APPLICATION/REQUÊTE N° 9310/81

Michael Anthony RAYNER v/the UNITED KINGDOM

Michael Anthony RAYNER c/ROYAUME-UNI

DECISION of 16 July 1985 on the admissibility of the application

DÉCISION du 16 juillet 1986 sur la recevabilité de la requête

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Article 1 of the Convention *: States which regulate air traffic and construct airports are responsible under the Convention for noise nuisance caused by such airports.*

Article 6, paragraph 1 of the Convention *: The Convention organs cannot characterise as "civil" a right which the national legal system does not recognise.*

The fact that proceedings are bound to fail because the right claimed does not exist does not amount to a denial of access to a court.

Article 8 of the Convention *: A State must not only restrict its own direct interference with the exercise of the rights guaranteed by this provision but must also protect these rights.*

Considerable noise nuisance in the home is an interference with private life. Considerations taken into account in determining the proportionality of interference : degree of public interest, level of nuisance, pre-existence of the nuisance in relation to the person concerned taking up residence, benefits to him.

Article 1, paragraph 1 of the First Protocol *: This provision cannot be interpreted as guaranteeing a particular quality of environment.*

Article 1 de la Convention *: L'Etat qui réglemente le trafic aérien et construit un aéroport répond, aux termes de la Convention, de la nuisance sonore causée par cet aéroport.*

Article 6, paragraphe 1, de la Convention *: Les organes de la Convention ne sauraient attribuer la qualité de « droit civil » à un droit que le système juridique national ignore.*

Le fait qu'une action en justice soit vouée à l'échec parce que le droit revendiqué n'existe pas n'équivaut pas à un refus d'accès aux tribunaux.

***Article 8 de la Convention** : L'Etat doit non seulement limiter ses ingérences directes dans l'exercice des droits garantis par cette disposition mais aussi protéger ces droits.*

Une nuisance sonore considérable au domicile est une ingérence dans la vie privée. Eléments retenus pour juger de la proportionalité de l'ingérence : intensité du besoin public, intensité de la nuisance, antériorité de celle-ci par rapport à l'installation de l'intéressé, avantages accordés à ce dernier.

***Article 1, paragraphe 1, du Protocole additionnel** : Ne peut être interprété comme garantissant une certaine qualité d'environnement.*

THE FACTS

(français : voir p. 16)

The applicant, Michael Anthony Rayner, of British nationality, is a partner with other members of his family in a long-established farming business engaged in various enterprises and involving the ownership of agricultural land and residential property for the use of employees. He is represented by the Federation of Heathrow Anti-Noise Groups (FHANG) and by Mr. N.C. Walsh of Messrs. Blaker, Son and Young, solicitors in Lewes.

His application concerns noise nuisance related to Heathrow Airport.

A. *The applicant's situation*

The applicant lives with his family at 3 Riverside Bungalows, Poyle Park, Colnbrook. His home was acquired by his family in 1952; at that time being occupied by a tenant. The applicant took up residence at the address indicated in 1961. Prior to that he lived in the village of Horton. Most of the property owned or occupied by the business of the applicant's family is within a one mile radius of the applicant's home. The home is situated about one and a third miles west of and in a direct line with Heathrow's northern runway.

It is regularly overflown during the daytime and to a limited extent at night-time and falls within a 60 NNI contour*. The village of Horton, where the applicant lived

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* NNI = Noise and Number Index, involving a combination of the number of aircraft heard above a certain noise level, and the average noise of aircraft to yield a single value. It appears that in the United Kingdom the officially advised Criteria for Control of Development in areas affected by aircraft noise, expressed in NNI values, are for dwellings :

60 NNI + above	- refuse
40 - 50 NNI	- no major new developments infilling only with appropriate sound insulation
35 - 39 NNI	- Permission not to be refused on noise grounds alone

until 1961, is situated, according to a map submitted by the applicant, within a 55 NNI contour.

