EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 21987/18
Robert NICOLAI
against Germany

The European Court of Human Rights (Fourth Section), sitting on 8 October 2024 as a Committee composed of:

Faris Vehabović*, President*,
Armen Harutyunyan,
Anja Seibert-Fohr*, judges*,
and Simeon Petrovski, *Deputy Section Registrar,*

Having regard to:

the application (no. 21987/18) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 2 May 2018 by a German national, Mr Robert Nicolai ("the applicant"), who was born in 1969, lives in Rangsdorf and was represented by Mr R. Eisele, a lawyer practising in Stuttgart;

the decision to give notice of the application to the German Government ("the Government"), represented by one of their Agents, Mr H.-J. Behrens of the Federal Ministry of Justice;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The application concerns the alleged impossibility of the applicant to challenge effectively a planning decision concerning Berlin Brandenburg Airport because incorrect information about the projected flight paths had been provided by the authorities during the planning approval procedure. The planning approval procedure and subsequent developments are set out in detail in *Büttner and Krebs v. Germany* ((dec.), no. 27547/18, §§ 5-20, 27 June 2024). The applicant is a homeowner whose home is located approximately 8 km south-west of the centre of the airport's southern runway.

The outline plan presented on 30 March 1998 by the company in charge of German air traffic control ("DFS") was based on flight paths in both operating directions which were intended to run in parallel for several kilometres extending in a straight line from the respective runways ("straight flight paths"). While this was not expressly indicated in the plan, the flight paths were based on the premise that the two runways would not be used for simultaneous independent departures. The outline plan projected a noise level or LAeq during the day of 45.9 dB(A) and a night-time LAeq of 38.3 dB(A) for the applicant. The applicant submitted that this estimate was incorrect and that he would have been exposed to a lower level of noise pollution based on straight flight paths.

2. In contrast to the outline plan, the final flight paths, as presented by DFS on 6 September 2010, provided, *inter alia*, that departure flight paths from both runways diverged to the north or south by at least 15 degrees shortly after take-off. The applicant submitted that he was exposed to a more significant level of noise pollution by these diverging flight paths. According to the Government, the projected noise levels to which the applicant would be exposed based on the flight paths as presented by DFS on 6 September 2010 had, in fact, decreased to a daytime LAeq of 42.8 dB(A) and a night-time LAeq of 34.9 dB(A). According to the Government, the projected noise level to which the applicant would be exposed, based on the final flight paths as set by the Federal Supervisory Authority for Air Navigation Services ("BAF") on 12 February 2012, increased to a daytime LAeq of 49.5 dB(A) and a night-time LAeq of 42.1 dB(A).

3. After the sequence of events which had led to the planning decision being based on straight flight paths despite DFS's initial objections had come to light (see, in detail, *Büttner and Krebs*, cited above, §§ 8-16), the applicant brought an action before the Federal Administrative Court on 23 December 2010 against the planning decision of 13 August 2004 and requested a reinstatement of the time-limit for bringing that action. He asserted that the planning authority had deliberately misled him about the impact of the airport on his property. This had prevented him from bringing an action against the planning decision in due time. The planning decision was unlawful as it was based on an incorrect estimation of the noise impact on Rangsdorf and therefore on an insufficient balancing of the competing interests.

4. By a judgment of 31 July 2012 the Federal Administrative Court dismissed the applicant's action as inadmissible, finding that it was time-barred. An action against the planning decision had to be lodged within one month of the decision's publication and the requirements for a reinstatement of that time-limit were not met: as the time-limit for bringing an action had expired more than a year before, reinstatement could only be granted on the ground of *force majeure*, but the relevant requirements were not met. The planning authority had not misled the applicant about his legal standing: as a homeowner in the vicinity of the airport he had had legal

standing to challenge the planning decision in any event, regardless of the exact flight paths. Furthermore, such action would not have been without prospects of success, as the Federal Administrative Court's rulings of 16 March 2006 on several test cases had shown (see *Büttner and Krebs*, cited above, § 17). Moreover, the planning authority had not deceived the applicant with regard to a fact that was relevant to the prospects of success of an action against the planning decision: had the applicant brought an action against the planning decision in time, he could not have had that decision quashed on the grounds that it had not considered the requirement for flight paths to diverge by 15 degrees in the event of simultaneous independent departures. For reasons similar to those set out in detail in *Büttner and Krebs* (ibid., §§ 25-29), the Federal Administrative Court found that the outline plan based on straight flight paths was adequate for an estimation of the noise impact in the event of simultaneous independent use of the runways with diverging flight paths. Notably, the planning decision was not rendered flawed, in the sense of having been based on an inappropriate balancing of interests, by the fact that the planning authority had relied on the outline plan with straight flight paths. The population density was broadly similar in the areas under the straight flight paths and the modified flight paths with a 15-degree divergence and it would not be appropriate to base a decision approving the development of an airport on specific flight paths without having regard to the possibility that the paths might be changed in a way which might, in turn, entail changes in the area affected by aircraft noise. Nor did the documents referred to by the applicant show that the planning authority's use of the original outline plan had been based on inappropriate considerations: for reasons set out in detail in *Büttner and Krebs* (ibid., § 30), the planning authority's decision to continue with the plans based on the straight flight paths was not unreasonable.

