OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 28 June 2011 [1]

1. In the present case, the Juzgado de lo Mercantil No 1 de Pontevedra (Commercial Court No 1, Pontevedra) asks whether 'cancellation' within the meaning of Regulation No 261/2004 [2] includes a case in which a flight has taken off but is forced to return to the airport of departure for technical reasons. It also seeks guidance on the meaning of the term 'further compensation' in Article 12 of the Regulation.

Legal background

The Montreal Convention

2. The Convention for the Unification of Certain Rules for International Carriage by Air ('the Montreal Convention') was signed by the European Community on 9 December 1999 and approved by it on 5 April 2001. [3]

3. The third recital in the preamble to the Montreal Convention recognises the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.

4. Article 19 of the Montreal Convention 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

1 — Original language: English.

2 — 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, 'the Regulation').

3 — Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) (OJ 2001 L 194, p. 38). The Montreal Convention entered into force on 28 June 2004 as regards the EU, France and Spain; it is now in force in all the Member States.

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.'

5. Under Article 3(1) of Regulation No 2027/97, [4] the liability of an EU air carrier in respect of passengers and their baggage is governed by all provisions of the Montreal Convention relevant to such liability.

Regulation No 261/2004

6. The preamble to the Regulation includes 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 …

(13) Passengers whose flights are cancelled should be able either to obtain reimbursement of their tickets or to obtain re-routing under satisfactory conditions, and should be adequately cared for while awaiting a later flight.

(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

4 — Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air (OJ 1997 L 285, p. 1), as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents (OJ 2002 L 140, p. 2).

been avoided even if all reasonable measures had been taken. …'

7. According to Article 1(1), the Regulation establishes minimum rights for passengers when (a) they are denied boarding against their will, (b) their flight is cancelled or (c) their flight is delayed. Under Article 3(1)(a), the Regulation applies, inter alia, to passengers departing from an airport in the territory of a Member State.

8. Article 2(l) defines 'cancellation' as 'the non-operation of a flight which was previously planned.' [5]

9. Article 5 is entitled 'Cancellation'. Article 5(1)(a) and (b) provides for passengers whose flight is cancelled to be offered assistance by the operating air carrier in accordance with Articles 8, 9(1)(a) and 9(2). In addition, in the 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 passengers concerned are entitled to the assistance specified in Article 9(1)(b) and 9(1)(c).

10. Under Article 5(1)(c), passengers whose flight is cancelled also 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.'

5 — The definition also includes the condition 'and on which at least one place was reserved'. However, this case is not concerned with flights cancelled before any places are reserved.

11. Article 5(3) reads:

'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.'

12. Article 7 is entitled 'Right to compensation'. Paragraphs 1 and 2 provide:

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

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

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

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

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

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

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

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

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

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

13. Article 8 is entitled 'Right to reimbursement or re-routing'. Where reference is made to that article, Article 8(1) provides that passengers are to be offered the choice between (a) reimbursement of the full cost of the ticket for a part, or the whole, of the journey, together with, when relevant, a return flight to the first point of departure, at the earliest opportunity, (b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity or (c) such re-routing at a later date.

14. Article 8(3) obliges air carriers, when offering to transport a passenger to an alternative airport in the destination town, city or region, to bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger.

15. Article 9 is entitled 'Right to care'. Where reference is made to that article, Article 9(1) provides that passengers are to be offered (free of charge, but subject to conditions varying according to the length of delay), (a) meals and refreshments, (b) hotel accommodation and (c) transport between the airport and the passengers' place of accommodation; in addition, under Article 9(2), passengers are to be offered free of charge two telephone calls, telex or fax messages or emails.

16. Article 12 is entitled 'Further compensation'. Article 12(1) states:

'This Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.'

Facts, procedure and questions referred

17. The applicants – María del Mar Pato Barreiro, Luis Ángel Rodríguez González and their daughter Yaiza Pato Rodríguez, aged four (the Pato Rodríguez family); Manuel López Alonso, Aurora Sousa Rodríguez and their son Yago López Sousa, aged six (the López Sousa family); and Rodrigo Manuel Puga Lueiro – were booked on an Air France flight from Paris (Charles de Gaulle) to Vigo (Peinador), scheduled to depart at 19.40 on 25 September 2008.

