Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 21 November 2019[1]

Case C-584/18

D.Z.
v
Blue Air – Airline Management Solutions SRL and Others

(Request for a preliminary ruling from the Eparchiako Dikastirio Larnakas (District Court, Larnaca, Cyprus))

(Reference for a preliminary ruling – Border control, asylum and immigration – Crossing of the external borders of the Member States – Decision No 565/2014/EU – Direct effect – Regulation No 261/2004 – Denied boarding – Definition – Error in assessing the adequacy of travel documentation – Limitation of liability clauses for air carriers)

1. By the request for a preliminary ruling which is the subject of this Opinion, the Eparchiako Dikastirio Larnakas (District Court, Larnaca, Cyprus) referred five questions to the Court of Justice on the interpretation of Decision No 565/2014/EU[2] and Regulation (EC) No 261/2004.[3] Those questions were raised in proceedings between D. Z. and Blue Air – Airline Management Solutions SRL ('Blue Air') concerning Blue Air's refusal to allow D. Z. to board a flight from Larnaa (Cyprus) to Bucharest (Romania).

Legal framework

2. Under Article 4(1) of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded,[4] since 1 January 2007, the date of its accession to the European Union, Romania has been required to subject nationals of the third countries listed in Annex I to Regulation (EC) No 539/2001[5] to a visa requirement. According to paragraph 2 of that article, the provisions of the Schengen *acquis* on the conditions and criteria for issuing uniform visas, as well as the provisions on mutual recognition of visas and on the equivalence between residence permits and visas, are binding on Romania from the date of accession, although they do not apply until the Council has adopted a decision to that effect.

1 Original language: Italian.

2 Decision of the European Parliament and of the Council of 15 May 2014 introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by Bulgaria, Croatia, Cyprus and Romania of certain documents as equivalent to their national visas for transit through or intended stays on their territories not exceeding 90 days in any 180-day period and repealing Decisions No 895/2006/EC and No 582/2008/EC (OJ 2014 L 157, p. 23).

3 Regulation 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).

4 OJ 2005 L 157, p. 203.

5 Council Regulation of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1). Regulation No 539/2001 was replaced with effect from 17 December 2018 by Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 (OJ 2018 L 303, p. 39).

Romania is therefore required to issue national visas for entry into or transit through its territory to third-country nationals holding a uniform visa or long-stay visa or residence permit issued by a Member State fully implementing the Schengen *acquis* or a similar document issued by Cyprus, Bulgaria or Croatia, which, like Romania, are not yet part of the Schengen area. In order to avoid imposing unjustified administrative burdens on Romania and the Member States which acceded to the Union on 1 May 2004 in the period prior to them joining the Schengen area, Decisions No 895/2006/EC[6] and No 582/2008/EC[7] were adopted, followed subsequently by Decision No 565/2014, which repealed the first two decisions and concerns only Romania, Bulgaria, Cyprus and Croatia.

3. According to Article 1 thereof, Decision No 565/2014, which was applied by both Cyprus and Romania at the material time for the main proceedings, 'introduces a simplified regime for the control of persons at the external borders whereby Bulgaria, Croatia, Cyprus and Romania may recognise unilaterally as equivalent to their national visas for transit through or intended stays on their territory not exceeding 90 days in any 180-day period the documents referred to in Article 2(1) and Article 3 of this Decision issued to third-country nationals subject to a visa obligation pursuant to Regulation … No 539/2001.'

4. Pursuant to Article 2(1) of Decision No 565/2014, Bulgaria, Croatia, Cyprus and Romania may consider as equivalent to their national visas, irrespective of the nationality of the holders, the documents listed in points (a) to (c) of that paragraph, issued by the Member States fully implementing the Schengen *acquis*. In accordance with paragraph 3 of that article, 'if Bulgaria, Croatia, Cyprus or Romania decide to apply … Decision [No 565/2014], they shall recognise all the documents referred to in paragraphs 1 and 2, regardless of which Member State issued the document, unless they are affixed to travel documents that they do not recognise or to travel documents issued by a third country with which they do not have diplomatic relations.'

5. Under Article 3(1) of Decision No 565/2014, 'if Bulgaria, Croatia, Cyprus or Romania decide to apply Article 2, they may …recognise as equivalent [to their national visas]' the visas and permits referred to in Article 3(1)(a) and (b) issued by those Member States, unless such visas and permits are affixed to travel documents that they do not recognise or to travel documents issued by a third country with which they do not have diplomatic relations. Paragraph 2 of that article specifies that the documents issued by Cyprus which may be recognised are listed in Annex III to Decision No 565/2014.

6. In accordance with the first paragraph of Article 5 of Decision No 565/2014, 'Bulgaria, Croatia, Cyprus and Romania shall notify the Commission within 20 working days of the entry into force of this Decision, if they decide to apply this Decision. The Commission shall publish the information communicated by those Member States in the *Official Journal of the European Union*.' On 6 September 2014, the Commission published the following information in the Official Journal, in accordance with the first paragraph of Article 5 of Decision No 565/2014 as regards Romania: 'Romania implements Decision No 565/2014/EU, and in accordance with Article 3 of the Decision recognises national visas and residence permits issued by Bulgaria, Cyprus and Croatia listed, respectively, in Annex I, II and III of the Decision, as equivalent to Romanian visas.'[8]

6 Decision of the European Parliament and of the Council of 14 June 2006 introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia of certain documents as equivalent to their national visas for the purposes of transit through their territories (OJ 2006 L 167, p. 1).

7 Decision of the European Parliament and of the Council of 17 June 2008 introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by Bulgaria, Cyprus and Romania of certain documents as equivalent to their national visas for the purposes of transit through their territories (OJ 2008 L 161, p. 30).

8 OJ 2014 C 302, p. 1. Similar information was published on the same date with regard to Cyprus, although that Member State excluded from recognition visas and residence permits affixed to travel documents issued by Azerbaijan and Turkey.

7. In accordance with Article 1(1) of Regulation No 539/2001, nationals of third countries on the list in Annex I to that regulation are required to be in possession of a visa when crossing the external borders of the Member States. Kazakhstan is included on that list.

8. Article 2(j) of Regulation No 261/2004 states that, for the purposes of the regulation, 'denied boarding' means 'a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation'.

9. Under Article 4(3) of Regulation No 261/2004, 'if boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9.'

10. Article 15 of Regulation No 261/2004, entitled 'Exclusion of waiver', states, in paragraph 1, that 'obligations vis-à-vis passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the contract of carriage.'

The main proceedings, the questions referred and the procedure before the Court

11. D. Z., the applicant in the main proceedings, is a Kazakhstani national. Blue Air, the defendant in the main proceedings, is a Romanian company which has been registered in Cyprus since 2015 and has established its place of business in that Member State.

