Shrinking Schiphol:

Court Case
Citizens group RBV against Dutch State to restore protection against aviation noise nuisance

Andrea Keessen,
Milieudefensie | Friends of the Earth Netherlands
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RBV[1] vs. the State (The Netherlands)
ECLI:NL:RBDHA:2024:3734
District court of The Hague, 20 March 2024,

https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2024:3734

English Google translation of the verdict: https://uitspraken-rechtspraak-nl.translate.goog/details?id=ECLI%3ANL%3ARBDHA%3A2024%3A3734&_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en-US&_x_tr_pto=wapp&_x_tr_hist=true

Illegal noise pollution

What is at stake in this case is whether the State has acted unlawfully by exposing a disproportionate number of people to serious annoyance and sleep disturbance caused by air traffic to and from Schiphol.

The legal question is whether the conduct of the State is **in breach of** Article 8 of **the European Convention on Human Rights (ECHR)**, which protects the right to privacy, including the home.

The court ruled that this is the case, first of all because the airport operated for almost a decade and a half under a regime which is not provided for by law. To make matters worse, the previous, legal regime, under which the airport should operate, was developed without a fair balance being struck between the interests of the aviation sector and the interests of the people. Moreover, the State did not offer adequate legal protection to its citizens, as required under Article 13 ECHR.

The Court ordered the State, within twelve (12) calendar months of service of this judgment :
a. **to enforce the applicable laws and regulations**, and
b. **to create a form of practical and effective legal protection that is accessible to all seriously inconvenienced and sleep-disturbed persons - including those who live outside the currently established noise contours** - in which the interests of the individual are also taken into account in a sufficiently individualized and motivated manner.

One part of the judgment is still object of legal proceedings. That is **whether the State is obliged to use the balanced approach** before it reduces the amount of aircraft movements – within one year – to comply with this judgment and enforce the currently applicable law.

According to this district court, it should not. After all, the EU Regulation respects the national laws and established policies in force in 2016. The aircraft traffic decision 2008 (LVB 2008) was already in force by then. A decision to enforce the LVB 2008 therefore does not constitute a restriction that requires the use of the balanced approach.

[1] RBV: https://www.beschermingtegenvliegtuighinder.nl/ On April 1, 2020, De Stichting Recht op Bescherming tegen Vliegtuighinder (RBV) [The Right to be protected against Aviation nuisance] was established. The establishment serves one purpose: to conduct civil proceedings against the State of the Netherlands. RBV wants the courts to provide legal protection for Schiphol residents, who are now disenfranchised. The law firm Prakken d'Oliveira, which specializes in human rights, is assisting RBV.

Simultaneously: other Court Case
At the moment, the Dutch state (with, interestingly enough, RBV at its side) is also involved in a parallel proceedings brought about by IATA and 15 airlines against its decision to use a provision that allows for 'experimental policies' to reduce the number of aircraft movements to 440.000. Among the Aviation Industry complaints is that the state did not follow the balanced approach when wanted to stop tolerating infringements and wanted to establish new experimental rules to lower the amount of aircraft movements.

These summary proceedings are pending before the Dutch Supreme Court. The Advocate General (AG) to the Dutch Supreme Court advised on 3 April 2024 that the state should use the balanced approach even when it decides to finally enforce the LVB 2008. The reason is that enforcement results in a noise induced reduction, which the AG – just like the European Commission - considers to be a reduction in the sense of the Regulation. It may take months before the Supreme Court will offer clarity by issuing its judgment.

Ongoing Balanced Approach procedure[2].
In the meantime, the state has started a balanced approach procedure, which is aimed to result in a proposed reduction to 452,000 aircraft movements.

Before 20 March 2025, this number should be lowered at least to 400,000 in order to comply with the court orders.

