Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

24 February 2022 *

(Reference for a preliminary ruling – Air transport – Regulation (EC) No 261/2004 – Article 3(1) – Scope – Flight with connecting flight departing from and arriving in a third country – Single reservation through a Community air carrier – Stopover in the territory of a Member State – Article 5(1)(c)(iii) and Article 7 – Delayed alternative flight – Taking into account of the actual arrival time for the purposes of compensation)

In Case C-451/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria), made by decision of 25 August 2020, received at the Court on 23 September 2020, in the proceedings

Airhelp Ltd

v

Austrian Airlines AG,

THE COURT (Fourth Chamber),

composed of K. Jürimäe, President of the Third Chamber, acting as President of the Fourth Chamber, S. Rodin (Rapporteur) and N. Piçarra, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Airhelp Ltd, by E. Stanonik-Palkovits, Rechtsanwältin,

– Austrian Airlines AG, by M. Klemm, Rechtsanwalt,

– the Austrian Government, by J. Schmoll and G. Kunnert, acting as Agents,

* Language of the case: German.

– the Danish Government, by M. Wolff, J. Nymann-Lindegren and M. Jespersen, acting as Agents,

– the European Commission, by G. Braun and K. Simonsson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(1), Article 5(1)(c)(iii) and Article 7(1) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

2 The request has been made in proceedings between Airhelp Ltd and Austrian Airlines AG concerning the latter's refusal to compensate NT, an air passenger whose rights are now held by Airhelp, for the cancellation of his flight.

Legal context

3 Article 2(h) of Regulation No 261/2004, entitled 'Definitions', provides:

'For the purposes of this Regulation:

…

(h) "final destination" means the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected;

…'

4 Article 3 of that regulation, entitled 'Scope', provides in paragraphs 1 and 5 thereof:

'1. This Regulation shall apply:

(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.

…

5. This Regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2. Where an operating air carrier which has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger.'

5 Article 5 of that regulation, entitled 'Cancellation', states, in paragraph 1(c)(iii):

'In case of cancellation of a flight, the passengers concerned shall:

…

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

…

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.'

6 Article 7 of the same regulation, entitled 'Right to compensation', provides, in paragraphs 1, 2 and 4 thereof:

'1. Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1 500 kilometres or less;

(b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;

(c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.

2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked:

(a) by two hours, in respect of all flights of 1 500 kilometres or less; or

(b) by three hours, in respect of all intra-Community flights of more than 1 500 kilometres and for all other flights between 1 500 and 3 500 kilometres; or

(c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air carrier may reduce the compensation provided for in paragraph 1 by 50%.

…

4. The distances given in paragraphs 1 and 2 shall be measured by the great circle route method.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 NT had booked a directly connecting flight from Chişinău (Moldova) to Bangkok (Thailand) via Vienna (Austria). The air carrier was scheduled to operate the two legs of the flight as part of one single booking. The first leg of the flight was from Chişinău to Vienna, scheduled to depart at 15.55 and to arrive at 16.40 on 29 May 2019. The second leg of the flight was from Vienna to Bangkok, scheduled to depart at 23.20 on 29 May 2019 and to arrive at 14.20 on 30 May 2019. According to the great circle method of calculation, the distance from Chişinău to Bangkok is more than 3 500 km.

8 The flight from Chişinău to Vienna was cancelled less than seven days before its scheduled departure. As a result, Austrian Airlines amended NT's reservation by transferring him onto an alternative flight, numbered TK 68, from Istanbul (Turkey) to Bangkok, scheduled to depart at 01.25 and to arrive at 15.00 on 30 May 2019. From the request for a preliminary ruling it is apparent that it was not possible to determine how, or at what time, NT was re-routed to Istanbul from Chişinău. The flight from Istanbul to Bangkok reached its destination at 16.47, in other words, 1 hour and 47 minutes after the scheduled arrival time for the re-routed flight.

9 Had the flight from Istanbul to Bangkok not been delayed, NT would have reached his final destination, Bangkok, 40 minutes later than if he had been able to travel via Vienna as originally planned. However, since the Istanbul-Bangkok flight was delayed by 1 hour and 47 minutes, NT actually reached his final destination 2 hours and 27 minutes after the scheduled arrival time for the directly connecting flight he had originally booked.

10 NT assigned his right under Article 7 of Regulation No 261/2004 vis-à-vis Austrian Airlines to Airhelp.

11 Airhelp brought an action before the Bezirksgericht Schwechat (District Court, Schwechat, Austria), claiming compensation of EUR 300 on the ground that Austrian Airlines did not offer to re-route NT so as to enable him to reach his final destination within two hours of the scheduled arrival time of the connecting flight he had originally booked, while acknowledging that Austrian Airlines was entitled to reduce the amount of compensation provided for in Article 7(1) of Regulation No 261/2004 by half, pursuant to Article 7(2) of that regulation.

