JUDGMENT OF THE COURT (Fourth Chamber)

22 December 2008 *

In Case C-549/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Handelsgericht Wien (Austria), made by decision of 30 October 2007, received at the Court on 11 December 2007, in the proceedings

Friederike Wallentin-Hermann

v

Alitalia — Linee Aeree Italiane SpA,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, E. Juhász, G. Arestis and J. Malenovský (Rapporteur), Judges,

* Language of the case: German.

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mrs Wallentin-Hermann, by herself, Rechtsanwältin,

— Alitalia — Linee Aeree Italiane SpA, by O. Borodajkewycz, Rechtsanwalt,

— the Austrian Government, by E. Riedl, acting as Agent,

— the Greek Government, by S. Chala and D. Tsagkaraki, acting as Agents,

— the Polish Government, by M. Dowgielewicz, acting as Agent,

— the Portuguese Government, by L. Fernandes, acting as Agent,

— the United Kingdom Government, by C. Gibbs, acting as Agent, and D. Beard, Barrister,

— the Commission of the European Communities, by R. Vidal Puig and M. Vollkommer, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 5(3) 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 reference was made in the course of proceedings between Mrs Wallentin-Hermann and Alitalia — Linee Aree Italiane SpA ('Alitalia') following Alitalia's refusal to pay compensation to the applicant in the main proceedings whose flight had been cancelled.

Legal context

International law

3 The Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999 ('the Montreal Convention'), was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38). That convention entered into force so far as concerns the Community on 28 June 2004.

4 Articles 17 to 37 of the Montreal Convention comprise Chapter III thereof, headed 'Liability of the carrier and extent of compensation for damage'.

5 Article 19 of the Convention, headed 'Delay', provides:

'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.'

Community law

6 Regulation No 261/2004 includes, inter alia, the following recitals:

'(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

...

(12) The trouble and inconvenience to passengers caused by cancellation of flights should … be reduced. This should be achieved by inducing carriers to inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable re-routing, so that the passengers can make other arrangements. Air carriers should compensate passengers if they fail to do this, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

…

(14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

(15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.'

7 Article 5 of Regulation No 261/2004, headed 'Cancellation', states:

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

(a) be offered assistance by the operating air carrier in accordance with Article 8; and

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and

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

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to

depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

(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.

…

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

…'

8 Article 7(1) of Regulation No 261/2004, headed 'Right to compensation', provides:

'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).

…'

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

9 It is apparent from the order for reference that Mrs Wallentin-Hermann booked three seats on a flight with Alitalia from Vienna (Austria) to Brindisi (Italy) via Rome (Italy) for herself, her husband and her daughter. The flight was scheduled to depart from Vienna on 28 June 2005 at 6.45 a.m. and to arrive at Brindisi on the same day at 10.35 a.m.

10 After checking in, the three passengers were informed, five minutes before the scheduled departure time, that their flight had been cancelled. They were subsequently transferred to an Austrian Airlines flight to Rome, where they arrived at 9.40 a.m., that is 20 minutes after the time of departure of their connecting flight to Brindisi, which they therefore missed. Mrs Wallentin-Hermann and her family arrived at Brindisi at 2.15 p.m.

11 The cancellation of the Alitalia flight from Vienna resulted from a complex engine defect in the turbine which had been discovered the day before during a check. Alitalia had been informed of the defect during the night preceding that flight, at 1.00 a.m. The repair of the aircraft, which necessitated the dispatch of spare parts and engineers, was completed on 8 July 2005.

12 Mrs Wallentin-Hermann requested that Alitalia pay her EUR 250 compensation pursuant to Articles 5(1)(c) and 7(1) of Regulation No 261/2004 due to the cancellation of her flight and also EUR 10 for telephone charges. Alitalia rejected that request.

13 In the judicial proceedings that Mrs Wallentin-Hermann then brought, the Bezirksgericht für Handelssachen Wien (District Commercial Court, Vienna) upheld her application for compensation, in particular on the ground that the technical defects which affected the aircraft concerned were not covered by the 'extraordinary circumstances' provided for in Article 5(3) of Regulation No 261/2004 which exempt from the obligation to pay compensation.

14 Alitalia lodged an appeal against that decision before the Handelsgericht Wien (Commercial Court, Vienna), which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are there extraordinary circumstances within the meaning of Article 5(3) of Regulation … No 261/2004 …, having regard to recital 14 in the preamble to the regulation, if a technical defect in the aeroplane, in particular damage to the engine, results in the cancellation of the flight, and must the grounds of excuse under Article 5(3) of [that] regulation be interpreted in accordance with the provisions of Article 19 of the Montreal Convention?