The applicant has submitted a report on aircraft noise monitoring by the London Scientific Services Noise and Vibration Group indicating that the average noise level at Poyle Park is 87 decibels (dB[A]) for landing aircraft and 86 dB[A] for aircraft taking off. Furthermore the report states that the percentage figure of noise level in excess of 90 dB[A] is 29% with regard to landing aircraft and 38% with regard to aircraft taking off.

The figures on the average noise level submitted by the respondent Government are 104-110 PNdB (perceived noise decibels) for landing aircraft and 93.2-111.3 PNdB for aircraft taking off. This corresponds, so the applicant points out, according to the standard PNdB - dB[A] conversion, to 91-97 dB[A] and 77.8-98.3 dB[A] respectively.

B. *The development and importance of Heathrow Airport*

The airport was transferred by the Air Ministry to the Civil Aviation Authorities on 1 January 1946. In May 1952 the first jet only airline service was inaugurated by BOAC.

Three terminals were built and opened in 1955, 1961 and 1968. A fourth terminal was scheduled for completion in 1985. Construction of a fifth terminal or a third London Airport at Stansted is under consideration.

The number of passengers handled by the airport increased steadily. In 1956 the airport handled three million passengers. In July 1963 the airport handled over one million passengers during one month. In 1973 the airport handled 22.4 million passengers on international routes and 4.4 million passengers on domestic routes. There was a resulting increase in aircraft movement. For the six months from June 1946 until December 1946 the movements were 2,046. In 1960 the movements were 146,501. In the twelve months preceding 29 February 1980 the movements were 303,110. The airport is currently used by over 70 airlines and serves over 200 destinations worldwide.

There are, as appears from statistics which are submitted by the applicant and not contested by the respondent Government, between 700 and 900 air movements at the airport depending upon the type of day. Since 1970 Concorde has been in service, but the total number of Concorde movements is very small, amounting to 1% of all movements at Heathrow.

Since 1978 a helicopter link between Heathrow and Gatwick has been in existence, with about twenty flights per day.

Heathrow is the United Kingdom's leading port in the value of visible trade and in 1983 handled cargo valued at £ 16.6 billion. It plays a major part in earning for

the United Kingdom the £ 4 billion per annum which is spent by overseas visitors to the United Kingdom. Over 20% of passengers use the airport as an interchange point. At a conservative estimate the airport contributes a net £ 200 million to the United Kingdom's balance of payments and provides direct employment for some 45,000 people. The number of people employed locally in servicing the industry is substantial. Heathrow is also a major contributor to the local government economy, paying approximately £ 9 million in local rates and rents in the year 1982/83.

C. *Noise abatement measures*

Various measures have been taken to control the noise nuisance connected with the running of an airport.

(a) *Noise certification*

Through international co-operation successive United Kingdom Governments have sought to make aircraft inherently quieter. The main forum for this activity is the International Civil Aviation Organisation (ICAO), originally through its Committee on Aircraft Noise (CAN) and now through its Committee on Aviation Environmental Protection (CAEP). A series of standards has been developed leading to the phasing out of aircraft unable to meet them. In the United Kingdom effect is given to the standards by means of an Air Navigation (Noise Certification) Order. In May 1979 new standards were developed to which the United Kingdom gave effect by way of the present 1984 Order. It includes, *inter alia*:

— changes to the requirement for subsonic jet aeroplanes;

— requirements for future production of existing types of supersonic transports and their derived versions.

(b) *Restrictions on night jet movements*

Specific steps have been taken by the United Kingdom Government since 1971 to reduce progressively the number of night movements and thereby achieve a reduction of night noise disturbance at Heathrow.

In 1978 the Government decided that all flights by noisier aircraft would be phased out over a period of ten years. This was to be achieved by the creation of two quotas, one for noisier aircraft movements and the other for quieter aircraft movements. It was decided that the former would be run down to zero over a ten year period by equal annual cuts and that the quotas for quieter aircraft movements would be increased at the same rate.