12. On 6 September 2015, D. Z. arrived at Larnaca Airport with the intention of boarding a flight operated by the defendant to Bucharest, on which he had a confirmed reservation. D. Z. was due to stay in Bucharest from 6 to 12 September 2015, the date of his scheduled return flight from Bucharest to Larnaca with a different air carrier. The purpose of his trip was to sit two examinations of the Association of Chartered Certified Accountants (ACCA) in Bucharest on 7 September 2015.

13. At the material time in the main proceedings, D. Z. was in possession of a valid passport issued by Kazakhstan, as well as a temporary residence permit for the territory of the Republic of Cyprus, issued in Nicosia on 15 June 2015 and valid until 6 April 2016. Although the order for reference does not expressly state this, it would appear to be common ground that that residence permit was of the type included on the list in Annex III to Decision No 565/2014,[9] recognised by Romania in accordance with Article 3(1)(b) of Decision No 565/2014.

14. Before his scheduled departure date for Romania, D. Z. had applied online for a Romanian entry visa via the website of the Ministry of Foreign Affairs of that Member State. In reply to the relevant questions, D. Z. stated that he fell into the following category: 'I hold a short-stay issued by Bulgaria, Cyprus or Croatia'. The Romanian Ministry of Foreign Affairs replied that he did not require an entry visa for Romania, if his intended stay there did not exceed 90 days in any 180-day period.

15. Having arrived at Larnaca Airport in good time for his flight, D. Z. presented his travel documents at check-in to the staff of the private company acting as Blue Air's handling agent in Cyprus. Together with his passport and temporary residence permit for Cyprus, D. Z. produced the visa application submitted via the website of the Romanian Ministry of Foreign Affairs and the reply, received by email, that he was not required to have an entry visa for Romania.

9 The residence permit in question comes under the heading 'Residence permits', first indent, 'Temporary residence permit (employment, visitor, student)' of that Annex.

16. The staff who checked D. Z.'s travel documents telephoned Blue Air's ground staff at Bucharest Airport, to whom they forwarded all the documents presented by D. Z. The Blue Air employee on duty at Bucharest Airport sent the following reply by email: 'I am sorry but they said that without a visa or a family member residence card, he can't enter Romania.'

17. In view of that response and the fact that the carriage of D. Z. to Romania would have obliged Blue Air to return him immediately to Cyprus and exposed the airline to administrative and criminal penalties, it was decided that D. Z. should not be allowed to board his flight. D. Z. demanded that he be provided with the reasons for being denied boarding in writing, but he never received any. It is also established that D. Z. did not receive any written decision from the Romanian authorities stating the reasons for the refusal to authorise his entry into Romania.

18. D. Z. is seeking compensation before the referring court for the lost cost of his return ticket, the cancellation fee for the hotel reservation in Bucharest, the entry fees for the examinations which he did not sit because he was unable to travel to Bucharest, the sum in wages not paid by his employer for the study leave he took in order to prepare for the examinations he was due to sit in Bucharest, and compensation for the non-financial damage which he sustained because his preparations for the examinations were wasted and he needed to prepare again to sit the same examinations on a different date. He considers that being denied boarding on the defendant's aircraft, even though he had all the travel documents required under Decision No 565/2014 and had been advised by the Romanian Ministry of Foreign Affairs that he did not require an entry visa, was contrary to the provisions of that decision and in breach of his contract with the defendant.

19. Blue Air contends that it was D. Z.'s responsibility to obtain any entry visa required by laws or under regulations, that he knew or should have known that he required a visa to enter Romania, that the Romanian authorities had powers of discretion to refuse him entry to Romania without a visa, and that the defendant cannot be held liable for the decision taken by the Romanian authorities to refuse him entry to the country. Blue Air also refers to the general conditions of carriage published on its website, which clearly state that the carrier is not liable for refusal of entry by the authorities of the State of destination or for documents that the customer is required to possess or for the application of the laws, regulations or directives of the State of destination.

20. It is against that background that the Eparchiako Dikastirio Larnakas (District Court, Larnaca) referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Should Decision No 565/2014 be interpreted as producing direct legal effect in the form, on the one hand, of the right of a third-country national not to be subject to a visa requirement for entry into the Member State of destination and, on the other hand, an obligation on that Member State of destination not to require such a person to have such a visa where that person is in possession of a visa or residence permit included in the list of visas and residence permits enjoying mutual recognition on the basis of Decision No 565/2014, which the Member State of destination has undertaken to apply?

(2) Where an air carrier directly and/or through its authorised and designated representatives at the airport of the Member State of departure denies boarding to a passenger, giving as its reason the fact that the authorities of the Member State of destination have refused that person entry to that State because he allegedly has no entry visa, can the air carrier be regarded as exercising powers and acting as an emanation of that State, such that Decision No 565/2014 can be cited against it by the passenger concerned before the courts of the Member State of departure in order to prove that he had a right of entry without requiring an additional visa and to claim compensation for infringement of that right and, by extension, of his contract of carriage?

(3) Can an air carrier directly and/or through its authorised and designated representatives rely upon a decision by the authorities of the Member State refusing a third-country national entry to the territory of that State in order to deny that national boarding, without first issuing and/or giving that person a written substantiated decision with respect to the refusal of entry (see Article 14(2) of Regulation No 2016/399, previously Article 13 of Regulation (EC) No 562/2006,[10] which requires a substantiated decision stating the reasons for refusal of entry), in order to safeguard respect for fundamental rights and, in particular, legal protection of the rights of the passenger concerned (see Article 4 of that regulation)?

(4) Does Article 2(j) of Regulation No 261/2004 mean that cases of denied boarding are exempt from its scope whenever boarding is denied by decision of the air carrier due to alleged "inadequate travel documentation"? Should that provision be interpreted as meaning that denied boarding does fall within the scope of the regulation where a court finds, on the basis of the particular circumstances of each specific case, that the travel documentation was adequate and that the denial of boarding was unsubstantiated or unlawful in that it infringed EU law?

(5) Can a passenger be deprived of the right to compensation provided under Article 4(3) of Regulation No 261/2004 where the air carrier relies upon a clause excluding or limiting its liability in the event of allegedly inadequate travel documentation, where such a clause is included in the standard terms, published in advance, governing the operation of and/or provision of services by the air carrier? Does Article 15, read in combination with Article 14, of that regulation, prevent the application of such clauses excluding and/or limiting the air carrier's liability?'

21. In accordance with Article 23 of the Statute of the Court of Justice, D. Z., Blue Air, the German, Cypriot and Netherlands Governments and the European Commission have submitted written observations. Those interested parties, with the exception of Blue Air, submitted oral observations at the hearing before the Court on 12 September 2019.