12 The Bezirksgericht Schwechat (District Court, Schwechat) allowed Airhelp's claim on the ground that the wording of Regulation No 261/2004 made it clear that, in the context of Article 5(1)(c)(iii) of that regulation, the scheduled arrival time of the flight originally booked had to be compared with the time that the re-routed flight actually reached the final destination. That court concluded that an air carrier is only exempt from paying the compensation provided for by Article 7 of that regulation if, on the facts, the passenger reached his or her final destination by means of the re-routed flight no more than two hours after the scheduled arrival time of the flight originally booked. However, that court did not address the question of whether the provisions of Regulation No 261/2004 were applicable to the case before it.

13 Austrian Airlines appealed against that decision to the referring court, the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria), disputing the relevance of the time restrictions used by the court of first instance. According to Austrian Airlines, in the event of a

flight cancellation, it is not the actual arrival time of the re-routed flight at the final destination that must be taken into account for the purposes of Article 5(1)(c)(iii) of Regulation No 261/2004, but rather the time that flight was scheduled to arrive.

14 However, the referring court wonders whether Regulation No 261/2004 is applicable to the case before it, bearing in mind the case-law of the Court from which it is apparent that a stopover in EU territory does not have the effect of making Regulation No 261/2004 applicable to directly connecting flights where neither the departure point nor the final destination is within EU territory. That is precisely the situation with the directly connecting flight at issue in the present case. The referring court wonders whether such an approach is compatible with the objective of that regulation, which is to ensure a high level of protection for passengers. In that regard, the referring court notes that, if the two flights had not formed one single booking, each of them would have fallen within the scope of Regulation No 261/2004, according to the clear wording of Article 3(1) thereof.

15 Furthermore, even supposing that Regulation No 261/2004 did apply, it would fall to be determined whether the time of departure and time of arrival referred to in Article 5(1)(c)(iii) of that regulation mean the times originally scheduled for the re-routed flight or the actual departure and arrival times of that flight. It is only in the latter scenario that NT would be able to claim compensation from Austrian Airlines.

16 Based on an analysis of different language versions of Regulation No 261/2004 and on national case-law, the referring court considers that that provision must be interpreted as meaning that the scheduled arrival time of the flight originally booked must be compared with the actual arrival time of the re-routed flight. It considers that such an interpretation also appears to be substantiated by the order of 27 June 2018, *flightright* (C-130/18, not published, EU:C:2018:496).

17 However, the referring court considers that Austrian Airlines' line of argument claiming that such an interpretation may produce outcomes contrary to the objective of a high level of protection for passengers is not without relevance, to the extent that taking into account the actual arrival time of the re-routed flight could give rise to different legal consequences in identical situations.

18 Lastly, the referring court wonders whether Article 5 of Regulation No 261/2004 must be interpreted as meaning that the air carrier is merely obliged to offer an alternative flight to the passenger concerned and does not, as a consequence, incur any liability in the event that the alternative flight is delayed, to the extent that it is not operated by that carrier. In that regard, it is evident from the judgment of 12 March 2020, *Finnair* (C-832/18, EU:C:2020:204), that the inconvenience suffered by passengers as a result of the cancellation of their booked flight, on the one hand, and as a result of a long delay of their re-routed flight, on the other, must be assessed separately and can, where appropriate, give rise to two rights to compensation.

19 In those circumstances, the Landesgericht Korneuburg (Regional Court, Korneuburg) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 3(1) of [Regulation No 261/2004] be interpreted as meaning that that regulation also applies to an air route booked under a single booking but consisting of two flights, both of which are operated by (the same) Community air carrier, if both the place of departure of the first flight and place of arrival of the second flight are in a third country and only the place of arrival of the first flight and the place of departure of the second flight are in the territory of a Member State?

If Question 1 is answered in the affirmative:

(2) Must Article 5(1)(c)(iii) of [Regulation No 261/2004] be interpreted as meaning that a passenger is entitled to compensation under Article 7(1) of that regulation even if, on the alternative flight offered to him [or her], his [or her] scheduled arrival time at the final destination would have been less than two hours after the scheduled arrival time of the cancelled flight, but he [or she] does not actually arrive within that time?'