Whether an aircraft qualifies for the quieter quota is determined by its noise performance as measured by the area within the 95 PNdB contour. According to the respondent Government, 95 PNdB is the noise level below which, on the evidence currently available, the average person sleeping in an insulated room is unlikely to be awakened. The specified criteria (4 square miles on take-off, 2.5 square miles on landing) correspond broadly to the performance of the quieter, modern jet aircraft

such as the A 300 B Airbus and the L1011 TriStar. No night flights by the noisier types of aircraft will be permitted from 1 April 1987.

(c) *Noise monitoring*

Monitoring of aircraft noise on take-off was first carried out in the early 1960's. Since July 1974 the British Airports Authority (BAA) has carried out monitoring on behalf of the Government using automatic equipment. This equipment consists of 13 Noise Monitoring Terminals ("NMT") linked to a central processing and control unit. The system is self-checking to ensure the validity of any noise reading in excess of the noise limit for the period.

The distribution of NMTs ensures that all departing jet aircraft pass over or close to a monitoring point and the NMTs accordingly provide a reliable check of the maximum noise levels produced by all aircraft.

The noise level of a jet aircraft taking off must not exceed the statutory limits of 110 PNdB by day (07.00-23.00 hours local time) or 102 PNdB by night (23:00-07.00 hours local time) at the nearest monitor after take-off.

In the event of an infringement of the noise limit the British Airports Authority informs the airline by letter and sends a copy to the Department of Transport. It is the responsibility of the airline operators to ensure that their aircraft are operated in such a manner that the statutory limits are met. To achieve this they may have to pay special attention to take-off procedures and/or adjust take-off weight to suit a particular departure route.

(d) *Minimum noise routes*

Such routes are designed to avoid as far as possible the major built up areas and thus to overfly the smallest number of people consistent with the requirements of safety and air traffic management.

(e) *Other operational measures*

In addition to the above principal measures other important measures are in force aimed at reducing noise levels, such as special approach procedures, minimum height requirements on take-off and approach to land, runway alternation, limitation on air transport movements, prior approval to operate, noise related landing charges.

(f) *Noise insulation grant scheme*

The first scheme for the sound insulation of dwellings was introduced for Heathrow in April 1966. There were further schemes in 1972 and 1975, the latter being improved in 1977 by increasing the financial limits. The present scheme came into operation on 1 April 1980 by means of Statutory Instrument 1980 No. 153.

A number of separate considerations entered into the formulation of the present scheme. In determining the area to be covered, the Government considered that account should be taken of the noise levels that people would be experiencing in the

coming years, since the progressive introduction into service of quieter aircraft was expected to bring about a gradual reduction of noise levels around Heathrow (and indeed around all other airports). The scheme therefore concentrated on those areas that would still be experiencing comparatively high noise levels in the mid-1980's. The scheme also concentrated on those areas where there is the greatest degree of disturbance due to aircraft noise at night. Within this area, the amount of grant provided was intended to cover 100% of the reasonable costs incurred.

Under the present scheme, the boundary is based on the forecast 50 NNI contour for 1985, and the composite of the 95 PNdB noise footprint for quieter aircraft. The 35 NNI is generally considered to indicate a low annoyance rating and 55 NNI a high annoyance rating. 95 PNdB is the exterior noise level below which, according to a Department of Trade Press Notice of 21 February 1978, current evidence suggests that the average person in an insulated room is unlikely to be awakened. The area enclosed by these two contours was then further extended to take account of natural boundaries, in the majority of cases, roads.

When the scheme was introduced in 1966 roof insulation was optional within the grant level. It was excluded from the 1980 Scheme for *all* classes of dwelling, because such treatment was made available in 1978 by the Department of the Environment's Home Insulation Scheme. It was felt that insulation for energy saving purposes also provided suitable acoustic protection.