(2) If the answer to the first question is in the affirmative, are there extraordinary circumstances within the meaning of Article 5(3) of Regulation [No 261/2004] where air carriers cite technical defects as a reason for flight cancellations with above average frequency, solely on the basis of their frequency?

(3) If the answer to the first question is in the affirmative, has an air carrier taken all "reasonable measures" in accordance with Article 5(3) of Regulation [No 261/2004] if it establishes that the minimum legal requirements with regard to maintenance work on the aeroplane have been met and is that sufficient to relieve the air carrier of the obligation to pay compensation provided for by Article 5 in conjunction with Article 7 of [that] regulation?

(4) If the answer to the first question is in the negative, are extraordinary circumstances within the meaning of Article 5(3) of Regulation [No 261/2004] cases of *force majeure* or natural disasters, which were not due to a technical defect and are thus unconnected with the air carrier?'

The questions referred for a preliminary ruling

The first and fourth questions

15 By its first and fourth questions, which it is appropriate to examine together, the referring court is essentially asking whether Article 5(3) of Regulation No 261/2004, read in the light of recital 14 in the preamble to that regulation, must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is covered by the concept of 'extraordinary circumstances' within the meaning of that provision or whether, conversely, that concept covers situations of a different kind which are not due to technical problems. The referring court is also asking whether the grounds of exemption under that provision must be interpreted in accordance with the provisions of the Montreal Convention, in particular Article 19 thereof.

16 It must be stated that the concept of extraordinary circumstances is not amongst those which are defined in Article 2 of Regulation No 261/2004. Moreover, that concept is not defined in the other articles of that regulation.

17 It is settled case-law that the meaning and scope of terms for which Community law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. Moreover, when those terms appear in a provision which constitutes a derogation from a principle or, more specifically, from Community rules for the protection of consumers, they must be read so that that provision can be interpreted strictly (see, to that effect, Case C-336/03 *easyCar*

[2005] ECR I-1947, paragraph 21 and the case-law cited). Furthermore, the preamble to a Community measure may explain the latter's content (see, to that effect, inter alia, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 76).

18 In this respect, the objectives pursued by Article 5 of Regulation No 261/2004, which lays down the obligations owed by an operating air carrier in the event of cancellation of a flight, are clear from recitals 1 and 2 in the preamble to the regulation, according to which action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers and take account of the requirements of consumer protection in general, inasmuch as cancellation of flights causes serious inconvenience to passengers (see, to that effect, *IATA and ELFAA*, paragraph 69).

19 As is apparent from recital 12 in the preamble to, and Article 5 of, Regulation No 261/2004, the Community legislature intended to reduce the trouble and inconvenience to passengers caused by cancellation of flights by inducing air carriers to announce cancellations in advance and, in certain circumstances, to offer re-routing meeting certain criteria. Where those measures could not be adopted by air carriers, the Community legislature intended that they should compensate passengers, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

20 In that context, it is clear that, whilst Article 5(1)(c) of Regulation No 261/2004 lays down the principle that passengers have the right to compensation if their flight is cancelled, Article 5(3), which determines the circumstances in which the operating air carrier is not obliged to pay that compensation, must be regarded as derogating from that principle. Article 5(3) must therefore be interpreted strictly.

21 In this respect, the Community legislature indicated, as stated in recital 14 in the preamble to Regulation No 261/2004, that such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an air carrier.

22 It is apparent from that statement in the preamble to Regulation No 261/2004 that the Community legislature did not mean that those events, the list of which is indeed only indicative, themselves constitute extraordinary circumstances, but only that they may produce such circumstances. It follows that all the circumstances surrounding such events are not necessarily grounds of exemption from the obligation to pay compensation provided for in Article 5(1)(c) of that regulation.

23 Although the Community legislature included in that list 'unexpected flight safety shortcomings' and although a technical problem in an aircraft may be amongst such shortcomings, the fact remains that the circumstances surrounding such an event can be characterised as 'extraordinary' within the meaning of Article 5(3) of Regulation No 261/2004 only if they relate to an event which, like those listed in recital 14 in the preamble to that regulation, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.

24 In the light of the specific conditions in which carriage by air takes place and the degree of technological sophistication of aircraft, it must be stated that air carriers are confronted as a matter of course in the exercise of their activity with various technical problems to which the operation of those aircraft inevitably gives rise. It is moreover in order to avoid such problems and to take precautions against incidents compromising flight safety that those aircraft are subject to regular checks which are particularly strict,

and which are part and parcel of the standard operating conditions of air transport undertakings. The resolution of a technical problem caused by failure to maintain an aircraft must therefore be regarded as inherent in the normal exercise of an air carrier's activity.