18. The flight took off as planned, but after a few minutes the pilot decided to return to Charles de Gaulle Airport because of a technical problem with the aircraft.

19. Only Mr Puga Lueiro was offered assistance or overnight hotel accommodation by Air France staff. The others slept in another terminal of Charles de Gaulle Airport as the terminal from which their flight was due to depart closed at midnight.

20. Air France rerouted the Pato Rodríguez family by booking them on a flight to Oporto, which departed from Paris (Orly) at 07.05 on 26 September. They reached their home

city of Vigo by taxi from Oporto, at a cost of EUR 170.

21. The López Sousa family was rebooked on the Paris-Vigo flight scheduled for 19.40 on 26 September. They received no assistance during the intervening time.

22. Mr Puga Lueiro took a Paris-Bilbao-Vigo flight on the morning of 26 September.

23. The applicants together brought an action against Air France before the referring court in which they alleged a breach of their contracts of carriage by air. They each claimed EUR 250 under Article 7 of the Regulation.

24. The Pato Rodríguez family have claimed an additional EUR 170 to cover the cost of the taxi from Oporto airport to Vigo. The López Sousa family claim expenses of EUR 20.50 for each meal taken in the airport and EUR 23.20 for an additional day in boarding kennels for their dog. Finally, each of the applicants seeks a further sum of EUR 650 by way of non-material damages, except for Mr Puga Lueiro, who claims EUR 300 under that head.

25. In its order for reference, the national court notes that the case before it raises issues of interpretation concerning the Regulation. It states that there are differences in interpretation between the parties concerning the scope of the term 'cancellation' which cannot be resolved by reference to the legislation. It has therefore referred the following questions to the Court:

'a. Is the term "cancellation", defined in Article 2(l) of [the Regulation], to be interpreted as meaning only the failure of the flight to depart as planned or is it also to be interpreted as meaning any circumstance as a result of which the flight on which places are reserved takes off but fails to reach its destination, including the case in which the flight is forced to return to the airport of departure for technical reasons?

b. Is the term "further compensation" used in Article 12 of [the Regulation] to be interpreted as meaning that, in the event of a cancellation, the national court may award compensation for damage, including non-material damage, for breach of a contract of carriage by air in accordance with rules established in national legislation and case-law on breach of contract or, on the contrary, must such compensation relate solely to appropriately substantiated expenses incurred by passengers and not adequately indemnified by the carrier in accordance with the requirements of Articles 8 and 9 of [the Regulation], even if such provisions have not been relied upon or, lastly, are the two aforementioned notions of

further compensation compatible one with another?'

26. Written observations have been submitted by the applicants before the referring court, the French, Italian and Polish Governments, the United Kingdom and the Commission. Air France submitted observations out of time but, on these being refused by the Court, did not further seek to put its point of view by requesting a hearing. No other party having requested a hearing, none was held.

Assessment

The first question

27. The referring court seeks clarification of the definition of the term 'cancellation' in Article 2(l) of the Regulation. It outlines two possibilities. First, 'cancellation' might mean 'only a failure of the flight to depart as planned'. Second, it might mean 'any circumstance as a result of which the flight … takes off but fails to reach its destination, including the case in which the flight is forced to return to the airport of departure for technical reasons'.

28. However, I note that the case in the main proceedings is indeed, specifically, one in which the flight was forced to return to the airport of departure for technical reasons – after, apparently, only a few minutes. I agree, therefore, with the applicants in those proceedings that the question to which the referring court needs an answer is whether that particular set of circumstances constitutes a cancellation within the meaning of the Regulation. For present purposes it is unnecessary, and would in my view be unwise, for the Court to consider other possible circumstances in which a flight may leave its airport of departure as planned but terminate at some place other than its scheduled destination. Any attempt to provide an all-embracing answer would be likely to omit consideration of one or more possible sets of circumstances.

