Neutral Citation Number: [2010] EWCA Civ 1093

Case Nos: C1/2009/2250 & 2252

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Wyn Williams
[2009] EWHC 1918 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2010

Before :

LORD JUSTICE WARD
LORD JUSTICE RICHARDS
and
SIR DAVID KEENE

Between :

The Queen (on the application of (1) Kibris Tűrk Hava Yollari and (2) CTA Holidays Limited)	**Appellants**
- and -	
Secretary of State for Transport	**Respondent**
- and -	
The Republic of Cyprus	**Interested Party**

Charles Haddon-Cave QC, Robert Lawson QC and **Professor Stefan Talmon** (instructed by **Herbert Smith LLP**) for the **Appellants**
David Anderson QC and **Sam Wordsworth** (instructed by **The Treasury Solicitor**) for the **Respondent**
Professor Vaughan Lowe QC and **Akhil Shah QC** (instructed by **DLA Piper UK LLP**) for the **Interested Party**

Hearing dates : 19-21 May 2010

Judgment

Lord Justice Richards :

1. The first appellant ("KTHY") is a Turkish airline. Since 1999 it has operated several scheduled flights each week between the United Kingdom and Turkey pursuant to an operating permit granted by the respondent Secretary of State under Article 138 of the Air Navigation Order 2005 ("the 2005 Order").

2. The second appellant ("CTA") is a wholly owned subsidiary of KTHY and operates as a travel agent, focusing on the provision of holidays in northern Cyprus.

3. On 23 November 2006 an application was made on behalf of KTHY for a variation of its operating permit so as to allow it to carry passengers, baggage and cargo on *scheduled* services between the United Kingdom and northern Cyprus. On the same date an application was made on behalf of KTHY and CTA for an operating permit under Article 138 of the 2005 Order to allow them to operate specified *charter* flights between the United Kingdom and Ercan airport in northern Cyprus.

4. By letter dated 20 February 2007 the Secretary of State refused both applications. The appellants challenged the decision in proceedings for judicial review, in which the Secretary of State was defendant and the Republic of Cyprus ("the RoC") appeared as an interested party. The claim was dismissed by Wyn Williams J, from whose order the appellants bring the present appeal.

5. In order to explain the issues in the appeal I need first to describe salient aspects of the political situation in the island of Cyprus, though I do not need to do so in the detail with which, understandably, it has been addressed by the parties in evidence. The judge dealt with it concisely and I am able to draw on his judgment for all I need at this stage.

The island of Cyprus

6. The RoC became an independent sovereign state on 16 August 1960. Its territory comprised the whole island of Cyprus with the exception of the two UK sovereign base areas.

7. On the same date the United Kingdom, Greece and Turkey were signatories (together with the RoC) to a Treaty of Guarantee by which, *inter alia*, they recognised and guaranteed the independence, territorial integrity and security of the RoC and "undertake to prohibit, so far as concerns them, any activity aimed at promoting, directly or indirectly, either union of Cyprus with any other State or partition of the Island" (Article II).

8. Following the invasion of the island by Turkish troops in 1974, the island was divided along a "green line", patrolled by a peace-keeping force, which separated the community in the north from that in the south. A joint declaration issued by Turkey, Greece and the United Kingdom on 30 July 1974 "noted the existence in practice in the Republic of Cyprus of two autonomous administrations, that of the Greek Cypriot community and that of the Turkish Cypriot community". On 13 February 1975 the Turkish Cypriots purported to establish the "Turkish Federated State of Cyprus" and enacted a constitution on the model of a separate state.

9. On 15 November 1983 the Turkish Cypriot authorities in the north declared an independent state called the Turkish Republic of Northern Cyprus ("the TRNC"). UN Security Council resolution 541 (1983) deplored the declaration and considered it legally invalid, and called upon all states to respect the sovereignty, independence, territorial integrity and non-alignment of the RoC. A further resolution, 550 (1984), called upon all states not to recognise the purported state of the TRNC. Neither the United Kingdom nor any other state with the exception of Turkey has recognised the TRNC.

10. In 2004, when the RoC acceded to the European Union, a protocol to the Act of Accession provided that "the application of the Acquis shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control".

11. The existing position was summarised as follows by the judge:

> "22. The TRNC has never been recognised by any state except Turkey since its inception. Conversely, the Republic of Cyprus continues to enjoy international recognition ....
>
> 23. There is no doubt, as a matter of fact, that there exists in the TRNC an established government; it governs the area of Cyprus which is north of '*the green line*'; it has done so continuously since 1983. Indeed, in his witness statement, Mr Garip says that Northern Cyprus and its population has been under the de facto control of an autonomous and fully functioning administration operated by Turkish Cypriots since 1974. As I have said, there currently exists a constitution which provides for an executive, a judiciary and a democratically elected legislature. The legislature has passed and continues to pass a body of civil and criminal law covering most aspects of normal living and trade and movement of persons, goods and services. Laws are administered and enforced by relevant officials, the police and the courts. Mr Garip points out that the Government of the United Kingdom has from time to time made use of the legal system which subsists in the Northern part of the island. For example, authorities in the United Kingdom have ensured that evidence is available in trials before the courts in Northern Cyprus."

12. The judge went on to explain the arrangements operating in the north with regard to civil aviation, as set out in the uncontested evidence of Mr Garip, General Coordinator (Assistant General Manager) of KTHY:

> "24. ... There currently exists a Civil Aviation Department within a Ministry of Communications and Public Works with responsibility for the administering of civil aviation in Northern Cyprus. Aircraft and their operators in Northern Cyprus are required to comply with the Aeronautical Information Publication ('AIP') published by the Civil Aviation Department from time to time. Extracts from the publication are set out in

> Mr Garip's witness statement ...; the AIP clearly seeks to follow the model of documents issued by the International Civil Aviation Organisation ('ICAO'). The airport at Ercan has been designated as a customs airport for the purposes of the Customs and Excise Law (Law no. 37/1983) enacted by the legislature in Northern Cyprus. Ercan was modernised and upgraded in 2003. It is apparently designed to comply with applicable ICAO standards in relation to airports."

The issues

13. The primary reason for the Secretary of State's refusal of the operating permits sought was that the grant of the permits would be in breach of the rights of the RoC under the Convention on International Civil Aviation signed at Chicago on 7 December 1944 ("the Chicago Convention"). The United Kingdom, as a party to that convention, is under an obligation to respect those rights. It is common ground that the Secretary of State's discretion under Article 138 of the 2005 Order must be exercised in accordance with such obligations (see *R v Secretary of State for Transport, ex p. Pegasus Holdings (London) Ltd* [1988] 1 WLR 990, 1002-1003). Thus, the decision to refuse permits by reference to the United Kingdom's obligations under the convention gives rise to an issue which is justiciable as a matter of domestic law.

