/91) with the Commission on 2 May 1991. The applicant company complained that the seizure of its aircraft and its subsequent return on conditions, violated its right to peaceful enjoyment of its possessions as guaranteed by Article 1 of Protocol No. 1 (P1-1). It further alleged that the proceedings involved did not comply with the requirements of Article 6 para. 1 (art. 6-1) of the Convention.

24. The Commission declared the application admissible on 1 April 1993. In its report of 30 November 1993 (Article 31) (art. 31), the Commission expressed the opinion that there had been no violation of Article 1 of Protocol No. 1 (P1-1) (nine votes to five) and that there had been no violation of Article 6 (art. 6) (eight votes to six).

25. The full text of the Commission's opinion and of the dissenting opinions contained in the report is reproduced as an annex to this judgment (1).

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1. Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 316-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS BY THE GOVERNMENT TO THE COURT

26. The Government, in their memorial, requested the Court to decide and declare that the facts disclose no breach of the applicant's rights under Article 1 of Protocol No. 1 and Article 6 (P1-1, art. 6) of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

27. The applicant company complained that the seizure of its aircraft and the subsequent requirement to pay £50,000 for its return amounted to an unjustified interference with the peaceful enjoyment of its possessions contrary to Article 1 of Protocol No. 1 (P1-1) to the Convention which reads:

"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."

28. It is not in dispute between those appearing before the Court that the matters complained of constituted an interference with the peaceful enjoyment of the applicant's possessions. However there was disagreement as to whether there had been a deprivation of property under the first paragraph (P1-1) or a control of use under the second paragraph (P1-1).

A. The applicable rule

29. The Court recalls that Article 1 (P1-1) guarantees in substance the right of property and comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph (P1-1) and is of a general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph (P1-1), covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph (P1-1), recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

30. However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among many other authorities, the AGOSI v. the United Kingdom judgment of 24 October 1986, Series A no. 108, p. 17, para. 48).

31. The applicant considered that it had been deprived of its aircraft albeit for a temporary period and, subsequently, as a permanent measure, of the £50,000 that it was required to pay as a condition for the return of its property. There had thus been a deprivation of possessions.

32. For the Government, with whom the Commission agreed, this was not a case involving a deprivation of property since no transfer of ownership of the applicant's aircraft had taken place. The seizure and demand for payment were to be seen as part of the system for the control of the use of an aircraft which had been employed for the import of prohibited drugs.

33. The Court is of the same view. It observes, in the first place, that the seizure of the aircraft amounted to a temporary restriction on its use and did not involve a transfer of ownership, and, in the second place, that the decision of the Court of Appeal to condemn the property as forfeited did not have the effect of depriving Air Canada of ownership since the sum required for the release of the aircraft had been paid (see paragraph 15 above).

34. In addition, it is clear from the scheme of the legislation that the release of the aircraft subject to the payment of a sum of money was, in effect, a measure taken in furtherance of a policy of seeking to prevent carriers from bringing, inter alia, prohibited drugs into the United Kingdom. As such, it amounted to a control of the use of property. It is therefore the second paragraph of Article 1 (P1-1) which is applicable in the present case (see, mutatis mutandis, the above-mentioned AGOSI judgment, p. 17, para. 51).

B. Compliance with the requirements of the second paragraph

35. It remains to be decided whether the interference with the applicant's property rights was in conformity with the State's right under the second paragraph of Article 1 of Protocol No. 1 (P1-1) "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest".

36. According to the Court's well-established case-law, the second paragraph of Article 1 (P1-1) must be construed in the light of the principle laid down in the Article's (P1-1) first sentence (see, as the most recent authority, the Gasus Dosier- und Fördertechnik GmbH v. the Netherlands judgment of 23 February 1995, Series A no. 306-B, p. 49, para. 62). Consequently, an interference must achieve 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. The concern to achieve this balance is reflected in the structure of Article 1 (P1-1) as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued.

37. In this regard the applicant considered that the interference with its property rights was not justified under Article 1 of Protocol No. 1 (P1-1). In the first place, it complained that the power to forfeit the aircraft and to require payment as a condition of its return did not depend on showing that the owner, operator or airline was in some way at fault. Indeed it pointed out that the proceedings brought before the United Kingdom courts were conducted on agreed assumptions predicated, in effect, on the fact that Air Canada had not been at fault.

Secondly, the relevant powers were exercised without a hearing before a judicial body. In particular, there existed no adequate legal safeguards to protect Air Canada from the exercise of discretion by Customs and Excise officials.

Thirdly, the temporary seizure of the aircraft was disproportionate to any wrong that might have been done, as was the requirement to pay £50,000.

38. For the Government, there were strong public interest reasons justifying the actions of the Commissioners in the present case. There had been previous occasions when inadequate Air Canada procedures had led to the carriage of dangerous drugs. Despite promises to improve their procedures they had failed to do so. The events leading to the seizure of the aircraft had involved very serious lapses in security (see paragraph 6 above). Moreover, it was noteworthy that following the events at issue there had been no further security problems with Air Canada. The Commissioners had thus acted within the margin of appreciation conferred on them by the second paragraph of Article 1 of Protocol No. 1 (P1-1) in order to encourage the adoption of higher security standards by the applicant company.