Consideration of the questions referred

The first question

20 By its first question, the referring court asks, in essence, whether Article 3(1) of Regulation No 261/2004 must be interpreted as meaning that that regulation applies to a directly connecting flight which is booked under a single booking and which consists of two flights which are to be operated by a Community air carrier, when both the airport from which the first flight departs and the airport into which the second flight arrives are situated in third countries and it is only the airport where the stopover takes place that is located in the territory of a Member State.

21 Article 3(1)(a) of Regulation No 261/2004 states that the regulation applies to passengers departing from an airport located in the territory of a Member State. According to Article 3(1)(b) thereof, the regulation also applies to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the EU Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.

22 In accordance with settled case-law of the Court, in interpreting a provision of EU law it is necessary to consider not only its wording but also its context and the objectives pursued by the legislation of which it forms part (judgment of 2 December 2021, *Vodafone Kabel Deutschland*, C-484/20, EU:C:2021:975, paragraph 19 and the case-law cited).

23 In that regard, in the first place, it is apparent from the wording of Article 3(1) of Regulation No 261/2004 that the regulation applies, on the conditions laid down, to passengers rather than to the flights they take, meaning that it is only the locations of a passenger's departure airport and arrival airport that matter, rather than the airports used as stopover points on the flights taken by that passenger in order to reach his or her destination. It follows that, in the case of

directly connecting flights forming one single booking, the place of the stopover airport cannot be taken into account for the purposes of that article, given that it cannot be regarded as the departure airport or arrival airport of the passenger concerned.

24 In the second place, that interpretation can be confirmed by analysing the context of which Article 3(1) of Regulation No 261/2004 forms part. The concept of 'final destination' is defined in Article 2(h) of Regulation No 261/2004 as the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight of the passenger concerned.

25 The Court has held that it follows from the term 'last flight' that the concept of 'directly connecting flight' must be understood as referring to two or more flights constituting a whole for the purposes of the right to compensation for passengers provided for by Regulation No 261/2004 (judgment of 31 May 2018, *Wegener*, C-537/17, EU:C:2018:361, paragraph 18 and the case-law cited). That is the case when two or more flights were booked as a single unit, as is the situation in the main proceedings (see, to that effect, judgment of 31 May 2018, *Wegener*, C-537/17, EU:C:2018:361, paragraph 19 and the case-law cited).

26 Accordingly, the Court has consistently held that a flight with one or more connections which is the subject of a single reservation constitutes a whole for the purposes of the right of passengers to compensation provided for in Regulation No 261/2004, implying that the applicability of Regulation No 261/2004 is to be assessed with regard to the place of a flight's initial departure and the place of its final destination (see, to that effect, judgment of 11 July 2019, *České aerolinie*, C-502/18, EU:C:2019:604, paragraph 16 and the case-law cited, and order of 12 November 2020, *KLM Royal Dutch Airlines*, C-367/20, EU:C:2020:909, paragraph 19 and the case-law cited).

27 That interpretation is also supported by the Court's case-law, according to which it is only the delay beyond the scheduled time of arrival at the final destination, understood as the destination of the last flight taken by the passenger concerned, and also the distance between the first point of departure and the final destination, excluding any connecting flights, which are relevant for the purposes of the fixed compensation under Article 7 of Regulation No 261/2004 (see, to that effect, judgment of 26 February 2013, *Folkerts*, C-11/11, EU:C:2013:106, paragraph 35, and order of 22 April 2021, *British Airways*, C-592/20, not published, EU:C:2021:312, paragraph 33 and the case-law cited).

28 It cannot be considered that a directly connecting flight must be regarded as a whole for the purposes of compensation under Article 7 of Regulation No 261/2004, but that such a flight would need to be artificially segmented in order to determine the scope of that regulation.

29 In the third place, the objective of Regulation No 261/2004 does not mean that such an interpretation of Article 3(1) of that regulation must be ruled out. Whilst the objective of ensuring a high level of protection for air passengers does of course require Regulation No 261/2004 to be interpreted in accordance with that objective, that cannot, however, lead to an improper extension of the scope of the regulation to situations that do not fall within it.

30 It follows that Article 3(1) of Regulation No 261/2004 cannot be interpreted to mean that a passenger on a directly connecting flight where the first point of departure and the final destination are located in third countries can rely on the provisions of that regulation simply because one or more stopovers between the different legs of that flight take place in EU territory.

31 In any event, an interpretation whereby, in the context of directly connecting flights, a stopover in an airport situated in EU territory were sufficient to render Regulation No 261/2004 applicable would not only run counter to the settled case-law of the Court, recalled in paragraphs 25 and 26 of the present judgment, but would also infringe the requirements under Article 3(1) of that regulation and the principle of legal certainty.