D. *The legal situation*

(a) *Remedies*

No specific remedies exist for individuals who might be affected by aircraft noise in the vicinity of airports. Section 76 of the Civil Aviation Act 1982 (formerly Section 40 of the Civil Aviation Act 1949) provides as follows:

> "No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of any Air Navigation Order or of any Orders under Section 62 above have been duly complied with and there has been no breach of Section 81 below."

Section 76 (2) of the 1982 Act goes on to provide for strict liability (i.e. liability without proof of negligence or intention) where material loss or damage to any person or property on land or water has been caused by (*inter alia*) an aircraft in flight or an object falling from an aircraft.

The provisions of Section 76 are comparable to those in the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface 1952 ("Rome Convention").

The Noise Abatement Act 1960 specifically exempts aircraft noise from its operations.

(b) *Compensation for noise nuisance or purchase of affected property*

Compensation for loss of value of houses and land from airport noise is provided for by the Land Compensation Act 1973. To qualify for compensation an applicant has to show that there is immunity on the part of the airport from actions for nuisance. Such immunity arises by virtue of Section 77 (2) of the Civil Aviation Act 1982 and immunity extends to operations at Heathrow.

The new rights to compensation were tied to new or altered public works first brought into use after 16 October 1969. For reasons of principle and practice intensification of an existing use, i.e. from works which had been first brought into use before the relevant date for the purposes of the 1973 Act, was not made compensable.

The BAA being a public statutory authority does not have power to acquire property near an airport unless it could show that the acquisition of the property was necessary for the proper performance of its function.

COMPLAINTS

The applicant complains of the frequency of excessive noise caused by landing or departing aircraft, the excessive noise levels themselves and the lack of any adequate respite. He also complains that British law, unlike that of other High Contracting States, excludes civil remedies for nuisance irrespective of the degree of loss or damage sustained. He invokes Articles 6 para. 1, 8 para. 1 and 13 of the Convention and Article 1 of Protocol No. 1.

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THE LAW

1. The applicant complains of noise and vibration nuisance caused by air traffic at Heathrow Airport. In addition he complains that Section 76 Civil Aviation Act (CAA) 1982 prevents him from raising his complaint before a national court.

The Commission has already held in the Arrondelle case (No. 7889/77, Dec. 15.7.80, D.R. 19 p. 186) that the United Kingdom is answerable under the Convention with regard to a complaint on aircraft noise in the vicinity of British airports because it is a State body, namely the British Airports Authority (BAA) which is responsible for the planning and construction of civil airports. In addition air traffic is regulated by legislation, the Civil Aviation Act (CAA) 1982.

The applicant complains of a continuing situation with regard to which, uncontestably, no specific remedy exists under British law. The applicant can, in these circumstances, be considered to have complied with the condition of Article 26 of the Convention.

The applicant first invokes Article 8 of the Convention. He submits that the noise nuisance complained of constitutes an interference with the right to respect for his private life and for his home.

The Commission considers that Article 8 para. 1 of the Convention which guarantees this right cannot be interpreted so as to apply only with regard to direct measures taken by the authorities against the privacy and/or home of an individual. It may also cover indirect intrusions which are unavoidable consequences of measures not at all directed against private individuals. In this context it has to be noted that a State has not only to respect but also to protect the rights guaranteed by Article 8 para. 1 (see Eur. Court H.R., Marckx judgment of 13 June 1979, Series A no. 31, para. 31). Considerable noise nuisance can undoubtedly affect the physical well-being of a person and thus interfere with his private life. It may also deprive a person of the possibility of enjoying the amenities of his home. In the present case the 60 NNI contour within which the applicant is living is uncontestedly an area in which, due to substantial noise nuisance, new housing developments are not permitted. The average noise level of aircraft overflying the applicant's home attains, according to the respondent Government's admissions, peaks of about 110 PNdB. It can be deduced from the Department of Trade's Press Notice of 21 February 1978, that such noise level is likely to awaken persons sleeping in an insulated room.

