JUDGMENT OF THE COURT (Fourth Chamber)

10 July 2008 *

In Case C-173/07,

REFERENCE for a preliminary ruling under Article 234 EC by the Oberlandesgericht Frankfurt am Main (Germany), made by decision of 7 March 2007, received at the Court on 2 April 2007, in the proceedings

Emirates Airlines — Direktion für Deutschland

v

Diether Schenkel,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis, R. Silva de Lapuerta, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,

* Language of the case: German.

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

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Emirates Airlines — Direktion für Deutschland, by C. Leffers, Rechtsanwältin,

— Dr Schenkel, by M. Scheffels, Rechtsanwalt,

— the Greek Government, by M. Apessos, O. Patsopoulou and V. Karra, acting as Agents,

— the French Government, by G. de Bergues and A. Hare, acting as Agents,

— the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,

— the Swedish Government, by A. Falk, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 6 March 2008,

gives the following

Judgment

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

2 The reference was made in the course of proceedings between the airline company Emirates Airlines — Direktion für Deutschland ('Emirates') and Dr Schenkel concerning Emirates' refusal to compensate him following the cancellation of a flight departing from Manila (Philippines).

Legal context

International law

3 The Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), concluded by the European Community, was approved by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38).

4 The Montreal Convention aims in particular to ensure protection of the interests of consumers in international carriage by air and equitable compensation based on the principle of restitution.

5 Article 1(2) and (3) of the convention, relating to its scope, provides:

'2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by

the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.'

Community law

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

'For the purposes of this Regulation:

…

(g) "reservation" means the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator;

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

…'

7 In accordance with Article 3 of the regulation, 'Scope':

'1. This Regulation shall apply:

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

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

…'

8 Under Article 4 of Regulation No 261/2004, 'Denied boarding':

'1. When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph.

…'

9 Article 5 of Regulation No 261/2004, 'Cancellation', provides:

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

…

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

…'

10 Article 7 of Regulation No 261/2004, 'Right to compensation', provides:

'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.

…'

11 Article 8 of Regulation No 261/2004, '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.

2. Paragraph 1(a) shall also apply to passengers whose flights form part of a package, except for the right to reimbursement where such right arises under [Council] Directive 90/314/EEC [of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59)].

…'

12 Under Article 17 of Regulation No 261/2004, 'Report':

'The Commission shall report to the European Parliament and the Council by 1 January 2007 on the operation and the results of this Regulation, in particular regarding:

— …

— the possible extension of the scope of this Regulation to passengers having a contract with a Community carrier or holding a flight reservation which forms part of a "package tour" to which Directive 90/314/EEC applies and who depart

from a third-country airport to an airport in a Member State, on flights not operated by Community air carriers,

— …'

The main proceedings and the order for reference

13 Dr Schenkel booked in Germany, with Emirates, an outward and return journey from Düsseldorf (Germany) to Manila via Dubai (United Arab Emirates).

14 For the return journey Dr Schenkel had a reservation on the flight of 12 March 2006 from Manila. The flight was cancelled because of technical problems. Dr Schenkel eventually departed from Manila on 14 March 2006 and arrived at Düsseldorf on the same day.

15 Dr Schenkel brought an action against Emirates in the Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main), claiming compensation of EUR 600 in reliance on Articles 5(1)(c) and 7(1)(c) of Regulation No 261/2004.

16 He argued that the compensation provided for in those provisions in the event of the cancellation of a flight applied to him in the present case. He submitted that the outward and return flights were non-independent parts of a single flight. Since the point of departure of that single flight was Düsseldorf, he was thus a passenger 'departing from an airport located in the territory of a Member State' of the European Community within the meaning of Article 3(1)(a) of that regulation.

17 Emirates submitted that the outward and return flights were to be regarded as two separate flights. Furthermore, Emirates did not have a licence granted by a Member State in accordance with Article 2(c) of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1).

18 It submitted that it was not therefore a 'Community carrier' referred to in Article 3(1)(b) of Regulation No 261/2004, and was not obliged to compensate Dr Schenkel for the cancelled flight.

19 The Amtsgericht Frankfurt am Main allowed Dr Schenkel's claim. Emirates appealed to the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main).

20 Although the Oberlandesgericht Frankfurt am Main is inclined to consider that a journey out and back constitutes a single flight for the purposes of Regulation No 261/2004, it is uncertain whether that interpretation of the concept of flight is correct.