Admissibility

22. Blue Air contends that the reference for a preliminary ruling is inadmissible, first, because – contrary to the provisions of Cypriot procedural law – the parties to the proceedings were not heard on the second and third questions referred for a preliminary ruling; second, because the referring court did not set out the applicable provisions of national law; and third, because that court did not set out all the points of law and fact necessary for the correct application of EU law. For its part, the German Government raises doubts as to the admissibility of the fourth and fifth questions referred, since it is not apparent from the order for reference that the applicant in the main proceedings relied on Regulation No 261/2004.

23. In that regard, it should be noted that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for establishing, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance.[11] The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the question submitted to it.[12] None of these situations applies in

10 Regulation of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

11 See, by way of example, judgment of 10 March 2016, *Flight Refund* (C-94/14, EU:C:2016:148, paragraph 40 and the case-law cited).

12 See, most recently, judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 27 and the case-law cited).

the present case. As regards the relevance of the fourth and fifth questions, I note that, while – as expressly indicated in the order for reference – it is true that the applicant in the main proceedings did not rely on Regulation No 261/2004, the referring court nonetheless stated in the order that Cypriot law allows it to award compensation to a party even if that party did not expressly claim it.

24. I would also point out that, according to settled case-law, it is not for the Court to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and legal proceedings. [13]

25. I therefore suggest that the Court declare admissible all the questions referred for a preliminary ruling by the referring court.

Substance

The first question

26. By its first question, the referring court essentially asks the Court of Justice whether Decision No 565/2014 produces direct effects, first in that a national of a third country listed in Annex I to Regulation No 539/2001 is entitled not to be required to be in possession of a national visa in order to enter the territory of one of the Member States to which that decision is addressed, if he holds a residence permit recognised by such a Member State as equivalent to its national visa in accordance with Article 3(1)(b) of that decision, and second, in requiring that Member State to permit entry in those circumstances despite the absence of such a visa.

27. Blue Air and the German, Cypriot and Netherlands Governments, on the basis of substantially the same arguments, propose that this question be answered in the negative. However, the Commission considers that it should be answered in the affirmative. [14]

28. As the Court of Justice has observed since the often-cited *Grad* judgment, it would be incompatible with the binding effect that Article 288 TFEU attributes to decisions 'to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision.' Where a decision has imposed an obligation on one or more Member States to act in a certain way, 'the effectiveness ("l'effet utile") of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of [EU] law.' [15]

29. However, in order for the obligation imposed by a decision on the Member States to which it is addressed to be capable of producing direct effects in the legal relationships between the Member States and those subject to their jurisdiction, the obligation must be unconditional and sufficiently precise. [16] Whether or not those criteria have been met must be examined in each particular case, having regard to the nature, background and wording of the provision to be invoked before the court. [17]

13 See, most recently, judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 30).

14 In his written observations, the applicant in the main proceedings, who replied fully to the questions referred for a preliminary ruling by the referring court, appears to be in favour of the recognition of direct (horizontal) effects for Decision No 565/2014.

15 Judgment of 6 October 1970, *Grad* (9/70, EU:C:1970:78, paragraph 5).

16 Judgment of 6 October 1970, *Grad* (9/70, EU:C:1970:78, paragraph 9). See also judgments of 12 December 1990, *Kaefer and Procacci* (C-100/89 and C-101/89, EU:C:1990:456, paragraph 24), and of 10 November 1992, *Hansa Fleisch Ernst Mundt* (C-156/91, EU:C:1992:423, paragraph 13).

17 Judgment of 6 October 1970, *Grad* (9/70, EU:C:1970:78, paragraph 6).

30. Before conducting that examination with regard to Decision No 565/2014, it is appropriate to pause and consider the argument put forward by the German Government, according to which the possibility of according direct effect to the provisions of that decision must be ruled out from the outset, on the ground that it is merely intended to simplify administrative procedures and not to confer rights on individuals.

31. In my opinion, that argument must be rejected.

32. First, the recognition of individual legal rights that are favourable to individuals as a counterpart to an obligation imposed on Member States by the provisions of a decision is a consequence of those provisions which may be unrelated to the overall objective actually pursued by the decision.[18] Second, the underlying premiss of the German Government's argument that the direct effect of a rule of EU law is necessarily linked to the EU's recognition of rights[19] for the individual relying on it in legal proceedings is contradicted, in my view, by the case-law of the Court of Justice.

33. Without wishing to enter into a scholarly discussion on the various permutations of direct effect and how this relates to other concepts of EU law, I would simply point out that the Court of Justice has long recognised that the ability of individuals to assert their rights under a provision of EU law imposing obligations on Member States does not depend on whether it is intended to confer rights on individuals, at least where such a provision is invoked not as a substitute for a conflicting national rule, but as a criterion for determining the legality of national legal provisions, measures or conduct adopted by a national authority.[20] Therefore, the fact that neither the provision of a decision addressed to Member States whose direct effect is invoked in order to oppose a conflicting national administrative measure nor the measure that contains it are intended to confer rights on individuals cannot in itself be regarded as decisive for the purpose of ruling out such direct effect.[21]

34. In the light of the foregoing, it is therefore necessary to ascertain whether Decision No 565/2014 imposes on the Member States to which it is addressed a sufficiently precise and unconditional obligation to recognise the residence permits referred to in Article 3(1)(b) of that decision as equivalent to national visas for the purposes of entry and temporary residence in their territory.

35. In the present case, the doubts expressed by the governments which have submitted observations to the Court essentially relate to the requirement of unconditionality, given that Article 3(1) of Decision No 565/2014 authorises, but does not oblige the Member States to which that decision is addressed unilaterally to recognise the residence permits referred to in Article 3(1)(b) as equivalent to their national visas, and given that this right does not apply unless those Member States decide to apply the decision in question.

18 See, to that effect, paragraph 24 of the judgment of 12 December 1990, *Kaefer and Procacci* (C-100/89 and C-101/89, EU:C:1990:456).

19 In paragraph 35 of its written observations, the German Government uses the term '*subjektiv-öffentlichen Rechten*'.

20 See, as regards directives, judgments of 23 November 1977, *Enka* (38/77, EU:C:1977:190, paragraph 18); of 19 January 1982, *Becker* (8/81, EU:C:1982:7, paragraph 25); of 19 September 2000, *Linster* (C-287/98, EU:C:2000:468, paragraphs 38-39); and, more recently, of 8 June 2006, *Feuerbestattungsverein Halle* (C-430/04, EU:C:2006:374, paragraph 28); of 17 July 2008, *Flughafen Köln/Bonn* (C-226/07, EU:C:2008:429, paragraph 33); of 17 November 2011, *Aladzhov* (C-434/10, EU:C:2011:750, paragraph 32); and of 5 September 2012, *Rahman and Others* (C-83/11, EU:C:2012:519, paragraph 25).

21 However, the individual must have an interest in ensuring that the Member State fulfils its obligation and be able to assert that interest before the national courts.