The Commission considers that in the given circumstances the level of noise amounts to an interference with the above-mentioned rights guaranteed by Article 8 para. 1.

It therefore remains to be examined whether the interference is justified under paragraph 2 of the Article.

It is not in question that the operation of Heathrow Airport has a legal basis. Furthermore, it cannot be doubted that the running of an airport and the increasing use of jet aircraft are in the interest of the economic well-being of a country and are also necessary in a democratic society. It is essential for developing external and internal trade by providing speedy means of transportation and it is also an important factor for the development of tourism.

The interference with the applicant's right under Article 8 para. 1 is also proportionate to the legitimate aim connected with the running of the airport. It is true that where a State is allowed to restrict rights or freedoms guaranteed by the Convention, the principle of proportionality may oblige it to make sure that such restrictions do not create an unreasonable burden for the individual concerned.

The Commission notes in this context that the United Kingdom authorities have, according to the applicant's own submissions, taken various measures to control and limit the noise nuisance connected with the running of Heathrow Airport. In particular it has not been disputed by the applicant that he qualified for a noise insulation grant.

It has further to be noted that the applicant took up residence at Poyle Park in 1961 while before he lived a little further away from the airport and its northern runway, namely in the village of Horton which is at present only within the 55 NNI contour. In 1961 jet aircraft were already in service. Also, the airport had already expanded considerably. The applicant must therefore have realised that he did not choose a very peaceful environment for his home. He has not alleged that at the time he had no reason to expect further expansion of air traffic increasing the noise level at his site, or that he had no other choice than to take up residence at Poyle Park. He thus took the risk of choosing a home in an environment which was likely to deteriorate.

To this extent the case can be distinguished from the case of the applicant Baggs (1) who finished the construction of his home in 1950.

Furthermore, the present case is distinguishable from the Baggs case in so far as the applicant Baggs is living within a 72.5 NNI contour where the maximum noise levels considerably exceed those indicated for the present applicant's home. It has to be noted in this context that the PNdB scale is logarithmic, which means that every increase of 10 represents a doubling of the loudness.

According to the applicant's own submissions an important number of people live within the 60 NNI contour while uncontestedly only very few people are exposed to the noise level the applicant Baggs has to endure and which renders Mr. Baggs' property practically unsaleable. As the Convention does not in principle guarantee a right to a peaceful environment, noise nuisance for which a Government can, as in the present case, be held responsible, cannot be considered to constitute an unreasonable burden for the individuals concerned if they have the possibility of moving elsewhere without substantial difficulties and losses. The present applicant has himself stated in a letter of 5 February 1985 submitted with his counsel's observations of 18 February 1985 on admissibility and merits, that locally demand for houses was sufficient to ensure rapid sale. Although the sale of his own property may, as he alleges, encounter certain difficulties there is nothing to show that such difficulties, which are partly due to the fact that the applicant's property is used for farming, are insurmountable.

The Commission concludes that the circumstances of the present case do not disclose that the applicant is subjected to a degree and frequency of noise nuisance which would have to be considered intolerable and exceptional compared with the situation of a large number of people living within the vicinity of an airport. The applicant's situation is not identical with that of the applicant Baggs who cannot escape the noise nuisance without sacrificing his house, because it is practically unsaleable. The interference complained of is consequently not disproportionate to

(1) See D.R. 44 p. 13.

the legitimate aim connected with the running of the airport. It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The applicant has further invoked Article 1 of Protocol No. 1 which guarantees the right to the peaceful enjoyment of possessions. This provision is mainly concerned with the arbitrary confiscation of property and does not, in principle, guarantee a right to the peaceful enjoyment of possessions in a pleasant environment. It is true that aircraft noise nuisance of considerable importance both as to level and frequency may seriously affect the value of real property or even render it unsaleable and thus amount to a partial taking of property. However, the applicant has not submitted any evidence showing that the value of his property was substantially diminished on the ground of aircraft noise so as to constitute a disproportionate burden amounting to a partial taking of property necessitating payment of compensation.