21 In those circumstances the Oberlandesgericht Frankfurt am Main decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 3(1)(a) of [Regulation No 261/2004] to be interpreted as meaning that "a flight" includes the flight from the point of departure to the destination and back, at any rate where the outward and return flights are booked at the same time?'

The question referred for a preliminary ruling

22 The referring court asks essentially whether Article 3(1)(a) of Regulation No 261/2004 is to be interpreted as applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the Treaty applies travel back to that airport on a flight departing from an airport located in a non-member country. The referring court also asks whether the fact that the outward and return flights are the subject of a single booking affects the interpretation of that provision.

23 In its question the referring court uses the term 'flight' and refers to the concept of journey or travel which appears in Regulation No 261/2004, and asks whether a 'flight' includes a journey by air from the point of departure to the destination and back.

24 The concept of 'flight' is of decisive importance for answering the question put, despite the fact that, although it appears in the German language version of Article 3(1)(a) of Regulation No 261/2004, a clear majority of the other language versions of that provision do not refer to it or use a term derived from the word 'flight'.

25 As the Advocate General observes in point 8 of her Opinion, passengers departing from an airport located in the territory of a Member State or in a non-member country are necessarily passengers embarking on a flight departing from such an airport. That divergence between the various language versions therefore has no effect on the actual meaning to be given to the provisions concerned, which determine the scope of the regulation.

26 Consequently, the Court must begin by interpreting the term 'flight'.

27 It should be noted, in this respect, that that term is not among those defined in Regulation No 261/2004, in Article 2, headed 'Definitions'. Nor is it defined in the other articles of the regulation.

28 In those circumstances, the term 'flight' must be interpreted in the light of the provisions of Regulation No 261/2004 as a whole and the objectives of that regulation.

29 Before undertaking that analysis, however, it should be observed that Article 3(1)(a) of Regulation No 261/2004, the provision to which the national court refers, must be read together with Article 3(1)(b) of the regulation.

30 It follows from Article 3(1) as a whole that the regulation applies to situations in which passengers use a flight either departing from an airport located in the territory of a Member State (indent (a)) or departing from an airport located in a non-member country and flying to an airport located in the territory of a Member State if the air carrier operating the flight concerned is a Community carrier (indent (b)).

31 It follows that a situation in which passengers depart from an airport located in a non-member country cannot be regarded as a situation covered by Article 3(1)(a) of Regulation No 261/2004, and therefore falls within the scope of that regulation only subject to the condition in Article 3(1)(b), namely that the air carrier operating the flight is a Community carrier.

32 As regards, next, the interpretation of the relevant provisions of Regulation No 261/2004, it must be observed, first, that Article 8(2) of the regulation refers to a flight which forms part of a package, implying that a flight is not the same as a tour or journey, which may consist of several flights. Article 8(1) expressly refers to a 'return

flight', thus pointing to the existence of an outward flight in the course of the same journey.

33 That is borne out by Article 2(h) of Regulation No 261/2004, which defines 'final destination' as the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight.

34 Next, Article 8(1) of Regulation No 261/2004 distinguishes between the first point of departure and the final destination of passengers, thus referring to two different places. If a 'flight' within the meaning of Article 3(1)(a) of the regulation were to be regarded as an outward and return journey, that would amount to considering that the final destination of a journey was the same as its first point of departure. In those circumstances, that provision would make no sense.

35 Finally, to regard a 'flight' within the meaning of Article 3(1)(a) of Regulation No 261/2004 as an outward and return journey would in fact have the effect of reducing the protection to be given to passengers under the regulation, which would be contrary to its objective of ensuring a high level of protection for passengers (see, to that effect, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 69).

36 In addition, first, Articles 4(1), 5(1) and 8(1) of Regulation No 261/2004 provide for redress for various kinds of damage that may occur in connection with a flight, but do not contemplate that one of those occasions of damage may occur several times during a single flight. In those circumstances, passengers departing originally from an airport located in a Member State could claim the benefit of that protection only once if they were to suffer the same damage on the outward and the return legs.

37 Second, to interpret Article 3(1)(a) of Regulation No 261/2004 in such a way that a flight includes an outward and return journey would further amount to depriving passengers of their rights in a situation in which the flight departing from an airport located in the territory of a Member State is not operated by a Community carrier.

