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

FOURTH SECTION

DECISION

Application no. 8422/19
Irene SCHÜTTKE and Others
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. 8422/19) 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 31 January 2019 by three German nationals, relevant details listed in the appended table, ("the applicants") who were represented by Mr S. von Raumer, a lawyer practising in Berlin;

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 night flight scheme for Berlin Brandenburg Airport. The planning approval procedure concerning the development of that airport and subsequent developments are set out in detail in *Büttner and Krebs v. Germany* ((dec.), no. 27547/18, §§ 5-20, 27 June 2024). Following the Federal Administrative Court's judgment of 16 March 2006 in test cases against the planning decision, in which it dismissed the applications for the planning decision to be quashed but ordered the planning authority to add further protective measures, in particular, additional

restrictions on night flights, the planning authority issued a supplementary decision with a modified night-flight scheme on 20 October 2009 (see ibid., § 17). As regards passenger and freight flights, that scheme mostly permitted flight operations in the marginal night hours (10 p.m. to 11.30 p.m. and 5.30 a.m. to 6 a.m.), restricted flight operations between 11.30 p.m. and midnight as well as between 5 a.m. and 5.30 a.m. and prohibited, as a rule, flights during core night hours (between midnight and 5 a.m.). An annual maximum number of arrivals and departures between 11 p.m. and midnight and between 5 a.m. and 6 a.m. was set. Flights carrying air mail were authorised during core night hours on working days. In general, night flights were restricted to low-noise aircraft so as to avoid single noise events with high sound peaks during the night. Following an extensive assessment of noise impact research, the planning authority set the threshold of night-time noise disturbance which entitled residents to noise protection measures ("night protection zone") at an LAeq (equivalent continuous sound level) of 50 dB(A) outdoors or, alternatively, a maximum of six noise events per night ("NAT events") with a noise level of 55 dB(A) indoors.

2. The applicants are homeowners living in the airport's vicinity, whose homes are located in the night protection zone. Based on the amended planning decision, the projected outdoors night-time LAeq for the applicants was: 57.5 dB(A) for the first applicant, 52 dB(A) for the second applicant and 55.5 dB(A) for the third applicant. According to the Government, the outdoors night-time LAeq to which the applicants 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, was: 56.2 dB(A) for the first applicant, 57.8 dB(A) for the second applicant and 53.6 dB(A) for the third applicant. Based on the amended planning decision, the projected number of NAT events was 20.1 for the first applicant, 8.1 for the second applicant and 21.3 for the third applicant. Based on the final flight paths, the number of NAT events was 18.9 each for the first and the second applicants and 13.7 for the third applicant. In view of the noise levels to which they were exposed, the applicants were entitled to financial compensation, *inter alia*, for soundproofing their homes to reduce the indoor noise level.

3. In 2010 the applicants brought actions in court against the amended planning decision, by which they sought to compel the planning authority to tighten the restrictions on night flights. They submitted, *inter alia*, that the planning authority's balancing of the competing interests had been deficient to their disadvantage. In particular, too little weight had been attached to the health risks arising from the noise of night flights and more recent research concerning these risks had not been taken into account. Lower thresholds for reasonable night-time noise pollution should have been set.

4. The Federal Administrative Court dismissed the applicants' actions as ill-founded. It found that the amended planning decision did not suffer from errors which infringed the applicants' rights. In particular, the planning

authority's balancing of the competing interests as regards the night-flight scheme had not been deficient to the disadvantage of the applicants. When weighing the interests in protection against noise, the planning authority had correctly considered the thresholds of night-time noise pollution to which residents could reasonably be exposed to be those set out in the amended planning decision (see paragraph 1 above). These thresholds were more favourable for residents, including the applicants, than the thresholds prescribed by section 2, subsection 2, second sentence, no. 1 lit. (a), of the Aircraft Noise Act at the time of the adoption of the amended planning decision (see ibid., § 46), which constituted the relevant point in time. Following the entry into force of the Aircraft Noise Act in 2007, which set out the levels of noise pollution to which individuals could reasonably be exposed, and the amended section 8, sub-section 1, third sentence, of the Civil Aviation Act, which provided that the said thresholds set out in the Aircraft Noise Act had to be observed in airport planning procedures, the authorities and domestic courts were no longer required to determine the threshold of reasonable noise pollution based on expert opinions in the field of noise impact research in each case. The applicants had not sufficiently substantiated that the thresholds prescribed by the Aircraft Noise Act fell short of the State's obligation to protect the right to physical integrity. There were no indications that lower thresholds than those set in the amended planning decision would have had to be set in the present case. Studies published after the adoption of the Aircraft Noise Act in 2007, upon which the applicants had relied, did not have to be taken into account. Their findings were considered controversial by the scientific community and did not lead to the conclusion that the thresholds set by the legislature in 2007 were, or had become, unacceptable. The studies could be taken into account during the legislature's mandatory review of the relevant noise thresholds, which had to have been conducted no later than 2017, in accordance with section 2, subsection 3, of the Aircraft Noise Act.