14. Wyn Williams J held that the grant of the permits sought would be in breach of the RoC's rights under the Chicago Convention and that this basis for the Secretary of State's decision was therefore correct in law. The appellants challenge that conclusion, essentially on the ground that the entitlement of the RoC to exercise its rights under the convention in relation to northern Cyprus has been suspended by reason of the fact that the RoC has lost effective control over that territory.

15. The Secretary of State has a further, more general basis on which he also seeks to support his decision. It flows from the fact that the United Kingdom, in accordance with its obligations under international law, has not recognised the TRNC as a state. It is said to follow as a matter of domestic law that decisions may not be made on the basis of, or by reference to, the purported laws and acts of the TRNC (save for laws and acts falling within a limited exception); and that to have granted the applications, thus approving international air services to and from airports in northern Cyprus, would inevitably have infringed this prohibition.

16. Wyn Williams J dealt *obiter* with that aspect of the case, again reaching a conclusion in favour of the Secretary of State. The appellants take issue with the judge's conclusion, contending that no rule of domestic law would be violated by the grant of the permits or by the court's upholding of the grant of the permits. The appellants contend in the alternative that the case falls within the limited exception acknowledged by the Secretary of State.

17. In addition to those substantive issues, there is a challenge to the order of Wyn Williams J that the appellants pay the RoC's costs of the claim for judicial review.

18. I should make clear that the Secretary of State's refusal of the permits is based squarely on his understanding of his legal obligations and that he has left open the decision he would reach in the absence of those constraints and has accepted that the

relevant policy considerations include factors in favour of the permits sought. The skeleton argument for the Secretary of State expresses the position as follows:

> "The Government is committed to ending the isolation of the Turkish Cypriot community, and supports the initiatives of the European Union and of the United Nations in this respect. In that context, the Government has expressed the belief that direct flights between the United Kingdom and northern Cyprus would contribute materially to ending the isolation of the Turkish Cypriots. Were there no legal obstacle, it would give full consideration to applications such as those which prompted the contested decision."

I do not need to quote the ministerial statements reflecting that position, which are set out at paras 28-29 of the judgment below.

19. The authorities of the TRNC positively support the provision of direct scheduled and charter flights into Ercan airport. The RoC, by contrast, positively opposes it. For both sides the issue is one of great political and practical importance.

The Chicago Convention on International Civil Aviation

20. The Chicago Convention governs international civil aviation. The United Kingdom acceded to the convention, for itself and its Crown Colonies, on 1 March 1947. The RoC acceded to the convention in its own right on 16 February 1961 and has remained a contracting state without interruption since that date.

21. Part I of the convention concerns air navigation. Chapter I sets out general principles, including these:

> "Article 1
>
> *Sovereignty*
>
> The contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory.
>
> Article 2
>
> *Territory*
>
> For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State."

22. Chapter II concerns flight over the territory of contracting states and includes the following provisions:

> "Article 5
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> *Right of non-scheduled flight*

Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.

Article 6

Scheduled air services

No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

...

Article 10

Landing at customs airport

Except in a case where, under the terms of this Convention or a special authorization, aircraft are permitted to cross the territory of a contracting State without landing, every aircraft which enters the territory of a contracting State shall, if the regulations of that State so require, land at an airport designated by that State for the purpose of customs and other examination. On departure from the territory of a contracting State, such aircraft shall depart from a similarly designated customs airport. Particulars of all designated customs airports shall be published by the State and transmitted to the International Civil Aviation Organization established under Part II of this Convention for communication to all other contracting States."

23. Part III of the convention concerns international air transport. Chapter XV contains one provision of relevance:

> "Article 68
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> *Designation of routes and airports*
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> Each contracting State may, subject to the provisions of this Convention, designate the route to be followed within its territory by any international air service and the airports which such service may use."

24. I will need to refer in due course to a few other provisions of the convention, but they are best dealt with in the context of the submissions to which they relate.

25. The judge directed himself that the convention was to be interpreted in accordance with the principles of international law codified in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention"), which provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"; taken with the observations of Lord Steyn in *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495, 508, that Article 31(1) is the starting point of treaty interpretation to which other rules are supplementary and that "the primacy of the treaty language, read in context and purposively, is therefore of critical importance".

26. The judge dealt first with the meaning of "sovereignty" in Article 1, holding that it has its usual meaning in customary international law and refers to "the *right* to exercise the functions of a state to the exclusion of all other states in regard to a certain area of the world" (Shawcross & Beaumont, *Air Law*, page I-26 para 38, emphasis added). He concluded that the RoC has exclusive sovereignty over the airspace above the whole of the island of Cyprus and the territorial waters adjacent thereto. At one stage the appellants took issue with this aspect of the judge's analysis, but that point has not been pursued before us.

27. In the light of that conclusion the judge considered whether the grant of the permits sought would cause the United Kingdom to be in breach of its obligations under the convention. He found that it would do so, for the following reasons:

> "45. I deal first with the application for a permit for scheduled flights. Under Article 6 no scheduled flight may be operated over or into the territory of a contracting state except with the permission of that state and in accordance with the terms of the permission. The territory of the Interested Party, in the context of Article 6, is the whole of the island of Cyprus and the territorial waters adjacent thereto. The Interested Party refuses to grant permission for scheduled flights operated by the First Claimant over or into its territory and it refuses to grant permission or authorisation for flights operated by the First Claimant to land at Ercan airport. In my judgment Article 6, properly interpreted, confers upon the Interested Party the right

to refuse permission as it has done. In such circumstances it seems to me to follow that if the Defendant granted permission for scheduled flights between the United Kingdom and Ercan airport such permission would be in conflict with the rights of the Interested Party under Article 6. As I have said the contracting states to the Convention have an obligation to respect the rights conferred upon other contracting states by the Convention. If a permit was granted for scheduled flights, therefore, the United Kingdom would be in breach of that obligation.

46. Chartered flights are the subject of Article 5. Article 5 constitutes an acknowledgment by each contracting state to the Convention that the civil aircraft of all other contracting states (other than scheduled flights) shall have the right to make flights into or in transit non-stop across its territory. However, there are important qualifications to the rights enjoyed by each contracting state; these qualifications are spelt out in Article 5 itself. First, there is a qualification which comes into play in relation to the safety of flights. I need not address that qualification in this judgment. Second, there is a qualification in the following terms:

> 'Such aircraft [i.e. non-scheduled flights] if engaged in the carriage of passengers, cargo, or mail for remuneration or hire ... shall also have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.'

47. This qualification is very widely drawn. A contracting state upon whose territory passengers, cargo or mail may be discharged has the power to impose such limitations in respect of that discharge as it may consider desirable.

48. In the present context the Interested Party has laid down that chartered flights operated by the First Claimant shall not be permitted to land at Ercan airport. In my judgment that is a limitation which it was and is entitled to impose given the terms of Article 5. Consequently, as with Article 6, if the Defendant grants to the Claimants a permit to operate chartered flights between the United Kingdom and Ercan airport the United Kingdom will be in breach of its obligation to respect the Interested Party's rights under Article 5.

