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

FOURTH SECTION

DECISION

Application no. 27485/18
Ursula ZEISIG
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. 27485/18) 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 8 June 2018 by a German national, Ms Ursula Zeisig ("the applicant"), who was born in 1940, lives in Zeuthen and was represented by Ms F. Hess, a lawyer practising in Leipzig;

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 the authorities had provided incorrect information about the projected flight paths 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). Like the applicants in that case, the applicant is a homeowner in the municipality of Zeuthen. Her home is located approximately 8 km east 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 runways in question ("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 45.6 dB(A) and a night-time LAeq of 37.9 dB(A) for the applicant.

2. The applicant was one among approximately 4,000 residents who brought an action before the Federal Administrative Court against the planning authority's decision of 13 August 2004 approving the development of the new single airport on the site of Berlin Schönefeld Airport. The proceedings in the applicant's case were stayed until that court ruled on several test cases. Following that court's judgment in the test cases, in which it ruled partially in favour of the plaintiffs (ordering the planning authority to add further protective measures, in particular, additional restrictions on night flights), counsel for the planning authority proposed to the plaintiffs whose cases had been stayed, including the applicant, to extend the partial success obtained by the plaintiffs in the test cases to them, if they withdrew their actions. The applicant agreed to this offer. On 3 July 2007 the Federal Administrative Court discontinued the proceedings in the applicant's case.

3. 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 she 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 presented by DFS on 6 September 2010, increased to a daytime LAeq of 49.2 dB(A) and a night-time LAeq of 41.5 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, was a daytime LAeq of 46.8 dB(A) and a night-time LAeq of 41.1 dB(A).

4. 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 10 January 2011 by which she sought to have the decision of 3 July 2007 (paragraph 2 above), as well as the planning decision of 13 August 2004, quashed. She argued that documents had surfaced which would have led to a more favourable decision on her initial action to have the planning decision quashed, as they showed that the planning decision had been unlawful.

5. By a judgment of 31 July 2012 the Federal Administrative Court dismissed the applicant's action. The court ruled out that the applicant would have obtained a more favourable court decision on her initial action on the basis of the documents to which she referred. Parts of the documents in question were not new as they had been among the documents submitted by the planning authority in the proceedings on the applicant's action against the planning decision. The applicant could have seen these documents if she had requested access to the case files. Those documents contained, *inter alia*, DFS's position that simultaneous independent departures from both runways required departure routes with a 15-degree divergence. Other documents were new, but they were not capable of leading to a more favourable outcome of the proceedings on the applicant's initial action. For reasons similar to those set out in detail in *Büttner and Krebs* (cited above, §§ 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. This finding was not put into question by the documents referred to by the applicant. 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 have been 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.

6. On 24 October 2017 the Federal Constitutional Court declined to accept the applicant's constitutional complaint of 20 December 2012 for adjudication. It found that the Federal Administrative Court's judgment did not infringe the applicant's right to effective legal protection or to a fair trial. The Federal Administrative Court had demonstrated in a plausible manner that certain documents to which the applicant had referred did not contain new facts and that those documents which did contain new facts were not capable of leading to a more favourable outcome of the proceedings on the applicant's initial action against the planning decision. With regard to the latter aspect, the Federal Constitutional Court referred to its decision on the constitutional complaint of the applicants in *Büttner and Krebs*. There, it had found that the Federal Administrative Court's findings as to the substantive legality of the planning decision had been in conformity with constitutional

law, notably the Federal Administrative Court's finding that the outline plan had been adequate for the purposes of choosing the appropriate site for the airport and approving its development at the Schönefeld site, as there was no requirement that the plan on which the choice of site for the airport was based should reflect the noise impact on specific individuals, given that the precise flight paths were not determined in the planning decision but at a later stage (ibid., § 42). The decision was served on the applicant's counsel on 12 December 2017.

7. The applicant, who acknowledged that the noise level to which she was exposed was below the threshold entitling her to noise protection measures, alleged a breach of the procedural aspect of her right to respect for her home and her private and family life under Article 8 of the Convention, because the domestic authorities had deliberately misled the public, including herself, about the expected flight paths during the planning approval procedure. As a result, she had been unable to challenge the development effectively at the planning stage. She had also been deprived of the possibility to decide about the withdrawal of her action against the planning decision in an informed manner; had she known that her property would be directly overflown, she would have pursued her action. The applicant further alleged a breach of her right to a fair trial under Article 6 § 1 of the Convention because the domestic courts had found that it had not been necessary to make an individualised assessment of the airport's noise impact on her; this was not compatible with the concept of individual human rights.

THE COURT'S ASSESSMENT

8. The Government argued that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention, *inter alia*, because she had withdrawn her initial action in the Federal Administrative Court against the planning decision, and that Article 8 of the Convention was not applicable in view of the low noise level affecting the applicant. The Court considers that it does not need to address the Government's objections, as the applicant's complaint under Article 8 of the Convention is, in any event, manifestly ill-founded for the following reasons.

9. The Federal Administrative Court established that she could have had access to documents containing DFS's position – that simultaneous independent departures from both runways required departure routes with a 15-degree divergence – during the proceedings on her initial action (see paragraph 5 above), a finding which the Federal Constitutional Court upheld as plausible (see paragraph 6 above). Having regard to the reasons advanced by the domestic courts, the Court sees no reason to question these findings. While the applicant did not, and could not, know during the planning approval procedure that the authorities had already known at that time that the straight flight paths on which the planning documents had been based were

unrealistic, the applicant could hence have obtained access to accurate information about the expected flight paths – namely paths diverging by 15 degrees in the event of independent simultaneous departures – during the proceedings on her initial action and challenged the planning decision accordingly in those proceedings.

10. The domestic courts further established that those documents which contained new facts were not capable of leading to a more favourable outcome of the proceedings on the applicant's initial action (see paragraphs 5 and 6 above). They explained, in particular, that 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 as the population density was broadly similar in the areas under the straight flight paths and the modified flight paths with a 15-degree divergence. Furthermore, there was no requirement that the plan on which the choice of site for the airport was based should reflect the noise impact on specific individuals, given that the precise flight paths were not determined in the planning decision but at a later stage (see paragraphs 5 and 6 above). Having regard to the reasons advanced by the domestic courts, 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 domestic courts, after having carefully examined the applicants' arguments in court proceedings that provided all necessary procedural safeguards, properly reviewed the planning authority's conduct of the balancing exercise and 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.

11. In view of the foregoing, the Court concludes that the application, including the complaint about the lack of an individualised assessment of the noise impact on the applicant's property, 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