29. Moreover, from the facts set out in the order for reference, there is no indication that the flight in question was resumed at any stage after its return to the airport of departure. All the applicants eventually reached their destination via other flights. [6] It is therefore not necessary to consider whether, if the

6 — It clearly cannot be considered that the flight which was scheduled for, and left at, 19.40 on 26 September 2008, on which the López Sousa family were rebooked, was the same flight as that which was scheduled for, and left at, 19.40 on 25 September.

flight had departed again after a delay, that delay might have been tantamount to a cancellation and, if so, how long a delay would have been required for that purpose.

30. I agree furthermore with the Commission that the reason for the return is irrelevant when determining whether a flight is cancelled or not. If there is a cancellation, then the reason may be relevant when determining whether it is 'caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken' within the meaning of Article 5(3) of the Regulation, in which case no compensation will be due. It is not relevant for determining the mere existence of a cancellation, whether in the circumstances of the present case or in any other circumstances. In the present case, no details have been given of the circumstances of the return to the airport of departure, and it has not been asked whether those circumstances may have been 'extraordinary' within the meaning of Article 5(3).

31. Consequently, I consider that the first question should be addressed in the revised form: Does the term 'cancellation', as defined in Article 2(l) of the Regulation, mean only the failure of the flight to depart as planned or does it also include the case in which the flight returns to the airport of departure and proceeds no further?

32. I have little difficulty in answering to the effect that a flight is cancelled within the meaning of the Regulation if, even after departing as planned, it does not arrive at its scheduled destination but returns to the airport of departure and proceeds no further.

33. There is no definition of a 'flight' in the Regulation, but the Court has interpreted the term as 'consisting essentially in an air transport operation, being as it were a "unit" of such transport, performed by an air carrier which fixes its itinerary'.[7] Its essence is, thus, the carriage by air of passengers and their baggage from airport A to airport B.[8]

34. 'Cancellation' of a flight, however, is defined. It means 'the non-operation of a flight which was previously planned'. That definition is objective. It refers to the actual non-operation of a flight, not to the taking of a decision not to operate the flight – still less to the moment at which such a decision may be taken.

7 — Case C-173/07 *Emirates Airlines* [2008] ECR I-5237, paragraph 40.

8 — There are, of course, cases in which (generally small) commercial aircraft may take passengers for short excursions, perhaps for aerial sightseeing or to provide a first experience of flying, and will plan to return, for obvious reasons, to the airport of departure. Not only are such flights irrelevant for present purposes but it is doubtful whether they would fall within the scope of the Regulation.

35. It seems to me that, when a flight is planned to carry passengers and their baggage from A to B, and when it departs from A as planned but then returns to A and proceeds no further, simply disgorging its passengers and their baggage at their point of departure, that flight cannot be said to have operated. No part of the 'unit of transport' which was due to be performed by the air carrier, according to the itinerary fixed by that carrier, has in fact been performed. Nothing of the essence of the operation has been achieved. The carrier has carried no one, and nothing, anywhere. The passengers are in the same situation as if they had remained in the departure lounge, with no hope of taking their planned flight. Another means of getting them to B will have to be found, since the flight which was previously planned will not be taking them there.

36. That, in my view, clearly constitutes the 'non-operation' of the flight in question.

37. However, the French Government and the United Kingdom have raised objections to any interpretation of the Regulation under which a flight could be said to be cancelled after its departure.

38. The United Kingdom refers, first, to the Court's statement in *Sturgeon* [9] that 'a flight which is delayed, irrespective of the duration of the delay, even if it is long, cannot be regarded as cancelled where there is a departure in accordance with the original planning'. It concludes that if a flight departs in accordance with the original planning put in place by the operator, it can never be regarded as cancelled.

39. I do not think that such a conclusion can be drawn. The statement quoted is concerned with flights which are delayed – which depart, and which subsequently arrive at their destination, later than the scheduled time. It is not concerned with flights which are aborted – which return to their airport of departure in such a way that the result is no different from that of a flight which never departs at all.