25 Consequently, technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves, 'extraordinary circumstances' under Article 5(3) of Regulation No 261/2004.

26 However, it cannot be ruled out that technical problems are covered by those exceptional circumstances to the extent that they stem from events which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. That would be the case, for example, in the situation where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism.

27 It is therefore for the referring court to ascertain whether the technical problems cited by the air carrier involved in the case in the main proceedings stemmed from events which are not inherent in the normal exercise of the activity of the air carrier concerned and were beyond its actual control.

28 As regards the question whether the ground of exemption set out in Article 5(3) of Regulation No 261/2004 must be interpreted in accordance with the provisions of the Montreal Convention, in particular Article 19 thereof, it must be stated that that convention forms an integral part of the Community legal order. Moreover, it is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation (see Case C-173/07 *Emirates Airlines* [2008] ECR I-5237, paragraph 43).

29 Under Article 19 of the Montreal Convention, a carrier may be exempted from its liability for damage occasioned by delay 'if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures'.

30 In this respect, it must be observed that Article 5(3) of Regulation No 261/2004 refers to the concept of 'extraordinary circumstances', whereas that concept does not appear in either Article 19 or any other provision of the Montreal Convention.

31 It should also be noted that that Article 19 relates to delays, whereas Article 5(3) of Regulation No 261/2004 deals with flight cancellations.

32 Moreover, as is clear from paragraphs 43 to 47 of *IATA and ELFAA*, Article 19 of the Montreal Convention and Article 5(3) of Regulation No 261/2004 relate to different contexts. Article 19 et seq. of that convention governs the conditions under which, if a flight has been delayed, the passengers concerned may bring actions for damages by way of redress on an individual basis. By contrast, Article 5 of Regulation No 261/2004 provides for standardised and immediate compensatory measures. Those measures, which are unconnected with those whose institution is governed by the Montreal Convention, thus intervene at an earlier stage than the convention. It follows that the carrier's grounds of exemption from liability provided for in Article 19 of that convention cannot be transposed without distinction to Article 5(3) of Regulation No 261/2004.

33 In those circumstances, the Montreal Convention cannot determine the interpretation of the grounds of exemption under that Article 5(3).

34 In the light of the above, the answer to the first and fourth questions referred must be that Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. The Montreal Convention is not decisive for the interpretation of the grounds of exemption under Article 5(3) of Regulation No 261/2004.

The second question

35 In the light of all the questions referred, it must be considered that, by this question, the referring court is essentially asking whether the frequency alone of the technical problems precludes them from being covered by 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 where air carriers cite those problems as a reason for flight cancellations with above average frequency.

36 As was stated at paragraph 27 of this judgment, it is for the referring court to ascertain whether the technical problems cited by the air carrier in question in the main proceedings stem from events which are not inherent in the normal exercise of its activity and are beyond its actual control. It is apparent from this that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded.

37 In view of the foregoing, the answer to the second question referred must be that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded.

The third question

38 By its third question, the referring court is essentially asking whether it must be considered that an air carrier has taken 'all reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004 if it establishes that the minimum legal requirements with regard to maintenance work have been met on the aircraft the flight of which was cancelled and whether that evidence is sufficient to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.

39 It must be observed that the Community legislature intended to confer exemption from the obligation to pay compensation to passengers in the event of cancellation of flights not in respect of all extraordinary circumstances, but only in respect of those which could not have been avoided even if all reasonable measures had been taken.

40 It follows that, since not all extraordinary circumstances confer exemption, the onus is on the party seeking to rely on them to establish, in addition, that they could not on any view have been avoided by measures appropriate to the situation, that is to say by measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned.

41 That party must establish that, even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able — unless it had made intolerable sacrifices in the light of the capacities of its undertaking

at the relevant time — to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight.

42 It is for the referring court to ascertain whether, in the circumstances of the case in the main proceedings, the air carrier concerned took measures appropriate to the situation, that is to say measures which, at the time of the extraordinary circumstances whose existence the air carrier is to establish, met, inter alia, conditions which were technically and economically viable for that carrier.

43 In view of the foregoing, the answer to the third question referred must be that the fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken 'all reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004 and, therefore, to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.

Costs

44 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:

1. **Article 5(3) 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 a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. The Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, is not decisive for the interpretation of the grounds of exemption under Article 5(3) of Regulation No 261/2004.**

2. **The frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded.**

3. **The fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken 'all reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004 and, therefore, to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.**

[Signatures]