This raises the question what the state should do, given that in September 2024 the maximum amount of aircraft movements must be set. The easiest way out might be to amend the current balanced approach number to 400.000 in order to restore the legal situation established by the LVB 2008, as advised by the AG. On the one hand, this is a noise related operating restriction which was already introduced before 13 June 2016 and therefore explicitly allowed to remain in force by Article 14 of the Noise Regulation 598/2014. It is defensible that this does not require the use of the BA, because the legal situation has not changed. On the other hand, it is also defensible that any noise induced reduction requires the use of the BA, because the Noise Regulation takes a broad definition of noise related actions. Art. 2 defines them as any measure that affects the noise climate around airports. Therefore, enforcement action can indeed fall within the scope of this definition. The Dutch state should immediately start the development of new legislation and a new balanced approach procedure, given that further reductions are necessary to comply with the court order.

This judgment is exceptional, yet it can also serve as a precedent for other airports. The exceptional circumstances are that the current aircraft movements of Schiphol are based on a regulation that never entered into effect and thus does not have a legal basis. After almost 15 years, the government is ordered to stop tolerating infringements of the applicable legal regime. This boils down to a court order to shrink the amount of aircraft movements. This is of wider significance, because the court order is also motivated by serious shortcomings of the law.

What makes this judgment interesting for other airports, is that the court held that the current legal regime was developed without establishing a 'fair balance' between the competing interests and ordered the state to develop better regulation. Remarkably, the court criticizes the conduct of the government over the years. It always prioritized the economic interests of the airport and the airlines. Other interests could only play a role if they would not diminish the hub function of the airport. The government ignored the development of the science about noise disturbance and sleep. And as recent research took the WHO guidelines as a starting point, it also gave these guidelines more weight in the decision-making process, even though they are not binding as such.
In this regard it is interesting that the court found that the current legal regime – based on an average yearly noise load – to be only on paper in compliance with the Aircraft Act. In reality, it does not provide the residents with equivalent and sufficient protection against noise as prescribed by the Act. The noise did not remain the same or become less over the years compared to 2004 (and arguably, 1995). Even

[2] https://www.luchtvaartindetoekomst.nl/onderwerpen/besluit-minder-vluchten-schiphol/spoor-2-balanced-approach/balanced-approach-in-english

though the government and the residents do not agree how many people actually suffer from noise disturbance, it is clear that the numbers are too high to comply with the equivalence norm in the Act. If such a goal – to reduce the amount of people suffering from noise – is formulated in other legislation, states can be held to account for not meeting them, in particular in the light of new scientific evidence on the impact of noise disturbance, as it turns out to be far more harmful than previously thought.

Moreover, the court held that the regulation does not comply with the norm of adequate legal protection for citizens under Article 13 ECHR. The noise regulation is based on a yearly noise load for all residents within a noise contour, coupled with few and strategically located monitoring points. This leads in particular to a lack of practical and effective legal protection for those who live far from the monitoring points or outside the noise contour. The court does not order the state to establish a maximum individual noise load. The court does not spell out how the new legal regime should look like. The court only prescribes that it should offer residents practical and effective legal protection, including those living outside the noise contours. And their interests have to be taken into account in a sufficiently individualized manner. Finally, while the court leaves it to the state to determine whether the airport is necessary for the economic wellbeing of the country, it mentions that the state needs to strike a fair balance with other interests. Even in this groundbreaking judgment, the economic argument that other airports do not restrict night flights still plays a role to justify night flights, just like in Hatton and others v the United Kingdom (ECHR 8 July 2003). This means that concerted action is necessary to stop night flights.

In order to better understand this judgment, one needs some basic understanding of the facts of the case. Therefore, (1) the relevant facts are summarized below. Then, (2) – based on the balanced approach – the judgment is summarized and analyzed.

1. Relevant facts

- Schiphol airport is a private company, with public ownership, i.e. its shares are owned by the State (70%) and the municipalities of Amsterdam (20%) and Rotterdam (2%)[3]. The ownership is not deemed crucial in this case, since the court states that the state does not cause the noise, but the airport. At the same time, the court states that the State is not just a supervisory authority with regard to the airport. It is the State which enables the airport to operate, as the State regulates air traffic to and from the airport.