40. The French Government also refers to *Sturgeon*, in particular to the Court's statement [10] that 'it is possible, as a rule, to conclude that there is a cancellation where the delayed flight for which the booking was made is "rolled over" onto another flight, that is to say, where the planning for the original flight is abandoned'. The French Government infers, *a contrario*, that there can be no cancellation where the planning for the original flight is not abandoned.

9 — Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, paragraph 34.

10 — Paragraph 36 of the judgment.

41. Again, it seems to me, that inference is not justified. As I have indicated, *Sturgeon* was concerned with a contention that a flight was merely delayed, not cancelled, whereas in the present case there is no indication of any such contention. In addition, on the one hand, the fact that it is possible to conclude that there is a cancellation in certain circumstances does not mean that there may never be a cancellation in other circumstances. On the other hand, it appears that, at least for some of the applicants, the bookings were in fact 'rolled over' to another flight. Moreover, all the planning for the original flight, with the sole exception of the departure, was in fact abandoned. The itinerary and the arrival at destination (which surely constitute the essence of any air transport operation or unit thereof) were cancelled and replaced by a return to the airport of departure, with the result that no meaningful part of the original planning was carried out.

42. The United Kingdom further argues that, of the three circumstances in relation to which the Regulation prescribes minimum conditions, denial of boarding and delays in departure are, by their nature, concerned with the situation prior to take-off. Therefore, it submits, cancellation too must be concerned with the situation prior to take-off.

43. That, it seems to me, is a logical non sequitur. One might just as well argue that denial of boarding and cancellation involve the passenger not being able to take the flight on which he was booked, so that delays too must involve such a situation – which would be nonsensical, since in the event of delay the passenger does take the flight on which he was booked.

44. The United Kingdom then seeks to demonstrate that a mere variation to the previous planning of the flight – such as a modification of the flight plan or a diversion from the final destination – does not amount to a cancellation of that flight, either in the normal sense of the word or as defined in Article 2(l) of the Regulation. It also objects that, if the term 'cancellation' were to be applied to cases where a flight had simply not followed its planned itinerary but had covered only part of the distance, it would be difficult or impossible to apply the 'distance banding' for compensation under Article 7(1) of the Regulation.

45. However, I have already expressed my view that this request for a preliminary ruling does not concern circumstances other than those of a simple and definitive return to the airport of departure, without reaching any other destination, and that the Court should confine its ruling to such circumstances. Consequently, I consider that the United

Kingdom's submissions in that regard are not relevant to the issue to be decided.

46. A number of further arguments are advanced in similar terms by both the French Government and the United Kingdom.

47. First, they stress the Regulation's aim of encouraging air carriers to inform passengers of cancellations as long as possible in advance of the planned date [11] and discouraging them from cancelling flights for purely commercial reasons (presumably, in cases where the number of reservations renders the flight unprofitable). [12] Once a flight has departed, there is clearly no scope to inform passengers of any 'cancellation' before the scheduled time of departure, nor can the airline have any commercial reason for not continuing with the flight. It is therefore inconsistent with the intention and purpose of the Regulation to class as a cancellation anything which happens to the flight after its scheduled departure.

48. I can agree that the aim of discouraging cancellations and encouraging advance notice of them is among those pursued by the Regulation. It is true also that compensation in relation to cancellations is linked, in recital 12 in the preamble, to failure to inform passengers in advance, a failure which can have no relevance if a flight is cancelled after its departure. If that were the sole aim with regard to cancellations, the submission of the two governments could have some merit. But the Regulation has other aims – primarily, that of ensuring a high level of protection for passengers. [13] Indeed, it seems clear that discouraging cancellations and encouraging advance notice of them are simply among the means of achieving the primary aim of passenger protection. Compensation in respect of last-minute cancellation is another such means; it is no less appropriate for that purpose if cancellation takes place after the last minute.

49. The situation experienced by the applicants in the main proceedings in the present case was clearly not a denial of boarding. Nor – in contrast to the situation in *Sturgeon*

11 — See recital 12 in the preamble to the Regulation, together with the provisions of Article 5(1)(c), which provide for the operating air carrier to inform passengers of cancellations, and thereby to avert any duty to pay compensation if certain other conditions are met.