49. Article 10 is also relevant to the applications made by both Claimants. This Article empowers a contracting state to make regulations requiring aircraft to land within its territory at an airport designated by the state for the purposes of customs and other examinations. The Interested Party has not designated

> Ercan as a 'customs airport' although it has designated a number of airports as 'customs airports' within the territory which it controls in the southern part of the island of Cyprus.
>
> 50. In my judgment the Interested Party is entitled under the terms of Article 10 to designate airports as 'customs airports' in that part of the island of Cyprus which it controls and, further, it is perfectly at liberty to refuse to designate an airport as a customs airport when that airport lies outside the area of the territory which it controls. As I interpret the Convention, each contracting state has a choice which it, and it alone, is entitled to exercise under Article 10. In my judgment, the grant of permits to the First and Second Claimant for direct flights between the United Kingdom and Ercan airport would place the United Kingdom in breach of its obligation to respect the Interested Party's rights under Article 10.
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> 51. The same process of reasoning applies with equal force to Article 68."

28. On its face, that is powerful reasoning. I agree with the judge that, for the reasons given by him, the grant of the permits sought would be in breach of the United Kingdom's obligation to respect the RoC's rights under the convention, if and in so far as the RoC remains entitled to exercise such rights in respect of northern Cyprus.

29. The "if" clause is important, because the essence of the submissions of Mr Haddon-Cave QC on this part of the case is that the RoC's entitlement to exercise its sovereign rights in respect of northern Cyprus has been suspended by reason of the fact that the RoC has lost effective control over that territory, with the consequence that the other contracting states have no obligation under the convention to respect the rights in question.

30. Mr Haddon-Cave submitted by way of overview that (1) a sovereign's entitlement to exercise sovereign rights under international law which require territorial control for their effective performance is suspended if and in so far as and for as long as it has lost effective administrative control over the territory; (2) where another power gains and maintains effective *de facto* administrative control over the territory, the entitlement of the sovereign to exercise those rights passes into the hands of that power, and to that extent the *de jure* government is impotent with regard to the territory; (3) this principle of suspension is a manifestation of the customary international law principle of effectiveness; and (4) it makes no difference whether the sovereign rights in question are recorded in a treaty (such as the Chicago Convention) or not. Accordingly, the RoC, as a displaced sovereign which has lost effective control over northern Cyprus, is no longer entitled to exercise sovereign rights in respect of that territory, and the entitlement to exercise those rights has passed to the authorities of the TRNC as the administration in effective control of the territory.

31. The distinction drawn between sovereign rights and the entitlement to exercise those rights was aptly described by Professor Lowe QC, for the RoC, as one of "ethereal subtlety" and the distinction was generally lost in the course of submissions, which referred more often to the suspension of rights than to the suspension of an

entitlement to exercise those rights. Whilst I have tried to bear the distinction in mind, I have found it easier in practice to start by considering, in line with the generality of the submissions, whether the RoC's rights under the convention have been suspended, before coming back to consider whether there is any additional mileage in the contention that the RoC's entitlement to exercise its rights has been suspended even if the rights themselves have not been suspended.

32. It is important to bear in mind that the rights in question are contained in a treaty, the Chicago Convention, and that the issue is whether those *treaty* rights have been suspended (or, ultimately, whether the entitlement to exercise those treaty rights has been suspended). It is no doubt correct, as Mr Haddon-Cave submitted, that the rights set out in the relevant articles of the convention are derived from or reflect general principles of international law regarding the sovereignty of a state. But they also have a particular and additional status as treaty rights. Every treaty in force "is binding upon the parties to it and must be performed by them in good faith" (Article 26 of the Vienna Convention). The Chicago Convention has a life and legal force of its own.

33. The suspension of rights under a treaty is governed by Part V of the Vienna Convention, which is headed "Invalidity, Termination and Suspension of Operation of Treaties" and purports to set out a complete code on the subject. Thus, Article 42(2) provides:

> "The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of the treaty."

Article 44 contains detailed provisions as to the separability of treaty provisions for the purposes of exercising the right to denounce, withdraw from or suspend the operation of a treaty.

34. In the course of argument we were taken to various specific provisions concerning the circumstances in which the operation of a treaty may be suspended, and in particular to Articles 57-62. None of those articles applies on the facts of this case.

35. By Article 57, the operation of a treaty may be suspended (a) in conformity with the provisions of the treaty, or (b) at any time by consent of all the parties after consultation with the other contracting states. It is notable that the Chicago Convention contains no provision for suspension by reason of the occupation of the territory of a contracting state, and it is not suggested that there has been any agreement to suspend its operation. Article 58 also relates to suspension by agreement, Article 59 provides for implied termination or suspension of the operation of a treaty by the conclusion of a later treaty, and Article 60 relates to termination or suspension of the operation of a treaty as a consequence of its breach: all are plainly inapplicable.

36. The primary focus before the judge was on Article 61, which reads:

> "Article 61
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> *Supervening impossibility of performance*

> 1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty ...."

37. That provision is very narrow in scope, relating to termination or suspension in consequence of the permanent or temporary disappearance or destruction of an object indispensable for its execution. That is not this case. In any event, (a) this is not a case of impossibility of performance of the treaty, and (b) no party has invoked impossibility of performance as a ground for suspending the operation of the treaty.

38. As to (a), the RoC's rights under the Chicago Convention are capable of being exercised in respect of northern Cyprus even without effective control over the territory itself. The rights may not be fully effective and enforceable, but they can be exercised effectively, as has been done in practice, by withholding permission for, or imposing limitations on, flights over the territory and by the non-designation of airports in the territory. The RoC is entitled to rely on other states to honour their obligations under international law to respect its decisions on such matters; and the effectiveness of the exercise of its rights is evidenced most obviously by the fact that all states other than Turkey have in practice respected those decisions.

39. As to (b), suspension pursuant to Article 61(1) does not occur automatically but has to be invoked. Articles 65-68 lay down formal procedures to be followed and make provision for judicial settlement, arbitration and conciliation. Far from having exercised the right to invoke suspension of the convention, however, the RoC continues to rely on the treaty as having full force and effect; and there is no evidence that any other contracting state has invoked suspension of the treaty in relation to northern Cyprus.

40. Article 62 concerns the situations in which a fundamental change of circumstances may be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty. None of those situations applies, and once again suspension has not been invoked.