5. By a decision of 2 July 2018, the Federal Constitutional Court declined to accept the applicants' constitutional complaint for adjudication. It nevertheless found that the Federal Administrative Court's judgment had not breached the applicants' right to be heard, as that court had examined the applicants' arguments and had simply reached conclusions that differed from the applicants' views. Neither the amended planning decision nor the Federal Administrative Court's judgment had breached the applicants' right to physical integrity. The Federal Constitutional Court found, in particular, that new scientific findings were, as a rule, not to be used as the basis of a planning decision until they had gained general acceptance in the scientific community. The legislature's duty to review and adjust provisions in view of scientific developments served to ensure that the risk posed by scientific uncertainties which still existed at the time of adoption of a planning decision would not be permanently borne unilaterally by those affected. To enable the

legislature to discharge that duty, the Government was obliged by section 2, subsection 3, of the Aircraft Noise Act to present a report to the Federal Parliament no later than 2017, and thereafter at regular intervals, containing an evaluation of the thresholds of reasonable noise pollution specified in subsection 2 of that provision, having regard to the latest developments in the fields of noise impact research and aviation engineering. The Federal Administrative Court, which had examined the state of noise impact research comprehensively, could not be faulted for finding that the planning authority had not been obliged to obtain expert opinions to determine the threshold of reasonable noise pollution in the present case, in view of the thresholds established by the Aircraft Noise Act. The decision was served on the applicants' counsel on 3 August 2018.

6. Relying on Article 8 of the Convention, the applicants submitted that they were exposed to considerable levels of night-time noise disturbance which affected their health. By relying exclusively on the thresholds set out in the amended planning decision and in domestic legislation and by failing to examine the applicants' individual circumstances and to consider the latest medical findings on the adverse effects of noise, on which they had relied, the domestic courts had deprived the applicants of the possibility to assert their rights effectively. This constituted a breach of Article 8 of the Convention taken alone and of Article 13 taken in conjunction with Article 8. The applicants also alleged a breach of Article 6 § 1 of the Convention because the domestic courts had not examined their essential argument as to the adverse effects on their health of the noise to which they were exposed.

THE COURT'S ASSESSMENT

7. The Government argued that the applicants had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention, as they had framed their complaints differently in the domestic proceedings and had not raised there some of the arguments which they subsequently raised before the Court. The Court considers that it does not need to address the Government's objection as the application is, in any event, manifestly ill-founded for the following reasons.

8. As regards Article 8 of the Convention, the Court observes that the domestic authorities had examined the state of noise impact research comprehensively throughout the domestic proceedings in the present case, as the legislature had done prior to setting out the relevant thresholds in the Aircraft Noise Act, and that they explained why they were no longer required to determine the threshold of reasonable noise pollution based on expert opinions in each case but could instead rely on the thresholds set out in the Aircraft Noise Act (see paragraphs 1, 4 and 5 above). In these circumstances, it is not in violation of Article 8 of the Convention that the domestic courts referred to the thresholds of night-time noise pollution set out in the amended

planning decision and in the Aircraft Noise Act when reviewing the planning authority's conduct of the balancing exercise, it being reiterated that authorities are entitled to rely on statistical data based on average perception of noise disturbance when planning night-flight schemes (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 125, ECHR 2003-VIII). The domestic courts also engaged with the studies relied upon by the applicants and concluded that these did not have to be taken into account, *inter alia,* because their findings had not gained general acceptance in the scientific community (see paragraphs 4 and 5 above). In these circumstances, there is no basis for finding that the applicants were deprived of the possibility to assert their rights. Nor are there any indications that the domestic authorities did not adequately take into account the applicants' interests or that they failed to strike a fair balance between the competing interests. In view of the foregoing, the applicants' complaints under Article 8 of the Convention taken alone and under Article 13 taken in conjunction with Article 8 are manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

9. The applicants' complaint under Article 6 § 1 of the Convention, which is directed, in essence, at the application of domestic law by the domestic courts, is likewise manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, as there are no indications that their findings were arbitrary or manifestly unreasonable (see *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, § 149, 17 October 2019).

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

Appendix

List of applicants:

Application no. 8422/19

No.	Applicant's Name	Year of birth	Nationality	Place of residence
1.	Irene SCHÜTTKE	1935	German	Glasow
2.	Monika KOHLT	1956	German	Dahlwitz
3.	Gerrit SCHRADER	1961	German	Blankefelde