36. As expressly stated in its recital 7, participation in the regime of unilateral recognition that Decision No 565/2014 sought to establish [22] is therefore *optional*. Moreover, while Article 2(3) of the decision specifies that, where the Member States to which it is addressed choose to apply it, they must recognise all the documents referred to in paragraphs 1 and 2 of that article, regardless of which Member State issued them, Article 3(1) of the decision allows the Member States that decide to apply Article 2 the further option of recognising as equivalent to their national visas the documents listed in Article 3(1)(a) and (b).

37. It is also settled case-law that a provision of EU law is unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the EU institutions or by the Member States. [23]

38. A strict application of that test would inevitably lead to the conclusion that the provisions of Decision No 565/2014, and in particular Article 3 thereof, lacked the unconditionality required by case-law.

39. First, the simplified regime for the control of persons at the external borders introduced by that decision does not apply to the Member States to which it is addressed unless they consent to this by issuing an express declaration to that effect. [24] Second, where such consent is given, the equivalence of the documents listed in Article 3(1)(a) and (b) of the decision with national visas is not automatic, but must also be expressly recognised by the Member State concerned. In addition, under Article 3(1), the Member State may exclude such recognition where visas or residence permits are affixed to certain travel documents. It is clear, therefore, that Decision No 565/2014 does not impose an unconditional obligation on the Member States to which it is addressed to recognise such equivalence, nor to participate in the simplified regime provided for by that decision.

40. Nevertheless, it is not in my view correct to end this analysis on the basis of that single observation.

41. It is clear from the Court's case-law that the mere fact that a provision of EU law needs to be supplemented by another act in order *to become effective* does not mean that the rule it contains, laying down an obligation which is in itself clear and precise, should not be considered – once it has become binding on the Member State concerned [25] – unconditional for the purposes of being relied on in judicial proceedings as a criterion for determining the legality of a conflicting national provision or measure adopted by a national authority. [26] The same applies to cases where such a provision is subject to a fixed period for implementation [27] or to a condition. [28]

42. In the case of Decision No 565/2014, the application by the Member State of the regime established by the decision – which, according to Article 5 of the decision, is to be notified to the Commission and published in the Official Journal – entails, under Article 2(3), an obligation to recognise, subject to the exceptions established by the Member State concerned in the Act of Accession, all the documents referred to in paragraphs 1 and 2 of that article, regardless of which Member State issued them. [29] Not to consider this obligation clear and precise, or indeed

22 See recitals 9 and 10 and Article 1 of Decision No 565/2014.

23 See, to that effect, judgments of 23 February 1994, *Comitato di Coordinamento per la Difesa della Cava and Others* (C-236/92, EU:C:1994:60, paragraph 9), and of 26 October 2006, *Pohl-Boskamp* (C-317/05, EU:C:2006:684, paragraph 41).

24 See Article 5 of Decision No 565/2014.

25 See judgment of 10 November 1992, *Hansa Fleisch Ernst Mundt* (C-156/91, EU:C:1992:423, paragraph 20).

26 This was, inter alia, the situation in the case that gave rise to the judgment of 6 October 1970, *Grad* (9/70, EU:C:1970:78).

27 See judgment of 10 November 1992, *Hansa Fleisch Ernst Mundt* (C-156/91, EU:C:1992:423, paragraph 19).

28 See judgment of 12 December 1990, *Kaefer and Procacci* (C-100/89 and C-101/89, EU:C:1990:456, paragraph 27), in which the obligation laid down in the provision of Decision 86/283 relied on was subject to the condition of reciprocity.

29 See, in that regard, Commission proposal of 21 June 2013, COM(2013) 441 final, p. 3.

unconditional, *once the Member State concerned has opted to apply the decision*, indicating any exceptions to the recognition of equivalence within the limits laid down in Article 2(3) of that decision, seems to me to be an overly formalistic application of the case-law referred to in point 37 of this Opinion.

43. However, the analysis becomes more complicated if we move on from Article 2 of Decision No 565/2014 to Article 3. As previously mentioned, that article does not impose on the Member States to which it is addressed an obligation – such as the one laid down in Article 2(3) – to recognise all the documents referred to therein as equivalent to their national visas, but merely allows them the option of doing so.

44. In view of Romania's decision unilaterally to recognise the residence permits referred to in Article 3(1)(b) of Decision No 565/2014, which that Member State notified to the Commission and which the Commission published in the Official Journal, can it be concluded that a national of a third country listed in Annex I to Regulation No 539/2001 who is in possession of a residence permit covered by the recognition is entitled to rely on Article 3 to challenge the lawfulness of the decision by the Romanian authorities to refuse that person entry into that Member State on the ground that he did not have a national visa?

45. In my view, neither the case-law referred to in point 37 of this Opinion, nor the wide margin of discretion which Article 3(1) of Decision No 565/2014 allows the Member States to which that decision is addressed as regards the recognition of the equivalence of the documents referred to therein, precludes an affirmative answer to that question.

46. Indeed, although the requirement that a provision of EU law must be unconditional if it is to be relied on in legal proceedings is inversely proportional to the discretion available to the Member States,[30] the Court has often focused more on how that discretion has been used than on the breadth of the discretion,[31] particularly when the 'direct opposing effect' of that provision is invoked.[32] The existence of a greater or lesser degree of discretion which the provision in question allows the Member States does not therefore appear automatically to prevent it from being relied on in judicial proceedings as a criterion for determining the legality of national legal provisions, measures or conduct adopted by national administrative authorities.[33] In the same spirit, which is more substantive than formalistic, the Court has also ruled – with regard to the provisions of a directive – that there is no justification in barring individuals from relying on such provisions before a national court once the Member State concerned has exercised the (wide) discretion it enjoys in implementing the directive.[34]

47. The answer to the question set out in point 44 of this Opinion therefore essentially depends on whether – once the Member State concerned has decided to apply Article 3 of Decision No 565/2014 without indicating any exceptions, as Romania has done – that Member State is required to recognise as equivalent to its national visas the documents referred to in Article 3(1), without being able to decide on a case-by-case basis whether or not to grant such recognition.

30 In its judgment of 12 December 1990 in *Kaefer and Procacci* (C-100/89 and C-101/89, EU:C:1990:456, paragraph 26), the Court affirmed that an unconditional provision is one which leaves no discretion to the Member States.

31 See, for example, as regards directives, judgments of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 105), and of 28 June 2007, *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391, paragraphs 59 and 60).