41. The appellants' case is that there is a wider principle of suspension of sovereign rights under international law and that the Vienna Convention is therefore not the end of the matter (and indeed is not even the right starting-point). Mr Haddon-Cave pointed to the preamble to the Vienna Convention, which contains a paragraph "affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". He also took us to a number of authorities relied on as showing the existence of a wider general principle, including (i) Paul Reuter, *Introduction to the Law of Treaties* (1995), paras 282-284; (ii) the American Law Institute's *Restatement of the Foreign Relations Law of the United States*, (1986), vol.1, p.221 para 3; (iii) a section by Iain Cameron on "Treaties: suspension" in the *Max Planck Encyclopaedia of Public International Law* (2007), at para 11; (iv) a Report of the International Law Commission, Sixtieth Session, *Draft Articles on Effects of Armed Conflicts on Treaties* (United Nations, 2008), pp.115-120; (v) G.G. Fitzmaurice, *The Juridical Clauses of the Peace Treaties* (Recueil des Cours, Vol.73, 1948-II), pp. 307-309; and (vi) a Memorandum by the

Secretariat of the International Law Commission, Fifty-seventh Session, *The effect of armed conflict on treaties: an examination of practice and doctrine* (United Nations, 2005), pp. 31-51. The general principle asserted by the appellants is said to result in the *automatic* suspension of sovereign rights, including treaty rights, without any invocation of suspension as required under the provisions of the Vienna Convention to which I have referred.

42. In my judgment, the preamble to the Vienna Convention takes the matter no further forward: the rules of customary international law continue to govern questions *not* regulated by the Convention, but the circumstances in which treaty rights may lawfully be suspended *are* regulated by the Convention, as Article 42(2) (quoted above) makes clear. *Oppenheim's International Law*, 9th ed. (1992), para 645 states that customary international law allows for a treaty to be denounced, suspended or terminated in circumstances which, although generally accepted, leave considerable room for argument on certain matters of detail, but that "Article 42 of the Vienna Convention introduces an element of certainty in providing that these consequences take place only as a result of the application of the provisions of the treaty in question or of the Vienna Convention".

43. By contrast, the Vienna Convention does exclude from its scope, and leaves for determination in accordance with the rules of customary international law, certain specific matters that are relevant for the evaluation of the materials upon which Mr Haddon-Cave relied. Thus, Article 73 (in Part VI, "Miscellaneous Provisions") provides:

> "Article 73
>
> *Cases of State succession, State responsibility and outbreak of hostilities*
>
> The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States."

44. In its judgment of 25 September 1997 in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (ICJ Reports 1997, p.7), the International Court of Justice emphasised the distinction between, on the one hand, lawful suspension in accordance with the law of treaties and, on the other hand, issues of state responsibility for suspension incompatible with the law of treaties, which are excluded by Article 73:

> "46. The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and suspension of the operation of treaties, set forth in Articles 60 to 62 ....

> 47. Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of a State which proceeded to it, is to be made under the law of State responsibility.
>
> Thus the Vienna Convention of 1969 on the Law of Treaties confines itself to defining – in a limitative manner – the conditions in which a treaty may lawfully be denounced or suspended; while the effects of a denunciation or suspension seen as not meeting those conditions are, on the contrary, expressly excluded from the scope of the Convention by operation of Article 73."

45. The passage in Reuter cited by Mr Haddon-Cave considers reliance on the doctrine of *force majeure* in cases of impossibility of performance of treaty obligations going beyond the formulation in Article 61 of the Vienna Convention. That engages an issue of state responsibility which is excluded by Article 73 and, as shown by the judgment in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, is distinct from the issue of treaty suspension.

46. The passage cited from the *Restatement of the Foreign Relations Law of the United States* likewise points to the narrowness of the formulation in Article 61 and observes that "it does not reach situations in which a party's performance is made impossible by other factors, for example, an agreement to deliver aid, arms, or other goods that is thwarted by acts of God, war, or the closure of a canal". That, too, appears to be concerned with *force majeure* and to engage the distinct issue of state responsibility. As to the question of war, it is the subject of other authorities considered below.

47. The passage by Cameron in the *Max Planck Encyclopaedia* mentions the possibility of suspension of treaties in a number of situations going beyond those in the Vienna Convention. It refers first to the effect of provisions in other treaties, specifically the United Nations Charter and the Vienna Convention on Succession of States in Respect of Treaties, which have no bearing on the present case. It then refers to the deliberate exclusion, by Article 73, of the effect of armed conflict from the scope of the Vienna Convention. That theme is pursued in the other materials cited.

48. The Report of the International Law Commission examines a range of views about the effect of the outbreak of war on multilateral law-making treaties (defined as treaties which create rules of international law for regulating the future conduct of the parties without creating an international regime, status or system). It refers, for example, to the British position as reported in a Foreign Office letter of 7 January 1948:

> "... It is not the view of His Majesty's Government that multilateral conventions *ipso facto* should lapse with the outbreak of war, and this is particularly true in the case of conventions to which neutral Powers are parties. Obvious examples of such conventions are the International Air Navigation Convention of 1919 [the predecessor of the Chicago Convention] and various postal and telegraphic conventions. Indeed, the true legal doctrine would appear to be that it is only the suspension of normal peaceful relations between belligerents which renders impossible the fulfilment of multilateral conventions insofar as concerns them, and operates as a temporary suspension as between the belligerents of such conventions ...."

49. Fitzmaurice is to similar effect, stating that when the subject was under discussion in the Juridical Commission of the Peace Conference, the view of the Commission was that, in general, multilateral conventions between belligerents are not affected by the outbreak of war as regards their existence and validity but are at the most suspended in their operation and automatically revive upon the restoration of peace without the necessity of any special provision to that effect. The Memorandum by the Secretariat of the International Law Commission gives further, detailed examples, noting *inter alia* that state practice relating to international transport agreements is contradictory but that history is replete with examples of armed conflict causing the suspension of such agreements (p.32 paras 53-54). It points out that the Chicago Convention itself provides, in Article 89, that "[i]n case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals". Its summary of the position in relation to the Second World War includes the statement that multilateral maritime and air transport agreements were rendered essentially inoperative but remained legally in force.

50. Whilst Mr Haddon-Cave relied on the material about the effect of war and armed hostilities as illustrating a wider principle of suspension under international law, to the effect that a treaty is suspended automatically where the facts on the ground are incompatible with the operation of the treaty, it seems to me that such material relates to a very specific situation which is specifically excluded from the Vienna Convention, does not apply to this case and cannot assist the appellants. It is not the appellants' case that there is belligerent occupation of northern Cyprus, and it is plain that the present situation is not one of armed conflict. The conditions for suspension of treaty provisions as between belligerents, or as between belligerents and neutrals, simply do not exist. I note that one of the examples of suspension given in the Memorandum by the Secretariat of the International Law Commission is that "the Turkish invasion of Cyprus in 1974 and the continuing dispute over the delimitation of the continental shelf in the Aegean Sea caused Greece and Turkey to suspend overflights until September 1976, when they were formally reinstated" (p.33, para 54). That is a far cry from the indefinite suspension of the RoC's rights under the Chicago Convention by reason of the continuing political situation in northern Cyprus, for which the appellants contend.

