Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

21 December 2021 *

(Reference for a preliminary ruling – Air transport – Regulation (EC) No 261/2004 – Common rules on compensation and assistance to passengers in the event of cancellation or long delay of flights – Article 2(l) – Article 5(1) – Change in the departure time of a flight – Departure postponed by approximately three hours – Passengers notified nine days before departure – Concepts of 'cancellation' and 'delay')

In Case C-395/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany), made by decision of 3 August 2020, received at the Court on 19 August 2020, in the proceedings

EP,

GM

v

Corendon Airlines Turistik Hava Taşımacılık A.Ş.,

THE COURT (First Chamber),

composed of L. Bay Larsen, Vice-President of the Court, acting as President of the First Chamber, J.-C. Bonichot and M. Safjan (Rapporteur), Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– EP and GM, by F. Puschkarski, Rechtsanwältin,

– the German Government, by J. Möller, M. Hellmann and U. Kühne, acting as Agents,

– the European Commission, by R. Pethke and K. Simonsson, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 23 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(l), Article 5(1) and Article 8(1) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

2 The request has been made in proceedings between, on the one hand, EP and GM, two air passengers ('the passengers in question'), and, on the other hand, the airline Corendon Airlines Turistik Hava Taşımacılık A.Ş. ('Corendon Airlines') concerning the latter's refusal to compensate the passengers in question when the scheduled departure time of their flight was postponed.

Legal context

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

'For the purposes of this Regulation:

…

(l) "cancellation" means the non-operation of a flight which was previously planned and on which at least one place was reserved.'

4 Article 5 of that regulation, entitled 'Cancellation', provides in paragraph 1:

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

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

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in [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 assistance specified in Article 9(1)(b) and 9(1)(c); and

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:
   (i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or
   (ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

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

5 Article 6 of that regulation, entitled 'Delay', states:

'1. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:

(a) for two hours or more in the case of flights of 1 500 kilometres or less; or

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

(c) for four hours or more in the case of all flights not falling under (a) or (b),

passengers shall be offered by the operating air carrier:

(i) the assistance specified in Article 9(1)(a) and 9(2); and

(ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).

2. In any event, the assistance shall be offered within the time limits set out above with respect to each distance bracket.'

6 Under Article 7 of that regulation, entitled 'Right to compensation':

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

…

(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;

…'

7 Article 8 of Regulation No 261/2004, entitled 'Right to reimbursement or re-routing', provides:

'1. Where reference is made to this Article, passengers shall be offered the choice between:

(a) – reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, 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) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.

…'

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

8 The passengers in question booked a package holiday using the internet platform 'Check24'. Their booking was confirmed by Corendon Airlines, the operating air carrier, for a flight to be carried out on 18 May 2019 from Düsseldorf (Germany) to Antalya (Turkey), with a scheduled time of departure at 13:20 and a scheduled time of arrival on the same day at 17:50.

9 Corendon Airlines subsequently postponed that flight, while retaining its number, and set the new time of departure at 16:10 and the new time of arrival at 20:40 on 18 May 2019, of which it informed the passengers in question nine days before the start of the flight. Since the flight, as changed, was delayed, it departed at 17:02 and landed at 21:30 on 18 May 2019.

10 The passengers in question sought compensation from Corendon Airlines in the amount of EUR 400 each, pursuant to Articles 5(1)(c) and 7(1)(b) of Regulation No 261/2004.

11 After Corendon Airlines had refused to compensate the passengers in question, the latter brought an action before the Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany), which dismissed that action on the grounds, first, that, although the departure time of the flight had been changed, the original planning of that flight had not been abandoned. Second, those passengers had, in any event, been informed of the change in departure time within the period laid down in Article 5(1)(c)(ii) of Regulation No 261/2004, which is between two weeks and seven days before the scheduled time of departure, with the result that it was not necessary to examine whether the change in the flight time constituted a cancellation or a long delay of that flight. Furthermore, that court noted that it was not necessary to examine whether Corendon Airlines had fulfilled its obligation to provide information on the rights which the passengers in question had under Article 8 of that regulation, since a possible breach of such an obligation to provide information does not confer a right to compensation under Article 7(1) of that regulation.

12 The passengers in question brought an appeal against the judgment of that court before the Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany), which observes that that judgment cannot be upheld if the postponement of the departure time of a flight by almost three hours amounts to a cancellation, within the meaning of Article 2(l) of Regulation No 261/2004, and if the communication relating to that postponement does not constitute an offer of re-routing under the conditions laid down in that regulation.