32 As regards directives, see, for example, judgments of 24 October 1996, *Kraaijeveld and Others* (C-72/95, EU:C:1996:404, paragraphs 59-61); of 19 September 2000, *Linster* (C-287/98, EU:C:2000:468, paragraphs 36 and 37, and the Opinion of Advocate General Léger, C-287/98, EU:C:2000:3, points 73 et seq.); of 7 March 1996, *Associazione Italiana per il WWF and Others* (C-118/94, ECLI:EU:C:1996:86, paragraphs 17 to 26); of 15 May 2014, *Almos Agrárkülkereskedelmi* (C-337/13, EU:C:2014:328, paragraph 34); and of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 66). See also Opinion of Advocate General Bot in *Rahman and Others* (C-83/11, EU:C:2012:174, point 81). For decisions, see judgment of 10 November 1992, *Hansa Fleisch Ernst Mundt* (C-156/91, EU:C:1992:423, paragraph 15).

33 See also, with regard to directives, judgments of 17 July 2008, *Flughafen Köln/Bonn* (C-226/07, EU:C:2008:429, paragraphs 33-34), and of 6 October 2015, *T-Mobile Czech Republic and Vodafone Czech Republic* (C-508/14, EU:C:2015:657, paragraph 53).

34 See judgment of 18 October 2001, *Gharehveran* (C-441/99, EU:C:2001:551, paragraphs 39 to 44).

48. When asked about this by the Court of Justice during the hearing, the German and Cypriot Governments answered in the negative. However, I am not convinced by that response.

49. The fact that the regime introduced by Decision No 565/2014 is based on unilateral recognition by the Member States to which that decision is addressed should not blind us to the fact that the decision establishes common rules on checks at the external borders and that the aim of those rules is to simplify those checks. It would be contrary to that objective and, ultimately, to the effectiveness of Decision No 565/2014 to find that those Member States that have decided to apply the regime introduced by that decision and have notified the Commission accordingly may then derogate from it in individual cases, retaining the right to refuse entry at the border to a national of a third country listed in Annex I to Regulation No 539/2001, in possession of one of the documents referred to in Article 3 of Decision No 565/2014, duly issued and valid, on the pretext that that person is not in possession of a national entry or transit visa. Such an interpretation of Decision No 565/2014 would also run counter to the principle of legal certainty, which is precisely what the publication of the Member State's notification to the Commission under Article 5 of the decision is intended to safeguard.

50. It follows that, once the Member State concerned has notified the Commission of its intention to apply Decision No 565/2014 and to recognise the documents listed in Article 3(1) as equivalent to its national visas, it is obliged to adhere to the decision taken.

51. Recital 7 of Decision No 565/2014, according to which participation in the regime should be optional, 'without imposing on the Member States obligations additional to those laid down by the [respective] Act of Accession', does not alter this conclusion. That decision and the simplified regime it introduces – which the Member States to which it is addressed apply voluntarily – are intended to mitigate the obligation laid down in the Act of Accession of those Member States systematically to require nationals of the third countries listed in Annex I to Regulation No 539/2001 to obtain a national entry or transit visa, thereby easing the administrative burden which that obligation entails for persons who have already been subject to rigorous checks by the issuing Member State.

52. On the basis of the foregoing considerations, I propose that the Court reply to the first question referred for a preliminary ruling that Decision No 565/2014 is to be interpreted as meaning that a Member State to which that decision is addressed and which has decided to recognise as equivalent to its national visas the documents listed in Article 3(1) of that decision, without exceptions, and which has duly notified the Commission in accordance with Article 5 of the decision, cannot, from the date of publication of that notification in the Official Journal, refuse entry at the border to a national of a third country listed in Annex I to Regulation No 539/2001, in possession of one of the documents referred to in Article 3(1), duly issued and valid, solely on the ground that that person does not have a national visa. Decision No 565/2014 may be relied on in judicial proceedings by a third-country national who has been refused entry into or transit through the territory of that Member State in the abovementioned circumstances in order to challenge the refusal on the ground that it is unlawful.

The second question

53. By its second question, the referring court essentially asks the Court whether an air carrier which, directly or through its representatives at the airport of departure, refuses to board a passenger on the ground that the authorities of the Member State of destination have refused entry as the passenger concerned does not have a national visa, must be regarded as an emanation of that Member State against which the passenger can invoke the provisions of Decision No 565/2014 to obtain compensation for breach of the contract of carriage. In other words, the Court is asked to rule on whether an individual may invoke in legal proceedings the obligations of the Member State of destination under an act of secondary legislation on border controls – in this case Decision No 565/2014 – against the company with which he has entered into a contract for carriage by air.

54. Let me say straight away that, like the Netherlands Government, I find it somewhat difficult to grasp the full meaning of this question, given the essentially contractual nature of the dispute in the main proceedings. By denying boarding to D. Z., Blue Air failed to provide the service that it was obliged to perform under the contract of carriage with D. Z. The question of whether that conduct may give rise to liability for breach of contract and whether, on that or any other basis, it entitles D. Z. to compensation for the losses incurred does not depend on whether D. Z. can rely in legal proceedings against Blue Air on Romania's obligations under the regime introduced by Decision No 565/2014, which that Member State has decided to apply.

55. In view of the foregoing, like all the interested parties that have submitted observations in this case, with the exception of D. Z., I consider that the second question referred should be answered in the negative.

56. The binding nature of a decision, which constitutes the basis for the possibility of invoking that decision before a national court,[35] exists only in relation to the Member States to which it is addressed. Accordingly, a decision addressed to Member States may not of itself impose obligations on an individual and may not be relied upon as such against them.[36]

57. Although in paragraph 27 of the *Farrell* judgment,[37] the Court stated that provisions of secondary EU law capable of producing direct effects can be relied on by an individual 'against organisations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals',[38] that case-law does not apply in the circumstances of the main proceedings.

58. As the Commission rightly points out, neither airlines nor their employees, representatives or agents who check whether travel documentation presented at the airport of the Member State of departure is in order can be considered responsible for carrying out border controls. Consequently, they have no power to refuse or authorise the entry of a third-country national into the territory of the Member State of destination.

59. It is true that, pursuant to Article 26(1)(b) of the Convention signed at Schengen on 19 June 1990 implementing the Schengen Agreement of 14 June 1985[39] and Directive 2001/51/EC[40] supplementing and specifying the conditions for the application of that article, carriers transporting foreign nationals in the territory of the Member States are subject to specific control obligations[41] and are, in particular, obliged 'to take all the necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territories' of the Member States. Furthermore, under paragraph 2 of that article, Member States are required to impose penalties on carriers which transport aliens who do not possess the necessary travel documents by air or sea from a third country to their territory.[42]

35 Judgment of 6 October 1970, *Grad* (9/70, EU:C:1970:78, paragraph 5).

36 See, to that effect, as regards directives, judgment of 26 February 1986, *Marshall* (152/84, EU:C:1986:84, paragraph 48).