51. In his reply Mr Haddon-Cave introduced Mark Villiger, *Customary International Law and Treaties* (2nd ed.), which argues at paras 311-313 that the Vienna Convention

leaves room for the concepts of modification and desuetude *qua* customary law, since it provides only for *contractual* means of terminating and amending treaties and is not intended to address the issue of the impact of customary law on treaties. Whether or not Villiger is correct on the subject of modification and desuetude, I am not persuaded that the passage cited provides support for the appellants' case as to the suspension of treaty rights. I note, too, that Villiger's *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) states at p.548 para 13 that "Article 42 is exhaustive in that it excludes all means of ending a treaty which are not mentioned in Part V of the Convention", going on to distinguish only three situations, none of which applies in this case: (i) additional grounds to end a treaty on which states *inter se* agree, (ii) the situations left open by Article 73, and (iii) termination of a treaty by desuetude.

52. Accordingly, I do not accept that the various materials cited by Mr Haddon-Cave support the existence of the general principle for which he contended. In any event, as already made clear, I do not accept that the facts on the ground in northern Cyprus are incompatible with the operation of the Chicago Convention: the RoC's rights under the convention remain capable of being exercised even if they are not fully effective and enforceable. Thus, I agree with Wyn Williams J's conclusions on this line of argument by the appellants:

> "62. … At the risk of repetition, the rights conferred by Article 5, 6, 10 and 68 of the Convention are capable of being exercised by the Interested Party for the reasons explained above notwithstanding that it does not have effective control over the TRNC.
>
> 63. This same line of reasoning is fatal to the submissions made on behalf of the Claimants to the effect that the rights conferred upon the Interested Party under Articles 5, 6, 10 and 68 of the Convention have become suspended by virtue of other doctrines of law which permit the suspension of rights (or obligations) in defined circumstances. Each of these doctrines has at its heart the notion that events have occurred which prevent the exercise of the rights in question or that events have occurred whereby the legal person subject to an obligation can treat the occurrence of the events as a reason why, at his election, he is absolved from compliance with an obligation. I am not persuaded that any doctrine of public international law exists whereby rights conferred by a treaty are suspended against the will of the legal person upon whom those rights are conferred and in circumstances when the rights can be enjoyed."

53. In reaching that conclusion the judge also took into account the views expressed by Professor Talmon, the appellants' junior counsel, in papers published in 2005 and 2009 respectively: see paras 53-57 of the judgment. Professor Talmon's 2005 paper is entitled *Air Traffic with Non-Recognised States: the Case of Northern Cyprus* (it is an English translation of an article published in (2005) 43 Archiv des Völkerrechts 1-42). His 2009 paper is entitled *The Recognition of the Chinese Government and the Convention on International Civil Aviation* (Chinese Journal of International Law

(2009), Vol. 8, No. 1, 135-159). The contrast between those papers is striking and creates for the appellants a degree of forensic embarrassment over and above that normally attached to counsel's reliance on his own published work.

54. In his 2005 paper Professor Talmon concluded that direct flights to northern Cyprus are only possible with the consent of the government of the RoC, which would have to designate, *inter alia*, Ercan airport as a customs airport in accordance with Article 10 of the Chicago Convention and, for scheduled flights, would have to grant at least tacit permission or other authorisation in accordance with Article 6; so that "states that start direct flights to northern Cyprus against the expressed wish of the Government of the Republic of Cyprus breach their obligations under the Chicago Convention". Wyn Williams J considered there to be little doubt that read as a whole the paper supported the Secretary of State's contentions in this case. Mr Haddon-Cave took issue with that, but I agree with the judge.

55. The 2009 paper concerns state practice with regard to flights to Taiwan, a topic which had also formed part of the analysis leading to the conclusion in the 2005 paper. The relevance of Taiwan is that it forms part of the state of China but the Government of the People's Republic of China ("the PRC"), which represents China within the International Civil Aviation Organization, does not have effective control over the territory. The paper involves a change of view by Professor Talmon about Articles 6 and 10 of the Chicago Convention and takes account of further information about state practice which was not available to him at the time of the 2005 paper: as to that, points emphasised in the appellants' submissions include (i) that in the 1980s several US and European airlines operated direct flights to Taiwanese airports despite strong protests by the Government of the PRC, and (ii) that since 2001 several states which do not recognise Taiwan or its government but recognise the Government of the PRC as the government of China have allowed direct flights to airports in Taiwan that have not been designated by the Government of the PRC as customs airports. Professor Talmon concluded (at para 50 of the 2009 paper):

> "As from 19 November 1971, China has been represented within the ICAO by the Government of the PRC, which, in principle, may exercise the rights under the Chicago Convention also with regard to Taiwan. However, rights derived from the Convention that require control over territory are suspended with regard to Taiwan. While the Government of the PRC remains competent to assign location indicators to airports in Taiwan and to designate airports throughout Taiwan as customs airports in accordance with Article 10 of the Chicago Convention it has, owing to its lack of territorial control, lost its legislative competence to require aircraft to land only at such designated customs airports. The right under Article 6 of the Chicago Convention to grant special permission or other authorization to operate scheduled air services also requires control over territory and is thus suspended with regard to Taiwan. Non-scheduled air services operated by aircraft of other contracting States do not require any special permission, either by the Government of the PRC or by that of the ROC [the Republic of China]."

56. One therefore sees in Professor Talmon's conclusions an expression of the appellants' case concerning suspension of rights in respect of territory over which the government of a state does not exercise effective control. For my part, however, I do not think that any general conclusions as to state practice, or as to the inferences to be drawn from it, can be derived from the evidence concerning Taiwan, and it seems to me that the views expressed by Professor Talmon in his 2005 paper concerning the position under the Chicago Convention are to be preferred to the theory developed in the 2009 paper as to the suspension of rights under that convention.

57. As to Taiwan itself, the position is factually far from clear-cut. Whilst it appears that some flights have taken place in the face of protests by the Government of the PRC, other services have had the express consent of that government or have been started only after consultation with the government. Further, the Government of the PRC has designated two airports in Taiwan as customs airports and has given location indicators to the five other airports in Taiwan which have been used for international charter flights from a limited number of states. By contrast with the position taken by the Government of the RoC in relation to northern Cyprus, there has been at the very least a degree of acquiescence and a lack of clear and consistent opposition by the Government of the PRC in relation to international flights to Taiwan. There is not enough by way of state practice to show an agreement between states, or a general acceptance by states, that because the Government of the PRC does not have effective control over Taiwan its relevant rights under the Chicago Convention are suspended and its consent is therefore not required.

58. The parties have also filed evidence as to state practice in relation to a number of other countries or territories, but I do not consider any of it to be sufficiently illuminating to merit specific consideration here. If anything turns on state practice, then it might be thought to be of particular relevance that, with one trivial exception, no state other than Turkey has permitted direct flights to northern Cyprus, and that the view expressed by the ICAO at various times, as set out in documents referred to in para 26 of the witness statement of Mr Figures on behalf of the Secretary of State, has been consistent with the need for the consent of the Government of the RoC to flights to northern Cyprus. I am not persuaded, however, that the topic of state practice is ultimately of any assistance for the analysis in this case.