In addition, it would have been open to Air Canada, if it believed that there was no reasonable basis for the decision to require the payment of money or that there had been an abuse of power, to challenge the exercise of the Commissioners' discretion by instituting proceedings for judicial review. Had Air Canada done so the courts could have examined any disputed questions of fact as well as points of law. Moreover the Commissioners, on the basis of the existing law (see paragraphs 20-22 above), would have been obliged to provide reasons for their actions.

In sum, in the Government's submission, a fair balance had been struck in the present case.

39. The Commission also considered that judicial review proceedings could have been brought and that the actions taken were proportionate to the aim of controlling the use of aircraft involved in the importation of prohibited drugs.

40. The Court first observes that it is clear from the decision of the Court of Appeal that both the seizure of the aircraft and the requirement of payment, in the absence of any finding of fault or negligence on the part of the applicant, were in conformity with the relevant provisions of the 1979 Act (see paragraphs 18-19 above).

41. While the width of the powers of forfeiture conferred on the Commissioners by section 141 (1) of this Act is striking, the seizure of the applicant's aircraft and its release subject to payment were undoubtedly exceptional measures which were resorted to in order to bring about an improvement in the company's security procedures. These measures were taken following the discovery of a container, the shipment of which involved various transport irregularities, holding 331 kilograms of cannabis resin (see paragraph 7 above). Moreover, this incident was the latest in a long series of alleged security lapses which had been brought to Air Canada's attention involving the illegal importation of drugs into the United Kingdom during the period 1983-87 (see paragraph 6 above). In particular, Air Canada - along with other operators - had been warned in a letter dated 15 December 1986 from the Commissioners that, where prohibited goods have been carried, they would consider exercising their powers under the 1979 Act including the seizure and forfeiture of aircraft.

42. Against this background there can be no doubt that the measures taken conformed to the general interest in combating international drug trafficking.

43. The applicant, however, claimed that no reasons had been given by the Commissioners, at the time of the events complained of, to justify their actions and that they had been, in effect, judge and jury in their own cause. It was only in the course of the proceedings before the Commission that reference was made to earlier security shortcomings (see paragraph 10 above).

44. The Court cannot accept this submission. It notes that it would have been open to Air Canada to have instituted judicial review proceedings to challenge the failure of the Commissioners to provide reasons for the seizure of the aircraft or indeed to contend that the acts of the Commissioners constituted an abuse of their authority. Although not an appeal on the merits of the case, the availability and effectiveness of this remedy in respect of the exercise of discretion by the Commissioners under their statutory powers has already been noted by the Court in its AGOSI judgment (loc. cit., pp. 20-21, paras. 59-60).

Moreover, although the provision of reasons from the outset would have contributed to clarifying the situation, the applicant could not have been in any real doubt as to the reasons for the Commissioners' decision having regard to the numerous incidents concerning the various security lapses and irregularities which had occurred in the past (see paragraph 6 above) - which the applicant has not sought to deny in the proceedings before the Court - as well as the warning letter from the Commissioners which had been sent, inter alia, to Air Canada pointing out that forfeiture of an aircraft was a possibility (see paragraph 6 at point (5) above).

45. The applicant next contended that judicial review proceedings only enabled the courts to examine the "reasonableness" of the exercise of discretion. It pointed out that the courts have held that the principle of proportionality was not part of English law (see paragraph 21 above).

46. The Court recalls that on a previous occasion it reached the conclusion that the scope of judicial review under English law is sufficient to satisfy the requirements of the second paragraph of Article 1 of Protocol No. 1 (P1-1). In particular, it is open to the domestic courts to hold that the exercise of discretion by the Commissioners was unlawful on the grounds that it was tainted with illegality, irrationality or procedural impropriety (see paragraph 20 above and the above-mentioned AGOSI judgment, ibid.).

Furthermore, there have been cases in which the courts have found that the Commissioners had acted unreasonably in the exercise of their powers under the 1979 Act (see paragraph 22 above).

There is no reason to reach a different conclusion on this point in the present case notwithstanding the qualified exclusion of the proportionality principle as a separate ground of review (see paragraph 21 above).

47. Finally, taking into account the large quantity of cannabis that was found in the container, its street value (see paragraph 7 above) as well as the value of the aircraft that had been seized, the Court does not consider the requirement to pay £50,000 to be disproportionate to the aim pursued, namely the prevention of the importation of prohibited drugs into the United Kingdom.

48. Bearing in mind the above, as well as the State's margin of appreciation in this area, it considers that, in the circumstances of the present case, a fair balance was achieved. There has thus been no violation of Article 1 of Protocol No. 1 (P1-1).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

49. The applicant further complained that it was, in effect, subjected to a criminal penalty. In the alternative, the seizure of the aircraft amounted to a determination, without court proceedings, of the company's civil rights and obligations in breach of Article 6 para. 1 (art. 6-1), the relevant part of which reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

A. Applicability

1. Criminal charge

50. Air Canada considered that it had been, in effect, fined by the Commissioners and that neither the condemnation proceedings nor the theoretical possibility of judicial review satisfied the requirements of Article 6 para. 1 (art. 6-1).

51. The Government, on the other hand, with whom the Commission agreed, pointed out that under domestic law no criminal charges had been brought and that the criminal courts had not been involved in the matter.