5. On 24 October 2017 the Federal Constitutional Court declined to accept the applicant's constitutional complaint for adjudication. It found that the Federal Administrative Court's dismissal of the applicant's action as time-barred had not violated his right to effective legal protection. In particular, the applicant had not sufficiently substantiated that he had failed to bring an action against the planning decision in time because the planning authority had deceived him about the noise impact of the airport on his property. His claim that he had not been aware of the airport's impact on his property before the diverging flight paths became publicly known was not sufficient. He had failed to demonstrate that he had been well aware of the possibility of being affected by the airport, but that he had believed that the planning approval procedure had been based on the most likely flight paths. Therefore, his decision not to bring an action against the planning decision in time could not be clearly attributed to the alleged deception. The applicant had not explained his motives for not bringing an action against the planning

decision in time or whether he had simply missed the time-limit for doing so. The decision was served on the applicant's counsel on 12 December 2017.

6. The applicant alleged a breach of his right to a fair trial and of his right of access to a court under Article 6 § 1 of the Convention. The planning authority had deliberately misled him about the expected flight paths and about the noise impact on his property during the planning approval procedure. This conduct, which had in essence been declared irrelevant by the domestic courts, deprived the planning approval procedure of its purpose and was not compatible with the rule of law. He had not been able to challenge the development of the airport at the planning stage and the aforementioned deceit had prevented him from bringing an action against the planning decision in time. In these circumstances, he had to be able to challenge the planning decision after learning about the authorities' deceit. The Federal Administrative Court's decision to reject his action as time-barred constituted an excessive restriction of his right of access to a court. The applicant also alleged a violation of Article 8 of the Convention on the aforementioned grounds. He explicitly stated that he did not allege that the findings of the domestic courts as to the substantive lawfulness of the planning decision were wrong.

THE COURT'S ASSESSMENT

7. In so far as the applicant alleged that his right of access to a court had been disregarded, the Court observes that even though the Federal Administrative Court dismissed his action as inadmissible, it examined the merits of the applicant's action in order to determine that the planning authority had not deceived him with regard to a fact that was relevant to the prospects of success of an action against the planning decision. It found that he could not have had that decision quashed on the grounds that it had not considered the requirement for flight paths to diverge by 15 degrees in the event of simultaneous independent departures, if he had brought an action against the planning decision in time, and explained why the planning decision was not rendered flawed, in the sense of having been based on an inappropriate balancing of interests, by the fact that the planning authority had relied on the outline plan with straight flight paths (see paragraph 4 above). Accordingly, there are no indications that the applicant's right of access to a court was restricted (see, more generally, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, §§ 84-90, 29 November 2016).

8. In so far as the applicant alleged a violation of his right to a fair trial, the Court notes that his complaint is, in essence, directed at the application of domestic law by the Federal Administrative Court. Having regard to the documents in its possession and the detailed reasons given by the Federal Administrative Court, the Court considers that there are no indications that

its findings were arbitrary or manifestly unreasonable (see *Büttner and Krebs*, cited above, § 59). In view of the foregoing, the Court concludes that the applicant's complaint under Article 6 § 1 is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

9. The Court does not have to determine whether Article 8 of the Convention is applicable in the present case, because the applicant's complaint under this provision is, in any event, manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Having regard to the reasons advanced by the Federal Administrative Court, as well as to the principles set out in *Büttner and Krebs* and its findings in that case (cited above, §§ 72-79), the Court considers that the Federal Administrative Court demonstrated that the planning authority's failure to mention during the planning approval procedure that it was possible, if not likely, that flight paths with a 15-degree divergence would eventually be set, had not affected the planning decision with respect to the applicant (see paragraph 4 above).

10. In view of the foregoing, the Court concludes that the application is manifestly ill-founded and that, as such, it must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 7 November 2024.

Simeon Petrovski Deputy Registrar	Faris Vehabović President