37 Judgment of 10 October 2017 (C-413/15, EU:C:2017:745).

38 See also judgment of 12 July 1990, *Foster and Others* (C-188/89, EU:C:1990:313, paragraph 20).

39 OJ 2000 L 239, p. 1.

40 Council Directive of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ 2001 L 187, p. 45).

41 Checks carried out by airlines can be divided into three types: (i) identity checks carried out within a commercial framework when the passenger checks in, with a view to ensuring that the passenger is the person indicated on the ticket or is entitled to certain discounts; (ii) checks carried out for security reasons in exceptional cases and circumstances, for instance where there are concerns that a passenger's conduct might disturb public order or jeopardise the safety of other passengers; (iii) checks with a view to avoiding penalties under carriers' liability legislation in the event of persons who do not have the requisite travel documents being carried (see, to that effect, the answer given by the then Commissioner Vitorino on 5 July 2001 to a parliamentary question on systematic identity checks carried out before boarding by Air France at Charles de Gaulle airport, at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2001-1486&language=EN).

42 The case giving rise to the judgment of 4 September 2014, *Air Baltic Corporation* (C-575/12, EU:C:2014:2155), concerned one of these administrative penalties imposed by the Lithuanian authorities on Air Baltic. Another case involving a penalty imposed by the Hungarian authorities on Ryanair is currently pending before the Court of Justice (see Case C-754/18, *Ryan Air Designated Activity Company*).

60. However, the provision in EU law and/or national law for such obligations and penalties does not mean that air carriers carrying out checks on passengers' travel documents prior to boarding at the airport of the Member State of departure, in order to ensure that they are in possession of the documents required for entry into the Member State of destination, should be regarded as emanations of that Member State, or that such checks may be classified as 'border checks' within the meaning of the Schengen Borders Code,[43] or indeed that the employees, representatives or agents of such carriers should be considered 'border guards' within the meaning of that Code.[44]

61. As the German Government correctly observed, this is the only possible conclusion that can be reached in the light of the judgment in *Touring Tours und Travel and Sociedad de Transportes*.[45] It is true that, in that judgment, the Court did find that the checks on travel documents, which a coach transport undertaking operating cross-border scheduled services within the Schengen area is required to carry out by reason of a general legal obligation (with financial penalties for non-compliance) imposed by a Member State and individual decisions taken by the police authority in that State, must be regarded as being carried out 'on the instruction and under the control' of that authority, even though that undertaking has no public powers. However, that conclusion is limited to the context of that case, in which the Court was asked to clarify whether those checks fell within the scope of Article 21(a) of Regulation No 562/2006, which preceded the current Schengen Borders Code, and whether they amounted to the 'exercise of police powers' having equivalent effect to border checks. No conclusions may therefore be drawn from this as to whether air carriers carrying out pre-boarding checks on travel documents can be regarded as organisations or bodies within the meaning of paragraph 27 of the *Farrell* judgment.[46]

62. For the reasons set out above, I consider that the answer to the second question referred is that an air carrier which, directly or through its representatives at the airport of the Member State of departure, denies boarding to a passenger on the ground that the authorities of the Member State of destination have refused entry as the passenger concerned does not have a national visa cannot be regarded as an emanation of that Member State, against which the passenger in question may invoke the obligations incumbent on the Member States that apply Decision No 565/2014.

The third question

63. By its third question, the referring court essentially asks the Court whether an airline may, directly or through its representatives or agents at the airport of departure, refuse to allow a passenger to board on the ground that the authorities of the Member State of destination have refused entry where no written substantiated decision has been adopted by those authorities or communicated to the person concerned in accordance with Article 13 of Regulation No 562/2006.

64. That question also seems to fall outside the contractual framework of the situation in the main proceedings.

43 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1). The concept of 'border checks' is defined in Article 2(11) of that Code as 'the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it'. In that regard, see judgment of 13 December 2018, *Touring Tours und Travel and Sociedad de Transportes* (C-412/17, EU:C:2018:1005, paragraph 45 and the case-law cited), in which the Court stated that checks on travel documents carried out by transport undertakings in connection with cross-border coach transport operations do not amount to border checks, in so far as they are carried out inside a Member State – in that case, the Member State in which the travellers board the coach at the start of the cross-border journey – and not 'at borders' or 'when the border is crossed'.

44 The term 'border guard' is defined in Article 2(14) of the Schengen Borders Code as 'any public official assigned, in accordance with national law, to a border crossing point or along the border or the immediate vicinity of that border who carries out, in accordance with this Regulation and national law, border control tasks'.

45 Judgment of 13 December 2018 (C-412/17, EU:C:2018:1005, paragraphs 48 and 49).

46 Judgment of 10 October 2017 (C-413/15, EU:C:2017:745).

65. An airline's refusal to board a passenger who has a contract of carriage with the airline, even if based on a decision taken by the authority of the Member State of destination that the passenger is not authorised to enter the territory of that Member State, still constitutes in any event conduct giving rise to contractual liability. As stated in response to the second question, checks on travel documents which airlines are required to carry out under EU or national law are not border checks and denied boarding cannot be regarded as refusal of entry into the territory of the Member State of destination, although it may have the same effect in that it prevents passengers from entering that territory.

66. The fact that the denied boarding is justified by the airline's intention not to infringe the national immigration laws of the Member State of destination of the flight and thus incur penalties, including criminal penalties, which may be imposed if it carried passengers without the documents required for crossing the border of that Member State, *does not alter the contractual nature* of that denial.

67. It follows that, by refusing to board a passenger, an airline is exposing itself, vis-à-vis the passenger, to the consequences of a breach of the contract of carriage with that passenger, depending on the contractual terms and the law applicable to the contract. In addition, as will be seen below, the airline will also face the consequences provided for in Regulation No 261/2004, provided the criteria for its application have been met.

68. In this context, the information obtained from the authorities of the Member State of destination, as well as the recommendations of and positions adopted by those authorities regarding the non-conformity of the travel documents held by the passenger with the requirements for entry into that Member State, are merely factors steering the airline's conduct under the contract, on a par with factors such as directly consulting the applicable regulations and, where appropriate, searching databases.

69. In any event, contrary to what is argued by Blue Air in its written observations, D. Z. cannot be considered to have been refused entry into Romanian territory because he did not have the documents required to cross the border of that Member State. Such a decision could only be taken by the competent Romanian authorities during a border check carried out pursuant to Chapter II of Regulation No 562/2006, which would require D. Z. to be present at the border, in compliance with the procedural requirements laid down in Article 13 of that regulation. Furthermore, D. Z. cannot be considered – as claimed by Blue Air – to have been the subject of a 'permanent' refusal of entry into Romanian territory because he did not have adequate documentation for that purpose, since no decision to that effect was communicated to D. Z. by the competent Romanian authorities and he was therefore not in a position to exercise the right to appeal provided for in Article 13(3) of Regulation No 562/2006.