- Until 2007, the Netherlands had their own system of noise regulation measurement units. The noise protection offered by the Dutch units were converted into the European Lden and Lnight units in the LVB 2008 decision. It is controversial whether this conversion happened correctly. The District Court now seems to say that on paper this occurred correctly. The court refers to the 2007 EEA report, despite a comment in this report expressing uncertainty about the correctness of the conversion. Residents – backed by experts – say that the conversion allowed for a doubling of the total average noise in the 2008 LVB decision compared to the 2004 LVB decision. According to the court, the paper reality is far removed from reality, due to the flawed application in practice of the criteria.
- This is relevant, because in the 1995 binding national spatial planning decision it is stated that under any new noise reduction framework or (measurement) method, the noise nuisance levels should remain the same or become lower over time (*equivalence requirement*). These rules aimed to strengthen both the hub function of Schiphol and the environmental quality around Schiphol.[4]
- The equivalence requirement still applies, as it became embodied in the 2003 Aviation Act. This Act contains elaborated equivalence criteria for the number of houses & people to suffer from noise pollution.
- The State made the political choice to stick to the reference situation in the application, i.e. only the houses built before a certain date and the people living within the drawn noise borders really

[3] https://www.schiphol.nl/nl/schiphol-group/pagina/aandeelhoudersinformatie/

[4] Indeed, the Dutch prefer to have their cake and eat it, or, as we say: saving both the goat and the cabbage.

counted. Others, despite being there, did not count, because that would reduce the space for growth of Schiphol.
- With the 2008 LVB decision, the State envisaged further growth to 480.000 aircraft movements per year.
- In order to allow Schiphol to grow, whilst protecting the quality of the environment for those living near Schiphol, a new norms and enforcement system was developed (NNHS). It should lead to use of those runways which would result in the least noise pollution. This system was however never established by law, even though Schiphol operates according to this system since 2010.
- Since 2010 (except during corona) air traffic to and from Schiphol has increased considerably, with a peak of almost 500.000 aircraft movements per year in 2019.
- Since 2014, violations of the noise standards at monitoring points occurred which were not enforced. The State had opted not to enforce, but to tolerate these violations if they were caused by flying according to the NNHS system (so-called anticipatory enforcement[5]).

[Note to SG: in this whole section you might want to incorporate the info from the paper that I have send you 10 Oct 2022]

- This was the situation when the European Noise Regulation entered into force on 13 June 2016. It prescribes a balanced approach procedure prior to the introduction of exploitation limits because of noise. [Not stated in the judgment, but crucial, is that this Regulation explicitly respects existing national law, instead of overriding it.]
- The 2019 research report by the Dutch research institute RIVM, which takes the WHO guidelines on noise pollution as a starting point, made clear what the real extent was of the noise pollution caused by Schiphol.
- In 2020, the ministry decided that future growth of Schiphol should fit within the conditions to protect the environment and reduce the negative impact, taking the 2019 situation as a reference. The ensuing proposed policy to temporarily use the possibility to implement 'experimental aviation policies to limit aircraft movements to 440.000 resulted in court proceedings by airlines against the state, which is still pending before the supreme court.
- And it resulted in a decision to not pusue this 'expirimental policy path' further but instead to reduce the aircraft movements to 452.000 per year following the balanced approach procedure which is now being scrutinized by the European Commission.

- The other effects, pollution and safety, were not the main subject of the claim by RBV and therefore of these proceedings.

- **Also no finite nature permit.** It is good to know that Schiphol is by no means operating legally with regard to its emissions (and noise impact) on Natura 2000 areas. Only recently, the minister issued a nature permit, against which proceedings were brought. Milieudefensie is one of the parties. It is possible that those court proceedings result in a further reduction to 250.000 aircraft movements per year and perhaps even less.

2. Breach of Article 8 ECHR

The serious noise experienced by a large group of people is such that the court considers this an interference with their rights protected under Article 8 ECHR. The court notes that it is not a given that this interference results in a breach of Article 8 ECHR. The rights protected by Article 8 are not absolute. Under the circumstances mentioned in Article 8, people have to tolerate some interference with their rights, provided that a fair balance has taken place of their interests and other interests of greater weight.