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

'(1) Is a flight cancelled within the meaning of Articles 2(l) and 5(1) of [Regulation No 261/2004] where the operating air carrier postpones a flight booked as part of a package holiday and scheduled to depart at 13:20 (LT) until 16:10 (LT) on the same day?

(2) Does the notification nine days prior to the start of the trip of the postponement of a flight from 13:20 (LT) to 16:10 (LT) on the same day constitute an offer of re-routing within the meaning of Article 5(1)(c)(ii) of [Regulation No 261/2004], and, if so, must that offer meet the requirements of Articles 5(1)(a) and 8(1) of [that regulation]?'

Consideration of the questions referred

The first question

14 By its first question, the referring court asks, in essence, whether Articles 2(l) and 5(1) of Regulation No 261/2004 must be interpreted as meaning that a flight is regarded as 'cancelled', within the meaning of those provisions, where the operating air carrier postpones the time of departure of that carrier by less than three hours, without making any other change to that flight.

15 It should be noted, as a preliminary point, that the referring court raises that question only in relation to a postponement of the departure time of the flight concerned by 2 hours and 50 minutes, without referring in its questions for a preliminary ruling to the subsequent delay incurred by that flight.

16 In that regard, it should be noted that the concept of 'cancellation' is defined in Article 2(l) of that regulation as 'the non-operation of the flight concerned which was previously planned and on which at least one place was reserved'.

17 The concept of 'flight' is not defined by that regulation. However, according to settled case-law, a flight consists, in essence, of 'an air transport operation, being as it were a "unit" of such transport, performed by an air carrier which fixes its itinerary' (judgment of 4 July 2018, *Wirth and Others*, C-532/17, EU:C:2018:527, paragraph 19 and the case-law cited). In addition, the Court has stated that the itinerary is an essential element of the flight, as the flight is operated in accordance with the carrier's pre-arranged planning (judgment of 19 November 2009, *Sturgeon and Other*s, C-402/07 and C-432/07, EU:C:2009:716, paragraph 30).

18 The Court has also held that, according to Article 2(l) of Regulation No 261/2004, flight cancellation, unlike delay, is the result of non-operation of a flight which was previously planned. It follows that, in that regard, cancelled flights and delayed flights are two quite distinct categories of flights. It cannot therefore be inferred from that regulation that a flight which is delayed may be classified as a 'cancelled flight' merely on the ground that the delay is extended, even substantially (judgment of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 33).

19 In those circumstances, where passengers are carried on a flight the departure time of which is later than the departure time originally scheduled, the flight can be classified as 'cancelled' only if the air carrier arranges for the passengers to be carried on another flight the original planning of which is different from that of the flight for which the booking was made (judgment of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 35).

20 The fact that the postponement of the departure time of the flight was announced to the passengers in question several days in advance does not, in itself, affect the distinction between the concepts of 'delay' and 'cancellation'.

21 As is apparent from the case-law cited in paragraph 18 of the present judgment, Regulation No 261/2004 provides for two quite distinct categories of flights, namely, first, cancelled flights, within the meaning of Article 5 of that regulation, and, second, flights delayed in departure, within the meaning of Article 6 of that regulation. Regulation No 261/2004 does not make classification in either of those categories dependent solely on the prior announcement that the departure time of the flight will be postponed.

22 Therefore, as the Advocate General observed in point 25 of his Opinion, it would be contrary to the customary interpretation of the terms of Regulation No 261/2004 and to its scheme to take the view that a flight which has been postponed by less than three hours, announced several days in advance, that flight being otherwise unchanged, constitutes a 'cancellation' within the meaning of Article 2(l) of that regulation.

23 In the light of the foregoing, the answer to the first question is that Articles 2(l) and 5(1) of Regulation No 261/2004 must be interpreted as meaning that a flight is not regarded as 'cancelled', within the meaning of those provisions, in the case where the operating air carrier postpones the time of departure of that flight by less than three hours, without making any other change to that flight.

The second question

24 By its second question, the referring court asks whether the notification of the postponement of the departure of the flight at issue constitutes an offer of re-routing, within the meaning of Article 5(1)(c)(ii) of Regulation No 261/2004, which relates to the concept of 'cancellation' of a flight within the meaning of Article 2(l) of that regulation.

25 Having regard to the answer given to the first question, there is no need to answer the second question.

Costs

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

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

Articles 2(l) and 5(1) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to

passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, must be interpreted as meaning that a flight is not regarded as 'cancelled', within the meaning of those provisions, in the case where the operating air carrier postpones the time of departure of that flight by less than three hours, without making any other change to that flight.

[Signatures]