59. Another matter considered by Wyn Williams J in reaching his conclusion was the law relating to the closure of seaports and its implications for the appellants' case in respect of airports in northern Cyprus. The appellants submit that there is a long standing rule of customary international law that an internationally recognised government of a state cannot, by legislative decree or executive decision, declare closed the seaports in those parts of its territory that are removed from its control. The authorities cited for that proposition include this passage from *Oppenheim's International Law*, at pp. 168-169:

> "The rights of insurgents in territorial waters depend on the extent of their effective territorial control within the state. They would seem in principle to have the right to close ports under their control merely by an order to that effect without the need to impose a blockade; contrariwise, the parent government is not entitled to close by decree ports which insurgents control

> (as it is entitled to do in respect of ports under its own control)
> but must establish an effective blockade in order to do so ...."

60. It is submitted that this is a manifestation of the wider principle and that what is true of seaports is in any event also true of airports. Indeed, in the course of his submissions Mr Haddon-Cave made much of the fact that the Government of the RoC has purported to close both the seaports and the airports in northern Cyprus, as well as to determine what aircraft may enter the airspace of Cyprus as a whole. He described this as a classic, unenforceable "paper blockade" and as demonstrating the flaw in the Government's approach. He referred to the answer given by the European Commission on 18 January 2008 to a Parliamentary question, to the effect that each state has the sovereign right to determine which ports are open for international transport but that "it is the Commission's understanding that there is no prohibition under general international law to enter and leave seaports in the northern part of Cyprus". The appellants' case is that there is no difference as regards airports and air transport.

61. The judge accepted the appellants' proposition concerning the closure of seaports but rejected the submission that seeks to carry it across into the field of air transport. He said:

> "65. It seems to me that this submission ignores the fact that the Interested Party has rights under the Convention (Articles 5, 6, 10 and 68) which it was capable of exercising regardless of whether it controlled the territory in the north of the island of Cyprus. In my judgment it cannot be that treaty rights relating to international aviation and which are capable of being performed (as I have found them to be) are nonetheless suspended by virtue of a principle of customary international law which has evolved and has been strictly confined hitherto in its application to the closure of seaports."

62. The RoC has advanced by respondent's notice the contention that the judge was wrong to accept in unqualified form the appellants' proposition concerning the closure of seaports. In the RoC's submission, the authorities relied on by the appellants concern the maritime law of blockade in time of war and have no wider application. That is said to be apparent, for example, from the passage cited from *Oppenheim's International Law* (which comes in a section on "Recognition and civil wars: recognition of belligerency and insurgency"); and Professor Lowe, presenting this part of the case for the RoC, referred *inter alia* to the 1856 Declaration of Paris by which the signatory states, seeking to bring a greater degree of uniformity into maritime law in time of war, declared that "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy". I think it unnecessary, however, to decide the question raised by the respondent's notice. I am prepared to assume that the judge was right to accept the existence of a rule relating to seaports in the form advanced by the appellants. Even so, I consider that the judge was right to reject the attempt to carry it across to airports and air transport.

63. My reasons for that conclusion, like those of the judge, come back to the fact that aviation is the subject of specific treaty provisions contained in the Chicago

Convention, which lays down the relevant rights and obligations of states and which must be read together with the provisions of the Vienna Convention governing the circumstances in which the operation of a treaty may lawfully be suspended. Indeed, the passage from *Oppenheim's International Law* relating to the closure of seaports states in a footnote that "[b]ecause of the provisions of the Chicago Convention of 1944 the situation in respect of airports in areas under the control of an unrecognised regime may be different", though it is fair to say that the footnote refers in support only to a statement in 1980 by a UK government minister (see British Yearbook of International Law 1980, page 367), which in the present context may be thought to be of limited weight. I do not accept that a rule of customary international law concerning seaports, whatever its precise scope, is capable of displacing the effect of detailed treaty provisions concerning aviation. In any event, we are concerned here not merely with the "closure" of Ercan airport but with the exercise of a bundle of rights under the Chicago Convention; and, as already stated, the rights of the RoC under that convention remain capable of being exercised in respect of northern Cyprus even without effective control over the territory. Those matters provide a powerful additional reason why the attempt to carry across the rule about the closure of seaports must fail.

64. At a higher level of generality, Mr Haddon-Cave sought to rely on the principle of effectiveness as an overarching principle of international law, contending that international law is pragmatic and that the automatic suspension of a sovereign's rights in respect of a territory of which the sovereign has lost effective control is a natural consequence of this. Both the principle of effectiveness and its limitations are attested by a passage cited from Antonio Cassese, *International Law* (2nd ed, 2005, pages 12-13):

> "International law is a realistic legal system. It takes account of existing power relationships and endeavours to translate them into legal rules. It is largely based on the principle of effectiveness, that is to say, it provides that only those claims and situations which are effective can produce legal consequences. Thus, for instance, if a new State emerges from secession, it will be able to claim international status only after it is apparent that it undisputedly controls a specific territory and the human community living there. Control over the State community must be real and durable. The same consideration holds true for insurgents. If civil strife breaks out within a State, the rebels cannot claim international rights and duties unless they exercise effective authority over a part of the territory concerned ....
>
> The principle of effectiveness permeates the whole body of rules making up international law ....
>
> The foregoing observations essentially apply to the *traditional* setting of the international community. Since the First World War a number of States have attempted to make 'legality' prevail over sheer force of authority. The main impetus came from the Stimson doctrine of 1932 (see 17.2.2). This doctrine suggested withholding legitimation from certain situations

> which, although effective, offended values that were increasingly regarded as fundamental."

65. The cross-reference in the last paragraph quoted is to a section (at pp. 341-342) where it is stated that on several occasions, when faced with unlawful behaviour of states which it was not in a position to terminate or against which it proved unable to recommend or enjoin effective sanctions, the United Nations has fallen back on non-recognition of the illegal situation. One of the examples given is the United Nation's pronouncements in respect of Cyprus. The effect of such pronouncements is said to be that states pledge themselves to avoid any international or internal act capable of turning the *de facto* situation into an internationally legal one, and that the domestic courts of all those states must treat acts and transactions with the unlawful authority as null and void.

66. The qualification about non-recognition of illegal situations is a strong pointer against the appellants' reliance on the principle of effectiveness as an overarching principle of international law, at least in so far as the principle is relied on as overriding or displacing the effect of the treaty provisions relevant to this case. A similar point can be made about the appellants' citation of the section on effectiveness by Karl Doehring in the *Encyclopaedia of Public International Law* (1995), vol.2, pages 43-47: whilst Doehring states that "the existence or non-existence of effectiveness *can be* of decisive importance for the objective evaluation of legal situations" (emphasis added), the section read as a whole suggests limits to the principle of effectiveness under international law as it now exists; and, for example, it refers to Articles 61 and 62 of the Vienna Convention as applications of the principle, rather than suggesting that the principle can override or displace the provisions of that convention.