38 Passengers on such a flight who had originally departed from an airport located in a non-member country would not be able to enjoy the protection provided by Regulation No 261/2004. By contrast, passengers starting their journey on the same flight would be able to enjoy that protection, as they would be regarded as passengers departing from an airport located in the territory of a Member State. Passengers on the same flight whose protection in respect of harmful consequences must be the same would then be treated differently.

39 It is settled case-law, however, that the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see *IATA and ELFAA*, paragraph 95; Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57; and Case C-227/04 P *Lindorfer* v *Council* [2007] ECR I-6767, paragraph 63).

40 In the light of all the above considerations, the concept of 'flight' within the meaning of Regulation No 261/2004 must be interpreted 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.

41 By contrast, the concept of 'journey' attaches to the person of the passenger, who chooses his destination and makes his way there by means of flights operated by air carriers. A journey, which normally comprises 'outward' and 'return' legs, is determined above all by the personal and individual purpose of travelling. Since the term 'journey' does not appear in the wording of Article 3(1)(a) of Regulation No 261/2004, it has in principle no effect on the interpretation of that provision.

42 In those circumstances, it must be ascertained whether other relevant legal instruments may affect the interpretation of the term 'flight'. In this respect, it must be examined whether, as the referring court appears to have found, the Montreal Convention is decisive. That convention defines the obligations of air carriers towards passengers with whom they have concluded a contract for transport, and fixes in particular the terms on which passengers may obtain individualised compensation in the form of damages for losses arising from a delay.

43 It is true that the Montreal Convention forms an integral part of the Community legal order (see, to that effect, *IATA and ELFAA*, paragraphs 35 and 36). Moreover, it is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation (see, to that effect, Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52).

44 However, the Montreal Convention does not in any way determine the extent of the obligations mentioned above by any reference to the concept of 'flight', a term which does not appear in the text of the convention.

45 Moreover, as the referring court rightly points out, successive carriages are regarded under the Montreal Convention as 'one undivided carriage', inter alia if they have been agreed upon in the form of a single contract. In so far as that concept of undivided carriage refers to a succession of several stages chosen by the passenger, it resembles rather the concept of 'journey' as defined in paragraph 41 above.

46 The Montreal Convention is not therefore decisive for the interpretation of the concept of 'flight' within the meaning of Regulation No 261/2004.

47 It follows from paragraphs 32 to 41 above that a journey out and back cannot be regarded as a single flight. Consequently, Article 3(1)(a) of Regulation No 261/2004 cannot apply to the case of an outward and return journey such as that at issue in the main proceedings, in which passengers who have originally departed from an airport located in the territory of a Member State travel back to that airport on a flight departing from an airport located in a non-member country.

48 That interpretation is also supported by the second indent of Article 17 of Regulation No 261/2004, as seen in the light of recital 23 in the preamble to the regulation, in which the Community legislature envisages the possibility of extending the scope of the regulation in future to passengers on flights from a non-member country to a Member State not operated by Community carriers.

49 If Article 3(1)(a) of Regulation No 261/2004 referred also to the case of an outward and return journey in which passengers who originally departed from an airport located in the territory of a Member State embark on a flight departing from an airport located in a non-member country, the passengers referred to in the second indent of Article 17 of the regulation would already fall within its scope. That provision would therefore be pointless.

50 As to the question concerning the fact that the outward and return flights are the subject of a single booking, this has no effect on the conclusion stated in point 47 above.

51 There is nothing in the definition of 'reservation' in Article 2(g) of Regulation No 261/2004 which makes it possible to identify the scope of Article 3(1)(a) of that regulation. The fact that passengers make a single booking has no effect on the independent nature of the two flights.

52 Consequently, the method of reservation cannot be regarded as a relevant factor in determining the scope of Article 3(1)(a) of Regulation No 261/2004.

53 In the light of the above considerations, the answer to the question must be that Article 3(1)(a) of Regulation No 261/2004 must be interpreted as not applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the Treaty applies travel back to that airport on a flight from an airport located in a non-member country. The fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision.

Costs

54 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 (Fourth Chamber) hereby rules:

Article 3(1)(a) 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 not applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the EC Treaty applies travel back to that

airport on a flight from an airport located in a non-member country. The fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision.

[Signatures]