An examination by the Commission of this complaint does not therefore disclose any appearance of a violation of Article 1 of Protocol No. 1.

It follows that this part of the application is likewise manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

3. The applicant has also alleged a violation of Article 6 of the Convention on the ground that the Civil Aviation Act 1982 excludes a right of action against trespass and nuisance by reason of the flight of an aircraft over property and a right of action against nuisance by reason of the noise or irritation caused by an aircraft or an aerodrome.

The respondent Government consider that Section 76 CAA does not impair the very essence of a right to a court.

It is true that, according to the jurisprudence of the European Court of Human Rights, any civil claim must be able to be submitted to a court (Eur. Court H.R., Golder judgment of 21 February 1975, Series A no. 18, p. 18, para. 36). However Article 6 para. 1 does not impose requirements in respect of the nature and scope of the relevant national law governing the "right" in question. Nor does the Commission consider that it is, in principle, competent to determine or review the substantive content of the civil law which ought to obtain in the State Party any more than it could in respect of substantive criminal law. As it has been stated in the Sporrong and Lönnroth case:

> "Whether a right is at all at issue in a particular case depends primarily on the legal system of the State concerned. It is true that the concept of a 'right' is itself autonomous to some degree. Thus it is not decisive for the purposes of Article 6 para. 1 that a given privilege or interest which exists in a domestic legal system is not classified or described as a 'right' by that system. However, it is clear that the Convention organs could not create by way of interpretation of Article 6 para. 1 a substantive right which has no legal basis whatsoever in

the State concerned." (Comm. Report 8.10.80, para. 150; see also No. 8282/78, Dec. 14.7.80, D.R. 21 p. 109; Kaplan v. the United Kingdom, Comm. Report 17.7.80, para. 134, D.R. 21 p. 5)

Unlike in the cases so far considered by the Commission (see No. 7443/76, Dec. 10.12.76, D.R. 8 p. 216; No. 10096/82, Dec. 9.10.84; No. 10475/83, Dec. 9.10.84, D.R. 39 p. 246) and the European Court of Human Rights (see Ashingdane judgment of 28 May 1985, Series A no. 93) the provision in Section 76 CAA does not confer an immunity from liability in respect of actions of certain and distinct groups of persons (such as soldiers or mental health patients as in the cases cited) but excludes *generally* any action in respect of trespass or nuisance caused by the flight of an aircraft at a reasonable height regardless of the status of the possible claimant. The Commission considers that the purpose and effect of Section 76 CAA is to exclude generally any possible compensation claims for trespass and nuisance and not just to limit jurisdiction of civil courts with regard to certain classes of civil action. The applicant, therefore, cannot invoke under English law a substantive right to compensation for the alleged noise nuisance. The mere fact that consequently an action in respect of aircraft noise nuisance would be devoid of all prospects of success is not equivalent to depriving the applicant of the right of access to a court.

The Commission also notes in this context that the applicant himself admitted that if Section 76 CAA did not apply, to sue in nuisance one would have to prove unreasonable user. His general contention is, however, that despite the various noise abatement measures taken by the competent authorities, his rights as guaranteed by the Convention are violated on account of aircraft-noise nuisance. In these circumstances it cannot be considered to be clearly established that under English law he could invoke before a court a substantive right were he not barred from doing so by Section 76 CAA.

It follows that this particular complaint does not disclose any appearance of a violation of the rights and freedoms set out in the Convention and in particular in Article 6 para. 1.

The application is to this extent again manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

4. On the other hand the Commission considers that the applicant's complaint of being deprived, as regards aircraft noise nuisance, of any effective remedy before a national authority raises important issues of law and fact under Article 13 of the Convention which are of such complexity that their determination must depend upon an examination on the merits.

For these reasons, the Commission

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint that as regards aircraft noise he has no effective remedy before a national authority within the meaning of Article 13 of the Convention;

DECLARES INADMISSIBLE the remainder of the application.