Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

26 February 2013 *

(Request for a preliminary ruling — Air transport — Regulation (EC) No 261/2004 — Articles 6 and 7 — Connecting flight(s) — Delay in arrival at the final destination — Delay equal to or in excess of three hours — A passenger's right to compensation)

In Case C-11/11,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Bundesgerichtshof (Germany), made by decision of 9 December 2010, received at the Court on 11 January 2011, in the proceedings

Air France SA

v

Heinz-Gerke Folkerts,

Luz-Tereza Folkerts,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, M. Ilešič, J. Malenovský (Rapporteur), M. Berger, E. Jarašiūnas, Presidents of Chambers, E. Juhász, A. Borg Barthet, U. Lõhmus, A. Prechal, C. G. Fernlund, J. L. da Cruz Vilaça, and C. Vajda, Judges,

Advocate General: Y. Bot,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 27 November 2012,

after considering the observations submitted on behalf of:

— Air France SA, by G. Toussaint, Rechtsanwalt,

— the German Government, by J. Kemper, acting as Agent,

— the French Government, by G. de Bergues and M. Perrot, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli, avvocato dello Stato,

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

* Language of the case: German.

— the United Kingdom Government, by S. Ossowski, acting as Agent, and by D. Beard, Barrister,

— the European Commission, by K. Simonsson and K.- P. Wojcik, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 6 and 7 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, the company Air France SA ('Air France') and, on the other, Mr and Mrs Folkerts, concerning compensation for damage that Mrs Folkerts claims to have suffered as a result of the her delayed arrival at her final destination, having held a reservation to fly from Bremen (Germany) to Asunción (Paraguay) via Paris (France) and São Paolo (Brazil).

Legal context

International law

3 The Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), concluded in Montreal on 28 May 1999, was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 1999 L 194, p. 38).

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

5 Article 19 of that convention, entitled 'Delay', provides:

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

6 Article 22(1) of the Montreal Convention limits the liability of the carrier in the case of damage caused by delay in the carriage of persons to 4 150 Special Drawing Rights (SDRs) for each passenger.

European Union ('EU') law

7 Recitals 1 to 4 and 15 in the preamble to Regulation No 261/2004 state:

'(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.

(3) While Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport [OJ 1991 L 36, p. 5] created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays.

(4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.

...

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

8 Paragraph 1 of Article 1 of Regulation No 261/2004 entitled 'Subject' provides:

'1. This Regulation establishes, under the conditions specified herein, minimum rights for passengers when:

(a) they are denied boarding against their will;

(b) their flight is cancelled;

(c) their flight is delayed.'

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

'For the purposes of this Regulation:

…

(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;

…'

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

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

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

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

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

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

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart No more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

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

...

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

...'

11 Article 6 of Regulation No 261/2004, entitled 'Delay', is worded as follows:

'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.'

12 Article 7 of Regulation No 261/2004, entitled '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.

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 of Regulation No 261/2004, entitled 'Right to reimbursement or re-routing', is worded as follows:

'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.

…'

14 Article 9 of Regulation No 261/2004, entitled 'Right to care', is worded as follows:

'1. Where reference is made to this Article, passengers shall be offered free of charge:

(a) meals and refreshments in a reasonable relation to the waiting time;

(b) hotel accommodation in cases

— where a stay of one or more nights becomes necessary, or

— where a stay additional to that intended by the passenger becomes necessary;

(c) transport between the airport and place of accommodation (hotel or other).

2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.

3. In applying this Article, the operating air carrier shall pay particular attention to the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied children.'

15 Article 13 of Regulation No 261/2004, entitled 'Right of redress', provides:

'In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.'

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

16 Mrs Folkerts held a reservation to fly from Bremen to Asunción, via Paris and São Paulo.

17 In accordance with the original planning, Mrs Folkerts' flight was scheduled to depart from Bremen on 16 May 2006 at 6.30 am and arrive in Asunción, her final destination, the same day at 11.30 pm.

18 The departure of the flight from Bremen to Paris, operated by the company Air France, was delayed and the aircraft took off only shortly before 9.00 am, that is a delay of approximately two and a half hours beyond the scheduled departure time. Mrs Folkerts, who already had her boarding cards for the entire journey on departure from Bremen, did not reach Paris until after Air France's aircraft scheduled for the connecting flight to São Paulo had already departed. Mrs Folkerts was re-booked by Air France on to a later flight to São Paulo. Because of her late arrival in São Paulo, Mrs Folkerts missed the connecting flight to Asunción originally scheduled. She therefore did not arrive in Asunción until 17 May 2006 at 10.30 am, that is 11 hours after the arrival time originally scheduled.