70. In view of the foregoing considerations, I propose that the Court answer the third question as follows: the fact that an airline's refusal to allow a passenger to board a flight between two Member States which are not part of the Schengen area may be based on information, recommendations or decisions by the competent authorities of the Member State of destination of the flight as to the conformity of the documents held by the passenger with those required for the purpose of crossing the border of that Member State does not, in itself, exonerate the airline from the consequences which, under the contract and the law applicable to the contract, stem from the failure to provide the transport service.

The fourth question

71. The fourth question concerns the interpretation of Article 2(j) of Regulation No 261/2004. The referring court essentially asks the Court whether, under that article, all cases of 'denied boarding' justified by the airline on the basis of the alleged inadequacy of the passenger's travel documents are excluded from the scope of the regulation, even if a court decision has found those documents to be in order and the denied boarding was therefore unjustified.

72. It should be borne in mind that Article 2(j) of Regulation No 261/2004 precludes characterisation as 'denied boarding' and therefore the application of that regulation on two sets of grounds. The first relates to the failure of the passenger presenting himself for boarding to comply with the conditions laid down in Article 3(2) of that regulation. The second concerns cases where there are 'reasonable grounds' to deny boarding, 'such as reasons of health, safety or security, or inadequate travel documentation'.[47] The reasons given by Blue Air for D. Z.'s denied boarding, relating to the position taken by the Romanian authorities on the need for a national visa for entry into Romania, fall into the second set of grounds.

73. The Court has previously held – when interpreting Article 2(j) of Regulation No 261/2004, taking into account the context of that provision and the objectives pursued by the legislation of which it forms part, as is apparent from recitals 3, 4, 9 and 10 of the regulation and from the preparatory works[48] – that the concept of 'denied boarding' contained in that provision should be construed 'broadly as covering all circumstances in which an air carrier might refuse to carry a passenger'.[49] According to the Court, a narrow interpretation of that concept is contrary to the objective of Regulation No 261/2004, which, as stated in its first recital, is to ensure a high level of protection for passengers.[50]

74. It would therefore be contrary to the broad scope of that concept as recognised by the Court, as well as to the objectives pursued by Regulation No 261/2004, to interpret the exception contained in Article 2(j) of the regulation concerning the existence of 'reasonable grounds to deny them boarding' as meaning that it is sufficient for the airline to put forward such grounds (for example, inadequate travel documentation) to avoid the application of that regulation and to deprive the passenger who is denied boarding of the right to compensation provided for in Article 7 thereof.

75. In other words, the question of whether or not an airline's refusal to allow a passenger to board may be classified as 'denied boarding' within the meaning of Article 2(j) of Regulation No 261/2004 does not depend on the type of grounds relied on to justify such a refusal, but on the substance of those grounds. It follows that 'denied boarding' may exist even if such a refusal has been justified on grounds relating to the adequacy of the travel documents held by the passenger or, as claimed by Blue Air, the position taken by the authorities of the Member State of destination on such adequacy, where it is apparent that such justification is unfounded.[51]

47 See judgment of 4 October 2012, *Finnair* (C-22/11, EU:C:2012:604, paragraph 29).

48 Specifically, the proposal for a regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights, presented by the Commission of the European Communities on 21 December 2001 (COM(2001) 784 final).

49 See judgments of 4 October 2012, *Finnair* (C-22/11, EU:C:2012:604, paragraph 22), and of 4 October 2012, *Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor* (C-321/11, EU:C:2012:609, paragraph 24).

50 See, to that effect, judgments of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraph 69); of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 18); of 4 October 2012, *Finnair* (C-22/11, EU:C:2012:604, paragraph 23); and of 4 October 2012, *Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor* (C-321/11, EU:C:2012:609, paragraph 25).

51 See, to that effect, Commission Notice on Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council (C/2016/3502, OJ 2016 C 214, p. 5, paragraph 3.1.1).

76. That said, the mere fact that the airline's reasons for denying boarding are considered unfounded should not in itself be sufficient justification for the application of Regulation No 261/2004. Indeed, the reference in Article 2(j) of that regulation to the 'reasonableness' of the grounds for the denied boarding leads me to believe that the EU legislature essentially intended to impose a duty of care on airlines in assessing the merits of those grounds, thus not ruling out the possibility that an error in that assessment could be regarded as excusable, taking into account all the relevant circumstances.

77. The preparatory work for Regulation No 261/2004 also seems to support this view. Although the Commission's initial proposal did not contain a definition of the concept of 'denied boarding', the need to introduce such a definition was raised at first reading by the European Parliament with an amendment which excluded from this concept, without further clarification, 'circumstances where boarding is denied for disruptive behaviour, health and safety reasons or inadequate travel documentation'.[52] The reference to 'reasonable grounds' for denying boarding was later inserted during the adoption of the regulation, presumably on the initiative of the Council,[53] while extending the scope of possible cases of non-application of the regulation and linking them to the criterion of reasonableness.

78. It is certainly true that the Court seems to include in the concept of 'denied boarding' within the meaning of Article 2(j) of Regulation No 261/2004 – and thus to bring within the scope of that regulation – in general any conduct not attributable to the passenger.[54] However, I believe that the clarification given by the Court in this respect should be understood in the sense that, as a general rule, that concept covers denied boarding that is attributable not to the passenger but to the carrier, and does not cover denied boarding which, while not attributable to the passenger, must in any event be considered reasonably justified for the purposes of the provision referred to above.

79. In my opinion, the fact remains that the refusal to allow a passenger to board on grounds relating to the adequacy of his travel documents may be considered reasonably justified only in exceptional circumstances, irrespective of whether it is based on an error made by airline staff. As noted by the Commission in its written observations, airlines have various tools at their disposal to verify the requirements for travel documents and entry visas in the countries of destination and to prevent passengers from being wrongly denied boarding on such grounds, including contacting the public authorities of the countries concerned and consulting the IATA Timatic database.

80. Those exceptional circumstances are not, in my opinion, present in the main proceedings, where, on the one hand, D. Z. presented himself for boarding with the documents required for entry into Romania, in accordance with Decision No 565/2014, and with the visa application sent to the Romanian Ministry of Foreign Affairs via that Ministry's website, together with the Ministry's reply stating that, in his case, a visa was not necessary, and, on the other, Blue Air's refusal to allow the passenger to board was based on an alleged decision by the Romanian authorities to refuse him entry. In this respect, I would point out that while the referring court does indeed seem to assume that D. Z. was the subject of such a decision, from reading both the order for reference and the written observations submitted by Blue Air, it is apparent that the only evidence on which that assumption is based is the email from Blue Air's employee at Bucharest Airport, the content of which is reproduced in point 16 of this Opinion. In its observations, Blue Air refers to the testimony, previously submitted

52 See Amendment 9 proposed at first reading. In justifying this amendment, Parliament stated that 'the regulation should contain a definition of "denied boarding" which takes account, for instance, of the fact that the absence or non-validity of an identity document or other safety concerns are valid reasons for refusing to transport passengers and should not be considered cases of denied boarding.' See the position of Parliament set out at first reading on 24 October 2002 (OJ 2003 C 300 E, p. 557). I note that, in the Commission's amended proposal for a Regulation (OJ 2003, 71 E, p. 188), the Commission accepted Parliament's amendment, inserting, in Article 2(h)b of the proposal for a Regulation, a definition of the concept of 'denied boarding' ('refusal to accommodate passengers on a flight') without, however, adopting the exception introduced by Parliament.