52. The Court agrees with the Government's observation. It is also noteworthy that the Court of Appeal specifically rejected the argument made by counsel for Air Canada that section 141 of the 1979 Act was tantamount to a criminal provision (see paragraph 16 above). In this connection, the Court of Appeal pointed out that the description of the relevant provisions as being "civil" did not preclude it from finding that a provision was, in effect, "criminal" in nature. However, the matter was resolved with reference to earlier cases which decided that section 141 provided a process in rem against, inter alia, any vehicle used in smuggling.

The Court is, for the same reasons, similarly persuaded.

Moreover, the factors referred to above - the absence of a criminal charge or a provision which is "criminal" in nature and the lack of involvement of the criminal courts - taken together with the fact that there was no threat of any criminal proceedings in the event of non-compliance, are sufficient to distinguish the present case from that of Deweer v. Belgium (judgment of 27 February 1980, Series A no. 35) where the applicant was obliged to pay a sum of money under constraint of the provisional closure of his business in order to avoid criminal proceedings from being brought against him.

53. It is further recalled that a similar argument had been made by the applicant in the AGOSI case (loc. cit.). On that occasion the Court held that the forfeiture of the goods in question by the national court were measures consequential upon the act of smuggling committed by another party and that criminal charges had not been brought against AGOSI in respect of that act. The fact that the property rights of AGOSI were adversely affected could not of itself lead to the conclusion that a "criminal charge" for the purposes of Article 6 (art. 6), could be considered as having been brought against the applicant company (loc. cit., p. 22, paras. 65-66).

54. Bearing in mind that, unlike the AGOSI case, the applicant company had been required to pay a sum of money and that its property had not been confiscated, the Court proposes to follow the same approach.

55. Accordingly the matters complained of did not involve "the determination of [a] criminal charge".

2. Civil rights and obligations

56. It has not been disputed by those appearing before the Court that the present case concerns a dispute relating to the applicant company's civil rights.

On the basis of its established case-law the Court sees no reason to differ from this view (see, the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, para. 40).

B. Compliance with Article 6 para. 1 (art. 6-1)

57. The applicant further maintained that its civil rights and obligations had been determined by the procedures under the 1979 Act. It contended, in this respect also, that neither the condemnation proceedings nor the remedy of judicial review satisfied Article 6 para. 1 (art. 6-1). In particular, the proportionality of the measures complained of could not be examined in judicial review proceedings and the wider the statutory provisions under scrutiny the narrower the scope of review. Moreover the remedy was discretionary in nature.

58. In the Government's submission, the Commissioners could not forfeit the aircraft until they had taken condemnation proceedings in the High Court which the applicant had the opportunity to defend. Furthermore, it had the possibility to bring judicial review proceedings to challenge the decision to require the money payment for the return of the aircraft.

59. For the Commission, the applicant's complaint as regards the condemnation proceedings related more to the content of the rights and obligations under domestic law than to any procedural right in connection with the determination of civil rights. Further, as regards judicial review proceedings, it was not prepared to express a view in the abstract since no proceedings had actually been brought by Air Canada.

60. The Court notes that the applicant's complaint related to both the seizure of the aircraft and the payment of £50,000.

61. As regards the seizure, the relevant provisions of United Kingdom law required the Commissioners to take proceedings for forfeiture once the seizure of the aircraft had been challenged (see paragraphs 11 and 18 above). Such proceedings were in fact brought and, with the agreement of the parties, were limited to the determination of specified questions of law. In such circumstances, the requirement of access to court inherent in Article 6 para. 1 (art. 6-1) was satisfied.

62. Furthermore, it was also open to Air Canada to bring judicial review proceedings contesting the decision of the Commissioners to require payment as a condition for the return of the aircraft. As noted above (see paragraph 44 above), had such proceedings been brought, Air Canada could have sought to contest the factual grounds on which the exercise of discretion by the Commissioners was based. However, for whatever reason, such proceedings were not in fact instituted. Against this background, the Court does not consider it appropriate to examine in the abstract whether the scope of judicial review, as applied by the English courts, would be capable of satisfying Article 6 para. 1 (art. 6-1) of the Convention.

Conclusion

63. Accordingly, there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention.

FOR THESE REASONS, THE COURT

1. Holds by five votes to four that there has been no violation of Article 1 of Protocol No. 1 (P1-1);

2. Holds by five votes to four that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 5 May 1995.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Walsh;
(b) dissenting opinion of Mr Martens, joined by Mr Russo;
(c) dissenting opinion of Mr Pekkanen.

Initialled: R. R.

Initialled: H. P.

DISSENTING OPINION OF JUDGE WALSH

1. I regret that I find it necessary to disagree with the majority of the Court in this case.

2. So far as the applicant company's claim of a breach of Article 1 of Protocol No. 1 (P1-1) is concerned, the Court has decided that the relevant paragraph is the second paragraph of Article 1 (P1-1). Thus the Court is of the opinion that the United Kingdom

action in depriving Air Canada of the sum of £50,000 was justifiable under the Convention as a measure conforming to the "general interest in combating international drug trafficking". On the particular facts of the case the Court is in reality holding that in "the general interest" an innocent person's goods or property may be forfeited to the State without compensation and in such cases the provisions of Protocol No. 1 contained in Article 1 (P1-1) are not violated. I fear that such a proposition may lead persons to compare it with the view that it may be "expedient that one innocent man should die for the people".