12 — See point 1 of the explanatory memorandum to the Commission's original proposal for the Regulation, COM(2001) 784 final, which states: 'Denied boarding and cancellation of flights, for commercial reasons, provoke strong resentment, not only because they cause serious delay and upset travel plans but also because they represent a failure by the transporter to respect its undertaking to carry passengers with reasonable dispatch.'

13 — See, in particular, recitals 1 and 2 in the preamble to the Regulation, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 69.

– does the air carrier appear to have alleged that it was a delay. If it was not a cancellation either, there would be a notable gap in the protection of passengers. A carrier could argue that it had no liability whatever under the Regulation, not even to offer assistance or care (indeed, it seems that very little care or assistance was offered to the applicants in this case). Such a glaring lacuna would run completely counter to the aim of ensuring a high level of protection for passengers. It would mean that passengers finding themselves in such circumstances would be entitled to less favourable treatment not only than those whose flight was cancelled before departure but also than those whose flight was subject to a few hours' delay – even though their situation involved in fact significantly more inconvenience.

50. Since, as the Commission points out, nothing in the Regulation indicates that a 'cancellation' can occur only before the flight departs, it seems to me that no such a limitation can be read into the wording if it would so spectacularly defeat the primary aim of the Regulation.

51. I would point out, however, that cancellation of a flight after it has departed is more likely to be caused by extraordinary circumstances within the meaning of Article 5(3) of the Regulation than is cancellation at a time which enables the air carrier to give passengers advance notice. The carrier will thus have to pay compensation in respect of a cancellation after departure only if the cause is one which could have been avoided by taking all reasonable measures. If, however, the cause could have been thus avoided, there will be liability under Article 19 of the Montreal Convention and, pursuant to Article 12(1) of the Regulation, the compensation payable under Articles 5(1)(c) and 7 of the Regulation may be deducted from amounts payable under that liability.

52. Next, the French Government and the United Kingdom warn of the risk that, if a return of the aircraft to its airport of departure were to be regarded as a cancellation of the flight, pilots might be under pressure to continue with the flight, rather than effect the return, in order to avoid the need for the air carrier to pay compensation under the Regulation. Such pressure might place the safety of the aircraft at risk.

53. That suggestion does not seem plausible. Even on the unlikely assumption that an airline may be callously indifferent to the safety of its passengers, it seems to me that no air carrier is likely to prefer the risk of an

accident, with potentially enormous sums at risk in terms both of its own material loss and of compensation due to victims, over the need to pay certain but limited compensation under the Regulation. It is all the more unlikely if an urgent return for safety reasons is caused by extraordinary circumstances within the meaning of Article 5(3) of the Regulation (as will presumably be the case unless the carrier has failed to take all reasonable measures), thus exonerating the carrier from liability to pay compensation under Article 7. And, quite apart from pilots' actual obligation to comply with internationally agreed safety procedures and requirements, it seems to me that they are likely to give weightier consideration to their own safety, and that of their crew and passengers, than to the commercial well-being of the air carrier employing them.

54. Finally, the two governments draw attention to the fact that, even in the absence of any right to compensation under Article 7 of the Regulation, passengers may still make claims in line with the terms of Article 19 of the Montreal Convention in circumstances such as those of the present case.

55. That is indeed so. I do not, however, see that it is of any relevance to the question whether a right to compensation under the Regulation exists or not.

56. I am consequently of the view that the term 'cancellation', as defined in Article 2(l) of the Regulation, covers cases in which a flight departs but then returns to the airport of departure and proceeds no further.

The second question

57. The national court's second question is based on the premiss that a cancellation has been established. It asks about the implications of the use of the term 'further compensation' in Article 12(1) of the Regulation which, it will be recalled, reads: 'This Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.'

58. Against that background, the referring court asks, first, whether a national court may award compensation for damage (including

non-material damage) arising as a result of a breach of a contract of carriage by air, in accordance with rules on breach of contract established in national legislation and case-law. Or is 'further compensation' confined to substantiated expenses incurred by passengers and not adequately indemnified by the carrier in accordance with Articles 8 and 9 of the Regulation, even if such provisions have not been relied upon? The referring court also asks whether the two aforementioned concepts of the term 'further compensation' are compatible.