53 A text broadly similar to the current one appeared in Article 2(j) of Common Position (EC) No 27/2003 of 18 March 2003 (OJ 2003 C 125, p. 63).

54 See judgments of 4 October 2012, *Finnair* (C-22/11, EU:C:2012:604, paragraph 24), and of 4 October 2012, *Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor* (C-321/11, EU:C:2012:609, paragraph 32 et seq.).

to the referring court, of the person who checked D. Z.'s travel documents. This testimony merely indicates that those documents were forwarded to Blue Air's ground staff at Bucharest Airport and that the employee on duty replied to Blue Air's agents at Larnaca Airport that without a visa, D. Z. would be denied entry into Romania. There is nothing in this testimony to indicate which Romanian authorities provided such information, or which authorities were contacted by the employee in question, or indeed whether D. Z.'s travel documents were forwarded to those authorities.

81. In the light of all the foregoing considerations, I propose that the Court reply to the fourth question that Article 2(j) of Regulation No 261/2004 is to be interpreted as meaning that the concept of 'denied boarding' within the meaning of that provision applies to cases where the passenger was not allowed to board the flight because of an error committed at the airport of departure by the airline's ground staff or by one of its representative or agents when checking whether the passenger's travel documents were in order, unless, in the light of the circumstances of the case, it is apparent that, despite due care, the error was unavoidable.

The fifth question

82. By its fifth question, the referring court essentially asks whether a clause limiting or excluding the liability of the air carrier in the event of denied boarding on grounds relating to the adequacy of the passenger's travel documents, contained in the general conditions of carriage applied by that carrier and published on its website, is compatible with Article 15 of Regulation No 261/2004.

83. Article 15 of Regulation No 261/2004 clearly states that the minimum rights of passengers laid down in that regulation may not be waived and that the obligations imposed on air carriers may not be derogated from, notably by a restrictive clause or derogation from liability in the contract of carriage.

84. Therefore, clauses such as those contained in the general conditions of carriage applied by Blue Air, in so far as they have the effect of depriving passengers of the right to financial compensation provided for in Article 4(3) of Regulation No 261/2004, in cases of denied boarding falling within the scope of that regulation, as defined in Article 2(j) thereof, are incompatible with that regulation.

85. As I stated in the reply to the fourth question referred for a preliminary ruling, cases where the denied boarding of the passenger was due to an error made by the airline's staff in assessing the adequacy of the travel documents presented by the passenger, and cases where the denied boarding was based on recommendations or decisions adopted by the authorities of the Member State of destination of the flight, in reliance on an incorrect assessment of whether those documents were sufficient to allow the passenger to enter the territory of that Member State, both fall within the scope of Regulation No 261/2004, pursuant to Article 2(j) of that regulation.

86. For the reasons set out above, I consider that the answer to the fifth question referred is that Article 15 of Regulation No 261/2004 precludes a clause limiting or excluding the liability of the air carrier in the event of denied boarding on grounds relating to the adequacy of the passenger's travel documents, contained in the general conditions of carriage applied by that carrier and published on its website, in so far as the application of that clause would have the effect of depriving passengers of the right to financial compensation provided for in Article 4(3) of that regulation in cases of denied boarding falling within the scope of that regulation, as defined in Article 2(j) thereof, which include denied boarding due to an error made by airline staff in assessing whether the passenger's travel documents were in order.

Conclusion

87. In the light of all the foregoing considerations, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the Eparchiako Dikastirio Larnakas (District Court, Larnaca, Cyprus):

Decision No 565/2014/EU of the European Parliament and of the Council of 15 May 2014 introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by Bulgaria, Croatia, Cyprus and Romania of certain documents as equivalent to their national visas for transit through or intended stays on their territories not exceeding 90 days in any 180-day period and repealing Decisions No 895/2006/EC and No 582/2008/EC is to be interpreted as meaning that a Member State to which that decision is addressed and which has decided to recognise as equivalent to its national visas the documents listed in Article 3(1) of that decision, without exceptions, and which has duly notified the Commission in accordance with Article 5 of the decision, cannot, from the date of publication of that notification in the *Official Journal of the European Union*, refuse entry at the border to a national of a third country listed in Annex I to Regulation No 539/2001, in possession of one of the documents referred to in Article 3(1), duly issued and valid, solely on the ground that that person does not have a national visa. Decision No 565/2014 may be relied on in judicial proceedings by a third-country national who has been refused entry into or transit through the territory of that Member State in the abovementioned circumstances in order to challenge the refusal on the ground that it is unlawful.

An air carrier which, directly or through its representatives at the airport of the Member State of departure, denies boarding to a passenger on the ground that the authorities of the Member State of destination have refused entry as the passenger concerned does not have a national visa cannot be regarded as an emanation of that Member State, against which the passenger in question may invoke the obligations incumbent on the Member States that apply Decision No 565/2014.

The fact that an airline's refusal to allow a passenger to board a flight between two Member States which are not part of the Schengen area may be based on information, recommendations or decisions by the competent authorities of the Member State of destination of the flight as to the conformity of the documents held by the passenger with those required for the purpose of crossing the border of that Member State does not, in itself, exonerate the airline from the consequences which, under the contract and the law applicable to the contract, stem from the failure to provide the transport service.

Article 2(j) 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 is to be interpreted as meaning that the concept of 'denied boarding' within the meaning of that provision applies to cases where the passenger was not allowed to board the flight because of an error committed at the airport of departure by the airline's ground staff or by one of its representatives or agents when checking whether the passenger's travel documents were in order, unless, in the light of the circumstances of the case, it is apparent that, despite all due care, the error was unavoidable.

Article 15 of Regulation No 261/2004 precludes a clause limiting or excluding the liability of the air carrier in the event of denied boarding on grounds relating to the adequacy of the passenger's travel documents, contained in the general conditions of carriage applied by that carrier and published on its website, in so far as the application of that clause would have the effect of depriving passengers of the right to financial compensation provided for in Article 4(3) of that regulation in cases of denied boarding falling within the scope of that regulation, as defined in Article 2(j) thereof, which include denied boarding due to an error made by airline staff in assessing whether the passenger's travel documents were in order.