[5] [To understand the verdict and why the ruling is very specific for Schiphol airport, it is necessary to understand that Schiphol has been operating under a very specific context; For many years it was – and still is - the case that although violations of the law regarding noise standards occurred, the enforcement agency was **ordered by the minister to not enforce the law**, but instead tolerate these violations. The ministry wanted to introduce a new system of noise regulation and ordered that in **anticipation** of this new system that until then the violations should be tolerated. So in fact, while the ministry calls it anticipatory enforcement, it in fact is **anticipatory non-enforcement**.

The court considers that Article 8 ECHR imposes a positive duty on member states to this convention to guarantee their citizens the right to respect for their physical and psychological integrity. This applies also in relations between citizens, which includes the relation between residents living around Schiphol airport and airlines. This duty encompasses inter alia the duty to introduce an effective and accessible system of measures to protect the right to privacy. This includes laws and regulations to respect their privacy and the application of these measures.

Article 8(2) of the ECHR sets several requirements for interference with personal privacy (as referred to in Article 8 of the ECHR). In short, the interference must be provided for by law and the interference must be necessary in a democratic society. The Member State has a margin of discretion in determining that, but there should be a fair balance between the interests of the individual and the community.

2.1 The applicable law

The court first has to determine whether the interference is provided for by law. The applicable law is the LVB 2008, as amended, with a legal basis in the 2003 Aviation Act.

The court acknowledges that since 2010, air traffic to and from Schiphol is handled in accordance with the NNHS. Anticipatory enforcement is one of the components of the NNHS. The court notes that, despite the fact that this has always been the intention, the NNHS has not yet been laid down in legislation and regulations. For this reason, the NNHS does not meet the requirement of a legal basis for the interference set out in Article 8(2) of the ECHR. The State is therefore acting in violation of Article 8 ECHR and therefore unlawfully by implementing the NNHS without implementing that legal basis.

The court then determines whether the LVB 2008 meets the equivalence criteria set out in the Aviation Act. It states that this is a paper reality, due to the way in which these criteria were applied.

2.2 No fair balance in the development of the LVB 2008

The court concludes that there was no fair balance in the context of development of the LVB 2008. In addition, the State failed to update the legal regulations with regard to new developments, like new scientific knowledge about the consequences of noise pollution and sleep disturbance. This was not taken into account in the context of the *equivalence criteria*, while this should have taken place for proper enforcement and the legal protection offered to citizens.

2.3 No effective implementation or enforcement of the rules

In essence it is simple. It is not disputed in this procedure that the LVB 2008 in the context of the NNHS is in fact no longer fully implemented and enforced since the system of strict noise preferential runway use and anticipatory enforcement started working in practice, almost a decade and a half ago. To the extent that enforcement takes place, enforcement is limited to exceedances that are not the result of anticipatory enforcement.

This means that the legal basis for the interference with the rights of local residents protected by Article 8 ECHR has not been implemented and enforced sufficiently effectively, so that Article 8 ECHR has been violated.

The court explains why the NNHS does not constitute an improvement with regard to noise pollution. According to the court, it does not comply with the equivalence criteria. The intention was that the number of people suffering from noise pollution caused by Schiphol should be equivalent or lower compared to 2004. Instead, it increased. While the State uses different numbers, even the State has to admit that the numbers increased. Here, the court makes a reference to the information given by the minister to Parliament, where the minister admitted that approximately 500,000 flight movements take place annually, although **within the standards framework of the LVB 2008 only 400,000 to 420,000**

flight movements fit. This maximum number of flight movements was the result of research commissioned by the ministry.

No effective legal protection and therefore a breach of the rights protected by Article 13 ECHR

Here, the court first restates that the standards in the LVB 2008 were barely enforced for almost a decade and a half. The NNHS, which never entered into force, may or may not have been enforced. It was not clearon the basis of which standards citizens enjoyed which protection. The court critizes the administrative proceedings, where complaints were judged under the NNHS, instead of under the LVB 2008. The administrative judges assessed only whether the nuisance was the result of the agreements on preferential runway use. If this were the case, the appeal was rejected without assessing the circumstances of the individual case.