3. In the present case the United Kingdom has not sought to dispute the innocence of the applicant company. Indeed it could not do so as the domestic courts had already established as a fact the innocence of the applicant company. They were the innocent and bona fide operators of an aircraft, worth many millions of pounds, on an international scheduled flight which was put at risk of forfeiture by the criminal actions of someone, unknown to the applicant company and without recklessness on their part, who smuggled prohibited goods aboard their aircraft and thus secretly used the aircraft for the carriage of the prohibited goods. Under the law of the United Kingdom dealing with the duties and powers of the Customs authorities it is clear that the innocence of the applicant company does not affect the liability to forfeiture of the aircraft. In my opinion the provisions of Article 1 (P1-1) do not permit the action taken.

4. It is to be recalled that the AGOSI case (1) dealt with the forfeiture of contraband. In the present case the drugs constituted the contraband, not the aircraft which was seized as being liable to forfeiture. The seizure was effected five days after the flight complained of, even though the aircraft in question had been free to make several flights in the interval. It appears quite clear from the facts that the action of the Customs authorities was to make an example of Air Canada for the purpose of directing their attention (and the attention of other international airlines) to the importance of careful scrutiny of what was actually carried in aircraft destined to land in the United Kingdom. But at the same time there was no accusation that the applicant company had been less than careful or were other than completely innocent of any wrongdoing. Yet it was decided to penalise them. The method adopted was to seize the aircraft and then to demand the payment of £50,000 as the price of its release before it was condemned. As the aircraft was still in transit to its final destination and loaded with passengers the applicant company had no alternative to paying the sum demanded. The Customs authorities subsequently brought condemnation proceedings and succeeded in the Court of Appeal. That decision amounted to conclusive evidence that the aircraft was legally seized and that the applicant company's money was lawfully forfeited. The condemnation had a retrospective effect back to the time of the seizure.

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1. Series A no. 108.
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5. Under the law of the United Kingdom the procedure is deemed to be civil rather than criminal. The Court has expressed the same view so far as the Convention is concerned. I do not agree. In the case of Öztürk v. Germany (Series A no. 73) the Court reaffirmed "the autonomy" of the notion of "criminal" as conceived under Article 6 (art. 6) of the Convention and held that one of the matters to be considered was the nature and severity of the penalty which the person concerned risked incurring. It is abundantly clear in the present case that it was the intention of the authorities to impose a penalty of £50,000 and they succeeded in that. It was upheld by the English Court of Appeal as being correct according to the law. It is clear that judicial review proceedings could not produce a decision to the effect that it was not so. That procedure is confined to testing the legality of the action complained of according to the national law. In the

result the applicant company were penalised to the extent of £50,000, in effect, for the criminal act of some person or persons unknown to them and for whose actions they bore no responsibility. While the condemnation is termed a decision in rem the penalty was levied in personam.

6. In my opinion there has been a breach of Article 1 of Protocol No. 1, and also of Article 6 (P1-1, art. 6).

DISSENTING OPINION OF JUDGE MARTENS, JOINED BY JUDGE RUSSO

Introduction

1. This case began with a seizure as a first step to confiscation (1); so the analysis should start there too. That analysis may be facilitated by some introductory remarks of a more or less comparative character (2).

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1. Lord Justice Purchas referred to section 141 (1) as: "the confiscatory provisions" ([1991] 2 Queen's Bench 467).

2. These remarks have no further pretension than to facilitate the analysis and have no scientific value. My comparative investigations were, perforce, limited: I only looked into the Austrian, Belgian, French, German, Netherlands and Swiss Criminal Codes as well as handbooks. I have tried to take into account that the relevant provisions have, nearly everywhere, been changed recently in the context of fashionable legislation for depriving criminals of the proceeds of their crimes and that I needed the old texts.

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At present, now that confiscation is generally used as a means of depriving certain criminals of the proceeds of their crimes, it may have become controversial whether such confiscations belong to the criminal law (3). However, the present confiscation is based on legislation which antedates this development. The present confiscation is not reparative and, when one rids oneself of national qualifications (4), it clearly falls within the ambit of criminal law (5): its evident purpose was to penalise an offence (drug smuggling) in order to prevent repetition thereof (6).

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3. See, however, the Court's judgment of 9 February 1995 in the case of Welch v. the United Kingdom, Series A no. 307-A.

4. According to the Court of Appeal (Lord Justice Purchas) the power under section 141 (1) is a power in rem enforceable as a civil right ([1991] 2 Queen's Bench 460).

5. See the remark made by Sir David Croom-Johnson in his judgment in the present case ([1991] 2 Queen's Bench 469): "It is not possible to say that section 141 of the Act of 1979 has no connection with crime".

6. The 1979 Act intended to prevent smuggling (see the judgment of Mr Justice Tucker, p. 8). In this context I cannot refrain from quoting the Government's enchanting understatement according to which the powers under section 141 (1) are only used in cases where the Commissioners "consider that this is appropriate to encourage the adoption of higher security standards by the company concerned".