19 At first instance and then on appeal, Air France was ordered to pay Mrs Folkerts damages, including, in particular, a sum of EUR 600 under Article 7(1)(c) of Regulation No 261/2004.

20 Air France then brought an appeal on a point of law before the Bundesgerichtshof (German Federal Court of Justice).

21 The Bundesgerichtshof considers that the outcome of that action depends on whether Mrs Folkerts is entitled to compensation from Air France pursuant to Article 7 of Regulation No 261/2004.

22 The Bundesgerichtshof takes the view that Mrs Folkerts is entitled to compensation in the amount of EUR 600 only if the case-law of the Court of Justice (Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923) – according to which passengers have the right to compensation under Article 7(1) of Regulation No 261/2004 also in the event of long delay – is also applicable to

cases where, although there was not yet any delay beyond the scheduled departure within the terms of Article 6(1) of that regulation, the final destination was nonetheless reached three hours or more after the arrival time originally scheduled.

23 Therefore, in the Bundesgerichtshof's view, the question of whether the right to compensation advanced by Mrs Folkerts is well founded depends on whether Article 7(1) of Regulation No 261/2004 may be relied on even where there is no delay within the terms of Article 6(1) of that regulation. The Bundesgerichtshof takes the view that it is not clear from the grounds of the judgment in *Sturgeon and Others* whether, for the purpose of entitlement to compensation under Article 7(1) of Regulation No 261/2004, the length of the delay in reaching the final destination alone is determinant or whether entitlement to compensation for such a delay additionally requires that the conditions set out in Article 6(1) of that regulation be met, that is to say, that the departure of the flight in question was already delayed beyond the limits set out in Article 6(1).

24 In those circumstances the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a passenger have a right to compensation under Article 7 of Regulation No 261/2004 in the case where departure of his flight was delayed for a period which is below the limits specified in Article 6(1) of that regulation, but arrival at the final destination was at least three hours later than the scheduled arrival time?

(2) If the first question is answered in the negative:

For the purpose of determining whether there was a delay, within the terms of Article 6(1) of Regulation No 261/2004, in the case of a flight consisting of several stages, should reference be made to the individual stages or to the distance to the final destination?'

Consideration of the questions referred

The first question

25 By its first question the Bundesgerichtshof asks, in essence, whether Article 7 of Regulation No 261/2004 must be interpreted as meaning that compensation is payable, on the basis of that article, to a passenger on connecting flights who has been delayed at departure for a period below the limits specified in Article 6 of that regulation, but has arrived at his final destination at least three hours later than the scheduled arrival time.

26 In the first place, it must be recalled that, as is apparent from Article 1(1) thereof, the purpose of Regulation No 261/2004 is to grant minimum rights to air passengers when faced with three different types of situation, namely, when they are denied boarding against their will, when their flights are cancelled and, lastly, when their flights are delayed.

27 It is apparent from Article 2 of Regulation No 261/2004, setting out definitions for the purposes of that regulation, that, unlike denied boarding and flight cancellation, flight delay is not itself defined in that article.

28 In addition, it should be noted that Regulation No 261/2004 contemplates two different types of flight delay.

29 First, in some contexts, such as the delay provided for in Article 6 of Regulation No 261/2004, that regulation refers only to a flight's being delayed beyond its scheduled departure time.

30 Second, in other contexts, Regulation No 261/2004 deals with the situation where arrival at the final destination has been delayed. Thus, in Article 5(1)(c)(iii) of Regulation No 261/2004, the European Union legislature draws legal consequences from the fact that the passengers whose flights have been cancelled and who are offered re-routing by an air carrier reach their final destination a certain amount of time after the cancelled flight's scheduled time of arrival.

31 In that connection, it should be noted that the reference, in Regulation No 261/2004, to different types of delay is compatible with Article 19 of the Montreal Convention, that convention being an integral part of the EU legal order (see Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 36, and Case C-63/09 *Walz* [2010] ECR I-4239, paragraphs 19 and 20). Article 19 of the Montreal Convention refers to the concept of 'delay in the carriage by air of passengers', without specifying at which stage of such carriage the delay in question must occur.

32 In the second place, it must be noted that the Court has held that when their flights are subject to long delay, that is delay equal to or in excess of three hours, passengers of such flights are entitled to compensation on the basis of Article 7 of Regulation No 261/2004, like those passengers whose original flights have been cancelled and whom an air carrier is not able to offer re-routing in accordance with the conditions laid down in Article 5(1)(c)(iii) of Regulation No 261/2004, given that they suffer an irreversible loss of time and, hence, a comparable inconvenience (see *Sturgeon and Others*, paragraphs 60 and 61, and Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECR, paragraphs 34 and 40).