67. It follows that I agree with Wyn Williams J that the RoC continues to enjoy relevant rights under the Chicago Convention in respect of northern Cyprus which have not been suspended either pursuant to the Chicago Convention itself or by virtue of some other principle of international law.

68. I come back to the question, if it is truly a separate question, whether the RoC's entitlement to exercise its rights under the Chicago Convention has been suspended in relation to northern Cyprus even though the rights themselves have not been suspended. The appellants' contention is that such entitlement has passed into the hands of the authorities of the TRNC because the RoC has lost, and they have acquired, effective control over the territory. For my part, I can see no sensible basis for that contention. The RoC remains the relevant state party to the convention, and the Government of the RoC continues to represent the RoC under the convention and is recognised by the ICAO as the only legitimate government of the state. The authorities of the TRNC have no status under the convention. Indeed, they purport to represent not the RoC but the TRNC, which is not recognised as a state and is on no view a party to the convention. Although the authorities of the TRNC have established a system aimed at ensuring compliance with ICAO requirements, with a body of rules, documents and procedures modelled on those of the ICAO (see paras 25 and 80-81 of the judgment below), this simply mimics or replicates the position of a contracting state. It does not turn the TRNC into a contracting state or turn the authorities of the TRNC into a representative of a contracting state. The authorities of the TRNC may purport to exercise, in relation to northern Cyprus, the rights of the RoC under the convention but neither under the convention itself nor by virtue of any

principle of customary international law can they be said to have displaced the Government of the RoC as the body entitled to exercise the convention rights of the RoC. It therefore seems to me that the argument as to suspension of entitlement to exercise the convention rights, as distinct from suspension of the convention rights themselves, gets the appellants nowhere.

69. In conclusion on this issue, I agree with the judge that the grant of the permits sought by the appellants would constitute a breach of the United Kingdom's obligation to respect the rights of the RoC under the Chicago Convention and would in consequence be unlawful as a matter of domestic law. The judge was right to uphold the Secretary of State's decision and to dismiss the claim for judicial review on this basis.

The "non-recognition" issue

70. My conclusion in respect of the Chicago Convention makes it unnecessary for me to deal in detail with the alternative basis on which the Secretary of State seeks to support his decision. Any conclusion of mine in relation to that issue would necessarily be *obiter*. It may, however, be helpful for me to indicate the ambit of the dispute. I also need to deal with one particular point on which the appellants place separate reliance in support of their own case.

71. The starting-point of the Secretary of State's case, supported by the RoC, is that the authorities of the TRNC claim that the TRNC is a state with an independent constitution and purport to act as the government of that state; but, in accordance with its obligations under international law, the United Kingdom has not recognised the TRNC as a state. From the fact of non-recognition of the state it is said to follow as a matter of domestic law that decisions may not be made on the basis of, or by reference to, the purported laws and acts of the TRNC (subject to the so-called *Namibia* exception referred to below). To grant the permits sought would, however, inevitably infringe that prohibition. The authorities of the TRNC have established a system and set of rules governing civil aviation in northern Cyprus, mimicking in that respect a contracting state under the Chicago Convention. To grant the permits would be to treat those rules as legally effective, involving an implied recognition that the situation was legal or an implied acknowledgment that the TRNC was capable of implementing lawful measures.

72. Wyn Williams J accepted that line of argument, at paras 85-89 of his judgment. He also went so far as to hold, at para 84, that the grant of the permits would "constitute acts of recognition" of the TRNC as a state and would thereby render the United Kingdom in breach of its duty not to recognise the TRNC. The Secretary of State, however, does not put his case as high as that or seek to support that particular finding by the judge. The argument is put in the more limited way I have indicated.

73. The appellants' case is that the grant of permits would not imply any form of recognition in the sense of giving effect to the rules established by the authorities of the TRNC or acknowledging that they have a legal status. It would merely acknowledge the existence of the authorities of the TRNC as the *de facto* government of the territory of northern Cyprus and the existence of the system and rules established by that *de facto* government to ensure *inter alia* that relevant safety standards are met. It would not require any dealings with the authorities of the

TRNC on a government-to-government basis or at all. In any event, states can have dealings with the *de facto* government of a non-recognised state without giving rise to implied recognition of the state (and various dealings and contacts have in fact taken place between the United Kingdom government and the authorities of the TRNC or the leaders of the Turkish Cypriot community without implying recognition). If, as the Secretary of State has accepted, the grant of the permits would not involve recognition of the TRNC as a state, it would not involve a breach of the United Kingdom's international obligations; and if it would not involve a breach of the United Kingdom's international obligations there is no basis for reliance on it by the Secretary of State, as a matter of domestic law, as a reason why it was not open to him to grant the permits. Alternatively, the appellants rely on the *Namibia* exception.

74. Most of the authorities relevant to this issue are referred to in the judgment of Wyn Williams J. For the reason already indicated, I think it better not to embark upon an analysis of counsel's submissions in relation to them. Assessment of them is complicated by the fact that, as detailed at paras 68 *et seq.* of the judgment, until April 1980 it was the policy of the United Kingdom government formally to recognise governments as well as states, but the policy was then changed to one of according recognition to states alone, leaving it to the courts to determine whether a regime qualified to be treated as a government (whether *de jure* or *de facto*).

75. There is, however, one particular point that I should cover, since Mr Haddon-Cave relied on it as a distinct ground upon which, in his submission, the appellants ought to succeed even if they failed on the Chicago Convention issue and on the main part of the non-recognition issue. It concerns the so-called *Namibia* exception, which is an acknowledged exception to the general rule that effect must not be given to the acts of non-recognised states.

76. The *Namibia* case was an Advisory Opinion of the International Court of Justice, dated 21 June 1971, on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*. The court held that the restraints implicit in the non-recognition of South Africa's presence in Namibia and the explicit provisions of the relevant Security Council resolution imposed on states the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which might entrench its authority over the territory. But it then expressed an exception in these terms (at para 125):

> "In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."