32 In that regard, it must be noted that Article 3(1) of Regulation No 261/2004 clearly sets out two distinct scenarios in which that regulation applies to the passengers concerned. As can be seen from paragraph 21 of the present judgment, the first scenario, set out in Article 3(1)(a), which concerns all passengers departing from an airport located in EU territory, is not subject to any other condition or reason to exclude the application of the regulation, whereas the second scenario, set out in Article 3(1)(b), which concerns all passengers departing from an airport located in a third country to an airport situated in EU territory, as long as their flight is operated by a Community carrier, nonetheless excludes the application of the regulation to such passengers if they received benefits or compensation and were given assistance in that third country.

33 An interpretation whereby a passenger could claim the benefit of the provisions of Regulation No 261/2004 on the sole ground that the airport where his or her directly connecting flight made a stopover was in EU territory would be incompatible with the second scenario, set out in Article 3(1)(b) of Regulation No 261/2004.

34 In the first place, such an interpretation would lead to a situation where passengers for whom neither the first point of departure nor the final destination was an airport located in EU territory would automatically fall under at least the first scenario set out in Article 3(1)(a) of Regulation No 261/2004, while passengers in the second scenario, set out in Article 3(1)(b), whose final destination was an airport located in EU territory, would nonetheless only be covered by the regulation if their flight was operated by a Community carrier and, in addition, they did not fall into the exclusion situation described in paragraph 32 of the present judgment.

35 In the second place, such an interpretation would deprive Article 3(1)(b) of Regulation No 261/2004 of part of its meaning since its applicability, even in cases where the final destination of the passenger concerned was an airport located in EU territory, would be limited to passengers on direct flights to the European Union.

36 Thus, a passenger on a flight from a third country to the European Union and with a connection at an airport in EU territory would automatically fall under Article 3(1)(a) of that regulation, whereas the same could not be said for a passenger on a direct flight between exactly the same departure airport and the same final destination if, additionally, his or her flight was not operated by a Community air carrier or if he or she fell into the exclusion situation described in Article 3(1)(b) of that regulation.

37 Indeed, in some case, such as that at issue in the main proceedings, such an interpretation would lead to the two scenarios set out in Article 3(1) of Regulation No 261/2004 being simultaneously applicable to the same situation.

38 On the one hand, in the present case, the stopover location on the first leg of the flight is on EU territory and is identical to the point of departure for the second leg of the flight, the journey is operated by a Community air carrier, and it does not appear from the file submitted to the Court

that NT received benefits or compensation or was given assistance in the third country where the departure airport was situated. NT could therefore, a priori, rely on the provisions of Regulation No 261/2004 by virtue of Article 3(1)(b).

39 On the other hand, if Article 3(1) of Regulation No 261/2004 were to be interpreted to mean that a stopover in an airport located on EU territory was all that was required in order for that regulation to apply to the passenger concerned, NT could also regard his situation as falling within the scenario set out in Article 3(1)(a). The result would be that, in a situation such as that at issue in the main proceedings, it would not be possible to determine with certainty which of the two scenarios set out in Article 3(1) of that regulation covered the passenger concerned.

40 In the third and last place, the consequence of such an interpretation would be that the concept of 'directly connecting flights' would need to be understood sometimes as a 'unit' consisting of two more flights forming a whole and sometimes as two or more distinct flights. Such an inconsistency in the ambit of that concept would infringe the principle of legal certainty which, according to settled case-law, requires that European Union legislation must be certain and its application foreseeable by those subject to it (see, to that effect, judgment of 14 October 2010, *Nuova Agricast and Cofra* v *Commission*, C-67/09 P, EU:C:2010:607, paragraph 77 and the case-law cited).

41 In the light of all the foregoing considerations, the answer to the first question is that Article 3(1) of Regulation No 261/2004 must be interpreted as meaning that that regulation is not applicable to a flight with a connecting flight, booked under a single booking but consisting of two flights, both of which are operated by a Community air carrier, if both the departure airport of the first flight and the arrival airport of the second flight are in the territory of a third country and only the airport where the stopover takes place is in the territory of a Member State.

The second question

42 In the light of the answer given to the first question, it is not necessary to answer the second question.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 3(1) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 must be interpreted as meaning that that regulation is not applicable to a flight with a connecting flight, booked under a single booking but consisting of two flights, both of which are operated by a Community air carrier, if both the departure airport of the first flight and the arrival airport of the second flight are in the territory of a third country and only the airport where the stopover takes place is in the territory of a Member State.

[Signatures]