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Criminal law usually makes it possible to confiscate the physical thing which was the object of the offence (objectum sceleris) as well as the physical thing by means of which the offence was committed (instrumentum sceleris). Presumably, the present confiscation falls within the latter category.

I further note that the object of the confiscation was an

aircraft which had landed at a United Kingdom (UK) airport, in the performance of an authorised scheduled international air service (7). This implies that the aircraft was owned by an airline which is in possession of the operating permissions required under a bilateral agreement between the UK and Canada, after having been designated by Canada and accepted by the UK for operation of agreed services (8).

7. See Article 6 of the 1949 Chicago Convention on International Civil Aviation.

8. See Bin Cheng, The law of international air transport (Stevens & Sons, London/New York, 1962), pp. 290-91 and 363.

This is a material feature of the present case: it shows that there cannot be the slightest doubt as to the owner's respectability. It shows, moreover, that this is not confiscation which finds its justification in the per se illegal nature of the confiscated object, such as when pornography (9) or other forbidden goods (such as certain weapons, explosives or drugs) are seized and confiscated.

9. See the Court's Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 30, para. 66.

A last introductory point to be made is that usually confiscation of an instrumentum sceleris which is not per se unlawful is only allowed when it belongs to the perpetrator of the offence; where it is possible to confiscate such an instrumentum also when it belongs to a third party, as a rule there are safeguards with respect to third parties which are in no way to blame.

The applicable Article 1 of Protocol No. 1 (P1-1) rule

2. For the purpose of Article 1 of Protocol No. 1 (P1-1), confiscations - whether of an objectum or of an instrumentum sceleris - are to be considered "penalties" within the meaning of the second paragraph of this Article (P1-1). I prefer this construction to that of the Court's AGOSI v. the United Kingdom judgment (10).

10. Judgment of 24 October 1986, Series A no. 108.

The AGOSI case concerned a confiscation of the objectum sceleris (forfeiture of gold coins concerning which an attempt had been made to smuggle them into the UK). The Court considered this to be confiscation as an instance of "control of use". It reasoned: (1) the prohibition on the importation of gold coins into the UK is "control of use" of such coins; (2) the forfeiture of the smuggled gold coins forms a constituent element of that "control of use"; (3) ergo the forfeiture of the (smuggled) gold coins is an instance of "control of use" of gold coins.

Obviously, this reasoning (11) cannot be followed with respect to a confiscation of the instrumentum sceleris. The present case makes that clear: the prohibition involved is the prohibition of importation of a controlled drug (cannabis resin) (12); but the forfeiture of an aircraft cannot be said to be an instance of "control of use" of cannabis resin. I therefore prefer to bring both types of confiscation of property under the second part of paragraph 2 of Article 1 (P1-1) where the States have reserved the right to enact such laws as they deem necessary for the purpose of securing the payment of penalties.

11. Which in itself is rather artificial; see also W. Peukert, EuGRZ 1988, p. 510.

12. See the Commission's report, paragraph 24.

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Absence of defence of innocent ownership

3. Section 141 (1) (13) of the 1979 Act (14) requires that "the thing" to be forfeited "has been used for the carriage, handling, deposit or concealment" of another thing which in its turn is liable to forfeiture under the Customs and Excise Acts, that is, generally speaking, a thing the importation of which into the UK is either prohibited or only permitted after payment of duty (15). In normal language (16): section 141 (1) gives the Commissioners (17) the power to confiscate a thing by means of which an offence (smuggling or an attempt at smuggling) was committed (18).

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13. For the text, see paragraph 18 of the judgment.

14. I use "the 1979 Act" and "the Commissioners" in the same sense as does the Court: see paragraphs 6 and 8 of its judgment.

15. See section 49 of the 1979 Act.

16. And leaving aside - as immaterial in the present context - that although importing prohibited goods or importing without payment of duty are criminal offences, in that context also the goods imported are liable to forfeiture even in case of wholly innocent importation: see the judgment of Sir David Croom-Johnson, [1991] 2 Queen's Bench 469-70.

17. See note 13.

18. This interpretation is corroborated by section 142 (1); see for the text: Commission's report, paragraph 23.

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Forfeiture under section 141 (1) of the 1979 Act therefore is a confiscation of the instrumentum sceleris and falls to be considered under paragraph 2 of Article 1 of Protocol No. 1 (P1-1) (see paragraph 2 above).

4. Section 141 (1) differs in two respects from the "normal type" of confiscation of the instrumentum sceleris: firstly, it "does not permit of any implication or construction so as to import an element equivalent to mens rea"; secondly, it does not "involve in any way any person in the widest sense whether as user, proprietor or owner" (19).

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19. Lord Justice Purchas in his judgment of 14 June 1990 ([1991] 2 Queen's Bench 467); see also the Court's judgment, paragraph 16.

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The first difference does not warrant the conclusion that the present confiscation does not belong to the type indicated in paragraph 1 above: that the confiscation does not require the establishment of someone being guilty of an offence does not alter the fact that it presupposes that an offence has been committed (by whoever) and that it purports to prevent such offences by penalising them.