77. A similar principle has been articulated in domestic authorities and is included within references to the *Namibia* exception as used in the present case. In *Carl Zeiss Stiftung*

v Rayner & Keeler Ltd (No.2) [1967] 1 AC 853, 954, Lord Wilberforce entered a reservation that "where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned … the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question". In *Hesperides Hotels Ltd v Aegean Holidays Ltd* [1978] 1 QB 205, a case which arose out of the expropriation of property in northern Cyprus, Lord Denning MR said at p.218G that he would, if necessary, unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by the United Kingdom government *de jure* or *de facto*, "at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth". In *Gur Corporation v Trust Bank of Africa Ltd* [1987] 1 QB 599, 622, Lord Donaldson MR said that he saw great force in the reservation of Lord Wilberforce in the *Carl Zeiss* case, "since it is one thing to treat a state or government as being 'without the law', but quite another to treat the inhabitants of its territory as 'outlaws' who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day-to-day activities having legal consequences". In *Caglar v Billingham (Inspector of Taxes)* [1996] STC (SDC) 150, para 121, the Special Commissioners, after a review of the authorities, formulated the principle in terms that "the courts may acknowledge the existence of an unrecognised foreign government in the context of the enforcement of laws relating to commercial obligations or matters of private law between individuals or matters of routine administration such as the registration of births, marriages or deaths", save that the courts will not acknowledge the existence of an unrecognised state if to do so would involve them in acting inconsistently with the foreign policy or diplomatic stance of the United Kingdom. In *Emin v Yeldag* [2002] 1 FLR 956, a case in which recognition was accorded to a divorce granted under the purported laws of the TRNC, Sumner J said that he did not dissent from the formulation of the principle in *Caglar v Billingham* but that he did not have to accept the breadth of the formulation for the purposes of his decision.

78. Mr Haddon-Cave submitted that the *Namibia* exception is a flexible principle and that the present case is a paradigm case for its application, given the importance of air travel and the adverse impact on ordinary people in northern Cyprus who are deprived of the advantages of international cooperation in the field.

79. I cannot accept that submission. In my judgment, the issue in the present case falls well outside the ambit of the *Namibia* exception, however precisely the principle may be formulated for the purposes of its application in domestic law. This case is not concerned with private rights, acts of everyday occurrence, routine acts of administration, day to day activities having legal consequences, or matters of that kind. The case involves public functions in the field of international civil aviation and the lawfulness of a public law decision. The issues in the case are issues of public law, concerning the question whether it is lawful to grant a permit for international flights to and from northern Cyprus contrary to the wishes (and, as I would hold, the treaty rights) of the recognised state of which that territory forms part. The body of rules established by the authorities of the TRNC to govern civil aviation in northern Cyprus is relevant only in so far as it affects those issues of public law (as distinct, for example, from the question whether the rules are capable of giving rise to private

rights of which our courts should take cognisance). This is not the kind of subject-matter at which the *Namibia* exception is directed.

80. It is almost certainly true that the opening up of international flights to northern Cyprus would be of great practical significance for persons resident in the territory, notwithstanding the evidence before the court that it is practical for visitors to the territory to use airports in the south of the island. But that does not bring the case within the exception. The mere fact that the impugned public law decision has a knock-on effect on private lives cannot be sufficient for the purpose. In my view, Mr Haddon-Cave's submissions read too much into the International Court of Justice's reference to the advantages derived from international co-operation and seek to give the exception far too wide a scope.

81. It follows that the *Namibia* exception cannot avail the appellants even as a way of meeting the Secretary of State's case as summarised under the heading of non-recognition. In any event, I can see no possible basis for the appellants' reliance on the exception to override or displace the effect of the Chicago Convention, since in that context the relevant question is whether the RoC remains entitled to exercise its rights under that convention and the *Namibia* exception simply has no place in the analysis. Either way, the appellants fail in their attempt to rely on the exception as a ground of challenge to the judge's decision.

The Treaty of Guarantee

82. I should also make brief mention of a further issue raised in submissions, this time by the RoC. Professor Lowe argued that an issue couched in terms of implied recognition was expressed too narrowly. One of the instruments upon which he relied in support of a wider formulation was the 1960 Treaty of Guarantee mentioned at para 7 above, which, in addition to obliging the United Kingdom not to recognise the TRNC, includes in Article II an undertaking by the United Kingdom to prohibit any activity aimed at promoting partition of the island of Cyprus. Professor Lowe suggested that the grant of the permits would constitute a breach of that undertaking.

83. The Treaty of Guarantee is not mentioned in the Secretary of State's decision letter. Mr Anderson accepted, however, that it would be a relevant consideration for the Secretary of State to take into account in exercising his discretion under Article 138 of the 2005 Order. But he also made clear the Secretary of State's position that the grant of the permits would not be in breach of Article 2 of the Treaty of Guarantee and that the Secretary of State was not relying on this treaty as a separate justification for his decision.

84. In the light of my conclusion in respect of the Chicago Convention, it is unnecessary to take the issue any further on the present appeal. Given the terms of the decision under challenge and the justification put forward for it by the Secretary of State, I doubt whether the issue would arise for decision in the present case in any event.

The costs issue

85. There is finally a short, discrete issue on costs which arises if the appeal against the decision of Wyn Williams J on the substance of the claim is dismissed. By a consequential order the judge ordered the appellants to pay the costs of the RoC as

interested party, in addition to the costs of the Secretary of State as defendant. The appellants challenge the order in so far as it required them to pay the costs of the RoC.

86. It was common ground before the judge, and is common ground before us, that the award of costs is in the discretion of the court but that the principles identified in *Bolton Metropolitan District Council v Secretary of State for the Environment* [1995] 1 WLR 1176, 1178H, are usually applied to determine whether or not an interested party can recover its costs in an unsuccessful claim for judicial review. In *Bolton*, Lord Lloyd stated that an interested party will not normally be entitled to its costs unless it can show that there was likely to be a separate issue on which it was entitled to be heard (that is to say, an interest not covered by counsel for Secretary of State) or unless it has an interest which requires separate representation. Wyn Williams J was plainly of the view that in this case the RoC did have an interest requiring separate representation. He stated:

> "This is a highly unusual case in which the interests of the Interested Party, a sovereign state, were under significant challenge. In those circumstances separate representation was completely justified and the interests of justice demand that the unsuccessful party should bear the costs not just of the Defendant but of the Interested Party."

87. The case for the appellants is that the judge erred in law or went beyond the reasonable bounds of his discretion in holding that the RoC had an interest requiring separate representation. At all times from his decision letter onwards the Secretary of State's stance was that he could not grant the permits sought because he was obliged to respect the RoC's sovereignty and its rights under the Chicago Convention, and in order to avoid recognition of the TRNC. The RoC's interests were fully protected by that stance. The RoC's participation was not invited by the appellants, nor could it be said that the RoC was obliged to participate at any stage because it was in ignorance of the stance being adopted by the Secretary of State.

88. I see no force in that argument. In my view the judge was fully entitled to treat this as a highly unusual case and to hold that the RoC, as a sovereign state seeking to protect its sovereignty and its rights under international law, had an interest that required separate representation before the court notwithstanding that the Secretary of State was also acting in support of the RoC's sovereignty and rights. The order that the appellants pay the costs of the RoC was a proper exercise of the judge's discretion.

Conclusion

89. For the reasons given I would dismiss the appeal both in respect of the substantive claim and in respect of costs.

Sir David Keene :

90. I agree.

Lord Justice Ward :

91. I also agree.