33 Since that inconvenience materialises, with regard to delayed flights, on arrival at the final destination, the Court has held that a delay must be assessed, for the purposes of the compensation provided for in Article 7 of Regulation No 261/2004, in relation to the scheduled arrival time at that destination (see *Sturgeon and Others*, paragraph 61, and *Nelson and Others*, paragraph 40).

34 The concept of 'final destination' is defined in Article 2(h) of Regulation No 261/2004 as being 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.

35 It follows that, in the case of directly connecting flights, it is only the delay beyond the scheduled time of arrival at the final destination, understood as the destination of the last flight taken by the passenger concerned, which is relevant for the purposes of the fixed compensation under Article 7 of Regulation No 261/2004.

36 In the third place, Article 6 of Regulation No 261/2004, which refers to the delay to a flight beyond its scheduled time of departure, seeks, according to its own terms, only to establish the conditions giving entitlement to the measures of assistance and care provided for in Articles 8 and 9 of that regulation respectively.

37 If follows that the fixed compensation to which a passenger is entitled under Article 7 of Regulation No 261/2004, when his flight reaches the final destination three hours or more after the scheduled arrival time, is not dependent on the conditions laid down in Article 6 of that regulation being met.

38 Accordingly, the fact that a flight such as that at issue in the main proceedings has not been delayed, as regards the scheduled departure time, beyond the limits set out in Article 6 of Regulation No 261/2004, cannot affect the obligation on air carriers to compensate the passengers of such a flight, provided that the arrival of that flight at the final destination has been delayed by three hours or more.

39 The opposite approach would constitute an unjustified difference in treatment, inasmuch as it would effectively treat passengers of flights arriving at their final destination three hours or more after the scheduled arrival time differently depending on whether their flights were delayed beyond the scheduled departure time by more than the limits set out in Article 6 of Regulation No 261/2004, even though their inconvenience linked to an irreversible loss of time is identical.

40 In the fourth place, at the hearing certain statistical data were referred to, in particular by the European Commission, concerning, first, the substantial volume of connecting fights transporting passengers through European airspace and, second, the recurrent nature of delays of at least three hours in arriving at the final destination affecting such flights, attributable to the connections missed by the passengers concerned.

41 In that regard, it is true that the obligation to pay compensation to the passengers of the flights in question in the fixed amounts laid down in Article 7 of Regulation No 261/2004 entails certain financial consequences for air carriers (see, to that effect, *Nelson and Others*, paragraph 76).

42 However, it must be emphasised, first, that those financial consequences cannot be considered disproportionate to the aim of ensuring a high level of protection for air passengers (*Nelson and Others*, paragraph 76) and, second, that the real extent of those consequences is likely to be mitigated in the light of the three factors set out below.

43 First of all, it should be noted that air carriers are not obliged to pay compensation if they can prove that the cancellation or long delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, that is, circumstances which are beyond the air carrier's actual control (Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 34, and *Nelson and Others*, paragraph 79).

44 Next, it must be noted that the discharge of obligations pursuant to Regulation No 261/2004 is without prejudice to air carriers' rights to seek compensation from any person who caused the delay, including third parties, as Article 13 of Regulation No 261/2004 provides (*Nelson and Others*, paragraph 80).

45 In addition, the amount of compensation, fixed at EUR 250, 400 and 600 depending on the distance of the flights concerned, may still be reduced by 50% in accordance with Article 7(2)(c) of Regulation No 261/2004, where the delay is – in the case of a flight not falling under subparagraphs (a) or (b) of Article 7(2) – less than four hours (*Sturgeon and Others*, paragraph 63, and *Nelson and Others*, paragraph 78).

46 Lastly, in any event, the case-law shows that the importance of the objective of consumer protection, which therefore includes the protection of air passengers, may justify even substantial negative economic consequences for certain economic operators (*Nelson and Others*, paragraph 81, and case-law cited).

47 In the light of the foregoing, the answer to the first question referred for a preliminary ruling is that Article 7 of Regulation No 261/2004 must be interpreted as meaning that compensation is payable, on the basis of that article, to a passenger on directly connecting flights who has been delayed at departure for a period below the limits specified in Article 6 of that regulation, but has arrived at his final destination at least three hours later than the scheduled arrival time, given that the compensation in question is not conditional upon there having been a delay at departure and, thus, upon the conditions set out in Article 6 having been met.

The second question

48 In the light of the affirmative answer given to the first question, there is no need to answer the second question.

Costs

49 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 (Grand Chamber) hereby rules:

Article 7 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 compensation is payable, on the basis of that article, to a passenger on directly connecting flights who has been delayed at departure for a period below the limits specified in Article 6 of that regulation, but has arrived at the final destination at least three hours later than the scheduled arrival time, given that the compensation in question is not conditional upon there having been a delay at departure and, thus, upon the conditions set out in Article 6 having been met.

[Signatures]