The combination of these two differences has the effect that under section 141 (1) an instrumentum sceleris belonging to another person than the perpetrator of the offence may be confiscated, whether or not the owner is to be blamed for his property having been used as means to commit the offence. Consequently, the owner of the instrumentum cannot plead "innocence" as a defence against the confiscation. That indeed was established in the proceedings taken by Air Canada in the present case (20).

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20. See paragraphs 14-16 of the Court's judgment. This result is the more amazing if one takes into account that under section 141 (3) the

owner and the commander of an aircraft which becomes liable to forfeiture "shall each be liable on summary conviction to a penalty equal to the value of the ... aircraft ..."!

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5. This raises the question (which was also at the core of the debate in the AGOSI case): whether the power of the executive to confiscate a person's property as instrumentum sceleris without that person even (21) being permitted to prove that he was in no respect whatsoever to blame for his property having been used as means to commit the offence, is compatible with the right guaranteed in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (P1-1)?

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21. "even" since, taking into account that the confiscation is, materially, a criminal sanction, it would be normal to require that the authorities bring proof of mens rea of the owner.

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I do not hesitate to answer that question in the negative (22). There is no room for a margin of appreciation here. Confiscating property as a sanction to some breach of the law - however important that breach may be and, consequently, however weighty may be the general interest in preventing it by severely penalising the offence - without there being any "relationship between the behaviour of the owner or the person responsible for the goods and the breach of the law" (23) is definitely incompatible both with the rule of law and with the right guaranteed in Article 1 of Protocol No. 1 (P1-1) (24).

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22. See in the same sense: Judge Pettiti in his dissenting opinion in the AGOSI case (loc. cit., p. 27: "In my view, this Article (P1-1) implies that an innocent owner, acting in good faith, must be able to recover his property."). See also in this sense: G. Cohen-Jonathan, La Convention Européenne des Droits de l'Homme (Economica, Paris, 1989), pp. 536-37; Peukert, EuGRZ 1988, p. 510 and (perhaps) Velu-Ergec, La Convention Européenne des Droits de l'Homme (Bruylant, Bruxelles, 1990), p. 686, para. 841 in fine.

23. Quote from the speech made by Mr Frowein in his capacity as Delegate of the Commission during the oral hearings in the AGOSI case (Series B no. 91, p. 103). I fully agree with his arguments and recommend reading pages 102 and 103.

24. See in this context also the Court's Hentrich v. France judgment of 22 September 1994, Series A no. 296-A, p. 21, paras. 47-49.

See also the interesting article of Michael Milde "The role of ICAO [i.e. International Civil Aviation Organisation] in the suppression of drug abuse and illicit trafficking" in Annals of Air and Space Law, vol. XIII (1988), pp. 133 et seq. On page 152 he discusses our problem. He argues that an air carrier "should not be responsible automatically if illicit drugs are found concealed in cargo (for example, containers or packed consignments), the contents of which have been falsely declared by the shipper ... The air carrier is not normally in a position to recognise or prevent a misrepresentation of the nature of the shipment without a detailed cargo inspection. Moreover, such an inspection would be impracticable, especially in case of containerised cargo, since the air carrier has neither the jurisdiction nor the professional competence". He goes on to say: "Air carriers should not be victimised by the process of drug interdiction and should not have their aircrafts seized, unless there is evidence of their fault or that of their employees or agents, or if it is proved that they are accessories to the offence of drug trafficking."

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In paragraphs 54 and 55 of its AGOSI judgment the Court has dealt with this issue, but in my eyes rather ambiguously. If the Court is

to be understood to have held that even where there is no relationship whatsoever between the behaviour of the owner of the confiscated property and the offence in consequence whereof that property was confiscated, the confiscation may yet meet the requirements of paragraph 2 of Article 1 (P1-1), I respectfully disagree.

In my opinion such a deprivation of property without compensation, by way of "penalty", is only compatible with Article 1 of Protocol No. 1 (P1-1) when the owner somehow is to be blamed in respect of the offence committed by dint of his property. We are in the field of customs legislation and I can therefore accept a reversal of the onus of proof (25), but I think that if the owner proves that he was "innocent" - that is: that he could not reasonably have known or suspected that his property would serve as an instrument for the offence nor, even with due diligence, have prevented that (26) - confiscation of his property by way of sanction is not permissible. Confiscation as a "sanction", not allowing for some defence of innocent ownership, upsets the fair balance between the protection of the right of property and the requirements of general interest.

25. See the Court's Salabiaku v. France judgment of 7 October 1988, Series A no. 141-A and its Pham Hoang v. France judgment of 25 September 1992, Series A no. 243.

26. I note that Mr Justice Tucker said in his judgment (p. 14) that counsel for the Commissioners had conceded "that in the present case there is nothing to indicate that the defendants [i.e. Air Canada] knew of the existence of the offending container or its contents, or that they were reckless about it".

The recent wave of legislation for depriving criminals of the proceeds of their crimes makes it all the more necessary to firmly maintain this principle: we know from experience that governments in their struggle with international crime do not always heed the limits set by the Convention. It is the Court's task to ensure that these limits are observed.

Discretion as a proper substitute for absence of defence of innocent ownership?