According to the court, adequate legal protection within the meaning of Article 8(2) and 13 ECHR requires that the judge carries out a proportionality assessment between the interests involved in the specific case, in which the interests of the individual must be taken into account in a sufficiently individualized and substantiated manner. On a side note, this is something the Dutch administrative courts have come to realise only very recently, in the aftermath of other scandals.

Here, the court gives more detail, as it states that even if the system of preferential runway use were legally established, this will not lead to a different assessment. Preferential runway use does not provide legal protection for individual stakeholders, because the standards are based on the amount of noise pollution for all residents within a noise contour and the effect of those standards is not foreseeable for individuals who experience noise pollution.

In addition, the court criticizes the limited amount and location of the enforcement points within the noise contours. A significant group of seriously inconvenienced and sleep-disturbed people live far from the enforcement points. This undermines the protective effect of the current legal system, because protection decreases the further a person lives from an enforcement point. Outside the noise contours, there are no enforcement points at all. Therefore, the current legal system offers no practical and effective legal protection at all to seriously inconvenienced and sleep-disturbed persons who live outside the noise contours, even though they are included in the equivalence criteria.

Necessary for the economic well-being of the country?

The premise is that (air traffic to and from) Schiphol itself makes an important contribution to the economy of the Netherlands. The question to what extent an activity such as aviation is necessary for the prosperity of the country – within the meaning of Article 8(2) of the ECHR – also largely falls within the policy space that the ECHR leaves to the Member States.

The court then adds that Article 8(2) ECHR does require that Member States determine the relative weight of all interests involved in relation to each other. The State has not done enough. There is no fair balance, because the interests of aviation have always been paramount and first guaranteed, after which it was examined whether and, if so, to what extent other interests could still be met. Also, the environmental space created by, for example, other (flight) procedures or routes or the introduction of quiet aircraft always converted into additional flight movements and did not benefit seriously inconvenienced or sleep-disturbed persons.

World Health Guidelines

The World Health Guidelines are not binding and EU law leaves it to the Member States to use national noise indicators, as long as they comply with the parameters of the EU Environmental Noise Directive. The ECHR does not oblige to use the WHO guidelines either.

Annex Article 8 ECHR

The requirements of Article 8 (2) according to the Dutch court (6.9 – 6.14).

> First of all, the interference must be provided for by law. This is the case if there is a basis in national law that is (i) accessible and (ii) has been formulated with sufficient precision in the sense that everyone can foresee in which situations interference will occur in their personal privacy.
>
> Secondly, interference with a democratic society must be necessary in one of the mentioned interests, which includes the economic well-being of the country. The interference is deemed to be necessary in a democratic society for the purposes stated in Article 8 of the ECHR if the interference meets an urgent social need (pressing social need) and is proportionate to achieving the intended purpose. The Member State has a margin of discretion in this regard.
>
> When assessing whether a Member State has remained within the margin of appreciation, great weight is given to the guarantees available to the individual. For example, the decision-making process leading to (the regulation of) interference must be fair and must take due account of the interests of the individual protected by Article 8 ECHR. In any case, the individual must be involved in the decision-making process; the competent authorities must weigh the competing interests and take into account the proportionality of the infringement of the rights guaranteed by Article 8 of the ECHR. In particular, account must be taken of " the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State ".
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> If the Member State has found the right balance (' fair balance ') between the different interests, despite the interference, there is no infringement of Article 8 of the ECHR. The manner in which the Member State deals with interference by third parties in the rights of persons on its territory protected by Article 8 of the ECHR must be assessed in the same way as the Member State's own interference, because the aforementioned test essentially imposes the same requirements as Article 8. paragraph 2 ECHR.
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> It is up to the State to state and prove that an interference with the rights of people on its territory protected by Article 8 of the ECHR is the result of a ' fair balance '.
>
> When assessing whether the requirements of Article 8(2) of the ECHR have been met in a specific case, the court must examine in detail the relevant arguments put forward regarding the proportionality of that interference and provide sufficient reasons for its decision.