59. The first part of that question can be answered simply. Article 12(1) sets no limitation on the type of damage for which a passenger may make a claim. That issue falls to be determined by national law, which must in turn take account of the Montreal Convention. In that respect, it may be noted that the Court held in *Walz* [14] that the 'damage' referred to in the Montreal Convention could be both material and non-material.

14 — Case C-63/09 [2010] ECR I-4239, paragraph 29.

60. Such an answer would appear also to deal with the second part of the question. The fact that compensation is due under Articles 5(1)(c) and 7 of the Regulation does not preclude a passenger from seeking further compensation for expenditure incurred because the air carrier failed to comply with its duties under Article 8 or 9. Even though such compensation is not explicitly provided for, it is clear that the obligation to provide care and assistance would be nugatory if it could not be enforced.

61. However, the national court asks also whether compensation for expenditure incurred because the air carrier failed to comply with its duties under Article 8 or 9 can be claimed 'even if such provisions have not been relied upon'. It is not clear what exactly is meant by this. The applicants, in their observations to this Court, have cited passages from their application before the national court which show that they specifically relied on a failure to provide the assistance required by the Regulation and referred explicitly to Article 9 thereof. But, whatever difficulty there may be with national procedural requirements, there is certainly nothing in the Regulation itself which would preclude awarding compensation in respect of a failure to provide care and assistance pursuant to Articles 8 and 9 simply because those

provisions were not explicitly cited by the claimant. Indeed, a national rule which led to such a result would appear to be impermissible to the extent that it denied applicants rights given to them by the Regulation.

62. It is just conceivable, on the other hand, that the national court is asking whether, in order for such a claim to be admissible, the claimant must have asked the air carrier, at the relevant time, for care and assistance on the basis of Articles 8 and 9 of the Regulation. If so, the answer must be no. Although Article 14 of the Regulation requires air carriers to inform passengers of their rights under the Regulation, the obligation to provide care and assistance is in no way contingent on a request by the passenger. The wording of Articles 8 and 9 is explicit: 'passengers shall be offered …'.

63. There is another difficulty in interpreting the term 'further compensation' in Article 12(1) of the Regulation as including compensation for expenditure incurred because the air carrier failed to comply with its duties under Article 8 or 9. The second sentence of Article 12(1) allows compensation 'granted under this Regulation' to be deducted from any 'further compensation'. If compensation granted under the Regulation is construed strictly as only that due under Article 7, that might imply that it could be offset against that due for failure to provide care and assistance, which is not, as such, 'granted under the Regulation'.

64. Such an interpretation would be nonsensical. The duty to pay compensation under Article 7 and the duty to provide care and assistance are concurrent and cumulative. An air carrier cannot escape one by offsetting it against the other. However, even if that interpretation were to be followed, Article 12(1) provides only that compensation granted under the Regulation *may* be deducted from further compensation. There is no obligation to deduct, and it will always be for the competent court to determine whether a deduction is equitable in the circumstances of the case. In the present circumstances, clearly, it would not be equitable.

Conclusion

65. In the light of all the above considerations, I suggest that in answer to the questions referred by the Juzgado de lo Mercantil No 1 de Pontevedra, the Court should rule as follows:

(1) The term 'cancellation', as defined in Article 2(l) 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, covers cases in which a flight departs but then returns to the airport of departure and proceeds no further.

(2) The term 'further compensation' in Article 12(1) of Regulation No 261/2004 includes compensation awarded, in accordance with national legislation and case-law, for damage (including non-material damage) in respect of a cancellation arising as a result of a breach of a contract of carriage by air.

(3) Where an air carrier has failed to fulfil obligations imposed on it by Articles 8 and 9 of Regulation No 261/2004, the passengers affected may claim reimbursement of any expenditure incurred by them as a result of that failure, irrespective of whether they requested fulfilment of the obligations at the relevant time. Compensation granted under Article 7 of the same Regulation may not be deducted from such reimbursement.