6. The Court of Appeal, of course, realised that section 141 (1) was open to the above objection and therefore could be qualified as "indeed harsh". However, it suggested, under section 152 and paragraph 16 of Schedule 3 that this harshness was open to mitigation by the Commissioners, be it as a matter of discretion (27). As a further solace the Court of Appeal added that "the exercise of this discretion will be readily open to review by the court under R.S.C. Order 53. This is a remedy which has developed very considerably in recent years ...".

27. See the judgment of Lord Justice Purchas, [1991] 2 Queen's Bench 468.

7. It is true that under section 152 and paragraph 16 of Schedule 3 (28) the Commissioners may, to put it shortly, "if they see fit" return "the thing" seized as liable to forfeiture to the owner

> "upon his paying ... such a sum as they think proper, being a sum not exceeding that which in their opinion represents the value of the thing ...".

28. See for the text of these provisions paragraph 19 of the Court's judgment.

Nevertheless, this way out is for two reasons unacceptable.

The first and most important reason is that it is incompatible with the rule of law. Section 141 (1) would only be compatible with Article 1 of Protocol No. 1 (P1-1) if "innocent ownership" were a defence against forfeiture (see paragraph 5 above). Under the rule of law "there must be a measure of protection in national law against arbitrary interferences with the rights safeguarded" under Article 1 of Protocol No. 1 (P1-1) (29). This requirement implies that Parliament should have clearly expressed the aforementioned "indispensable restriction" in the 1979 Act itself and, furthermore, that it could not properly substitute such expression of that restriction by leaving it - without in any way indicating that intention - to the (as far as the law goes) completely unfettered discretion of the Commissioners to see to it that their power to confiscate is not used where "innocence" is proved.

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29. See the Herczegfalvy v. Austria judgment of 24 September 1992, Series A no. 244, p. 27, para. 89.

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The second reason is that, if (notwithstanding the above objection) the aforementioned "substitute" were to be accepted at all, then only under the condition that it is equivalent to the required (indispensable) restriction in the 1979 Act itself. Which means that it should be certain that Commissioners ought to deliver "the thing" "seized as liable to forfeiture" without asking for payment if the owner establishes "innocence".

That condition is, however, by no means fulfilled. As already noted the text of the law gives them complete freedom ("if they think fit") and that strongly suggests that they are under no obligation to release without payment if "innocence" is established (30). In this context I note a conspicuous difference between the pleadings of the Government in the present case and those in the AGOSI case. There the Government argued that

> "where there is no fault at all on the part of the owner, it is likely that the goods will be returned. That is because it would be perverse, or wholly unreasonable, to retain the goods because to retain the goods would not further the purpose of the legislation in a discernible way" (31).

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30. In this context I refer to the judgment of the Court of Appeal in the AGOSI case, especially to the observations made by Lord Denning; see the Court's judgment in that case, loc. cit., p. 11, para. 30.

31. See their memorial, Series B no. 91, p. 83; see also the Commission's rendering of their arguments: Commission's report, paragraph 63, ibid., p. 26.

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The Court in paragraph 53 of its AGOSI judgment refers to this passage as a concession of the Government. In the present case the Government have refrained from making a similar concession. Which reinforces the conclusion that it is far from certain that an owner who can establish that there is no fault at all on his part can be certain that he will get back the sum that he was forced to pay to recover his aircraft that was seized as liable to forfeiture.

Procedural requirements of Article 1 of Protocol No. 1 and Article 6 para. 1 (P1-1, art. 6-1).

8. However, let me assume for a moment that it would be beyond dispute that the Commissioners would act (Wednesbury) unreasonably if they were to refuse to release the aircraft without payment (or when such payment had already been exacted to refund it) to an owner who had

established that there was no fault at all on his part. Would that not be sufficient to hold that, although "innocence" does not constitute a defence against the forfeiture itself, the powers of the Commissioners under section 152 and paragraph 16 of Schedule 3 are such as to make the enactment as a whole acceptable under paragraph 2 of Article 1 of Protocol No. 1 (P1-1)?

In my opinion: no. Even then the enactments would violate Article 1 of Protocol No. 1 in conjunction with Article 6 para. 1 (art. 6-1+P1-1) of the Convention. That is because I disagree with the Court's finding in paragraph 60 of its AGOSI judgment, repeated in paragraph 46 of its present judgment, that the scope of judicial review under English law is sufficient to satisfy the procedural requirements of the second paragraph of Article 1 (P1-1).

I recall that the powers under section 141 (1) are only compatible with the UK's obligations under Protocol No. 1 (P1) if the thing seized as liable to forfeiture is to be returned without payment to an "innocent" owner (see paragraphs 5 and 7 above). It follows that when a dispute arises between the owner and the Commissioners on the question whether or not he has established his "innocence", that dispute concerns a civil right: not only was the confiscation a measure enforceable as a civil right (32), but for the purpose of Article 6 para. 1 (art. 6-1) of the Convention the right of the owner to get back his property which has been confiscated illegally or, as the case may be, to recover the amount exacted which has been paid without lawful cause is a civil right also (33). Consequently, the owner is entitled to have that dispute settled by a court which meets the requirements of Article 6 para. 1 (art. 6-1), that is a court with full jurisdiction with regard to all questions of law and of fact that may arise.

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32. See note 3.

33. See, mutatis mutandis, my concurring opinion in the case of Fayed v. the United Kingdom, Series A no. 294-B, pp. 58-59.

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There is, obviously, yet another approach which leads to the same conclusion. However the "system" of the combined sections 141 (1) and 152 juncto paragraph 16 of Schedule 3 is to be qualified under national law (as civil, criminal or administrative), the result is that the Commissioners are given the power to prosecute and punish airline operators which (in their opinion) are guilty of some form of participation in offences under the 1979 Act by imposing and making them pay a considerable fine (34). Under the case-law of the Court giving such power to administrative authorities is, in principle, compatible with Article 6 (art. 6) provided that the airline operator can bring any such decision affecting him before a court that affords the safeguards of that provision (art. 6) (35).

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34. It is common ground that the Commissioners referred to the £50,000 as a "penalty".

35. See, inter alia, mutatis mutandis, the Court's Bendenoun v. France judgment of 24 February 1994, Series A no. 284, p. 19, para. 46.

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The parties have debated on the scope of judicial review under English law, but that debate is immaterial. Whatever that scope, judicial review is certainly not an appeal on the merits (36). That, however, is what is required: only a court with full jurisdiction as to both the facts and the law "affords the safeguards" of Article 6 (art. 6) (37).

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36. See Lord Donaldson of Lymington MR in R. v. Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 722: "... it must never be forgotten that it [i.e. judicial review] is a supervisory and not

an appellate jurisdiction" (the italics are in the original).
See further Wade & Forsyth, Administrative Law (Clarendon, London, 1994), pp. 38 and further 284 et seq. (the chapter: "Jurisdiction over fact and law"). See also the Court's O. v. the United Kingdom judgment of 8 July 1987, Series A no. 120, p. 27, para. 63.

37. I refer to my comprehensive dissenting opinion in the case of Fischer v. Austria, Series A no. 312, p. 25.

Conclusion

9. For these reasons I have voted for finding a violation both of Article 1 of Protocol No. 1 and of Article 6 para. 1 (P1-1, art. 6-1).

DISSENTING OPINION OF JUDGE PEKKANEN

To my regret I cannot agree with the opinion of the majority in the present case both as to Article 1 of Protocol No. 1 and as to Article 6 (P1-1, art. 6) of the Convention.

1. The aircraft in question was seized by the Commissioners apparently not for the purpose of forfeiture of the aircraft but with the aim of obliging the applicant to pay the "penalty" of £50,000. The "penalty" was, on the other hand, not levied as a fine or other kind of sanction but as a condition for the release of the seized aircraft. These two decisions taken by the Commissioners on the same day, are in reality parts of one single plan of action with a particular aim.

Both decisions were based on the Customs and Excise Management Act 1979 which gives practically unfettered discretion to the Commissioners with regard to both the seizure and the measures to be taken following it. Is this type of legal provision sufficiently precise to satisfy the criterion of "foreseeability" required by the Convention according to the Court's case-law? In the case of Margareta and Roger Andersson v. Sweden (judgment of 25 February 1992, Series A no. 226-A, p. 25, para. 75) this requirement, in so far as it concerns the exercise of discretion, was described as follows: "A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference". In my opinion the law in question does not fulfil this criterion of foreseeability.

2. In a situation where statutory powers confer an exceptionally wide discretion on the Commissioners, a defendant should necessarily have the right of access to a court with full jurisdiction to examine all contentious issues. However, this requirement is not, in my opinion, satisfied.

Judicial review seems to be the only judicial remedy open to the applicant in the present case; however, for the reasons developed below, it is not a sufficient remedy. The condemnation proceedings before a court are not adequate in a case where the purpose of the two decisions taken by the Commissioners was not to forfeit the aircraft but to oblige the applicant to pay a "penalty".

3. The intention of the Commissioners was not to deprive the applicant of possession of the aircraft but to limit the use of it until the "penalty" was paid. In this respect the case falls under the second paragraph of Article 1 of Protocol No. 1 (P1-1). The justification of an interference presupposes, according to the Court's case-law, inter alia that a fair balance between the interests of the State and those of the individual has been struck in a manner which reflects the principle of proportionality, and also that the applicant has had a reasonable opportunity of putting his case to the responsible

authorities (see the AGOSI v. the United Kingdom judgment of 24 October 1986, Series A no. 108, pp. 18-19, paras. 54-55).

However, there is no indication that the Commissioners had followed the proportionality doctrine in their decision-making process. As to the scope of judicial review, it is clearly stated in the House of Lord's decision in the Brind case (see paragraphs 21 and 46 of the judgment) that the proportionality test applied by this Court could not be applied by the courts of the United Kingdom since the Convention has not been incorporated into domestic law.

4. With regard to Article 6 (art. 6) of the Convention, my conclusion is that the availability of judicial review does not satisfy the requirements of Article 6 (art. 6) concerning the right of access to a court. Judicial review under English law involves merely a supervisory, as opposed to an appellate, jurisdiction. In addition, taking into account the limited grounds on which judicial review can be sought (see paragraph 20 of the judgment) it cannot be considered to be an effective judicial remedy in the circumstances of this case for the purposes of Article 6 (art. 6).

5. For these reasons I conclude that both Article 1 of Protocol No. 1 and Article 6 (P1-1, art. 6) of the Convention have been violated.