Case C-589/20

Request for a preliminary ruling

Date lodged:

10 November 2020

Referring court or tribunal:

Landesgericht Korneuburg (Austria)

Date of the decision to refer:

15 September 2020

Applicant and appellant:

JR

Defendant and respondent:

Austrian Airlines AG

REPUBLIC OF AUSTRIA

Landesgericht Korneuburg (Regional Court of Korneuburg, Austria)

[…]

The Regional Court of Korneuburg, sitting as an appellate court, […] in the case of the applicant JR […] versus the defendant **Austrian Airlines AG**, […] Vienna Airport, […] concerning EUR 4 675.00 plus interest and costs […], on appeal by the applicant against the judgment of the Bezirksgericht Schwechat (District Court, Schwechat, Austria) of 15 March 2020[…], sitting in closed session, has made the following

Order:

I. The following **questions** are referred to the Court of Justice of the European Union **for a preliminary ruling** under Article 267 TFEU:

Is Article 17(1) of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001, to be interpreted as meaning **that**

WORKING DOCUMENT

the concept [Or. 2] **of 'accident' within the meaning of that provision covers a situation in which a passenger falls on the last third of a mobile boarding stairway when disembarking from an aircraft – for no ascertainable reason – and sustains an injury, which was not caused by an object used when serving passengers within the meaning of the decision of the Court of Justice of 19 December 2019, C-532/18, and there was no defect in the quality of the stairway, which, in particular, also was not slippery?**

2. Is Article 20 of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001, to be interpreted as meaning **that any liability on the part of the air carrier ceases to exist in its entirety if circumstances such as those described in point 1 exist and the passenger was not holding on to the handrail of the stairway at the time of the fall?**

II. […] [Stay of proceedings]

Grounds

The applicant concluded a contract of carriage by air with the defendant. She flew from Thessaloniki to Vienna together with her husband AK and their two-year-old son […] on 30 May 2019. The flight was operated by the defendant. **[Or. 3]**

When it was time to disembark, the applicant waited with her family and let the other passengers disembark first. She was one of the last passengers to leave the plane. Mobile disembarkation stairways were provided at both the rear and front of the aircraft to allow passengers to disembark. The applicant and her family used the stairway at the front to disembark. Approximately 60 passengers had used the stairway to disembark before them. Of those approximately 60 people, none slipped or complained about a slippery area on the stairway.

The stairway at the front was made of metal and was not covered. The treads were made of corrugated sheet metal and were wide enough for two people to walk down the stairs alongside each other at the same time. There was a handrail on each side of the stairway. The stairway was in good condition and showed no signs of defects or damage. The treads were wet because it had rained earlier, but they were not slippery. It was not raining when the passengers were disembarking. The treads were neither oily nor greasy, nor in some way covered by large areas of dirt. Only on the last three steps were there isolated, dot-shaped pieces of dirt of unknown consistency. It could not be established that chewing gum had become stuck to the treads, nor that the small pieces of dirt were slippery. The corrugated surface of the treads ensures a particular non-slip quality. Such stairways are in constant use at Vienna International Airport. There are no covered stairways available. The stairway in question is a certified piece of equipment, which is tested by the Technischer Überwachungsverein (Technical Inspection Association, 'TÜV'). **[Or. 4]**

WORKING DOCUMENT

When the family disembarked, AK went first, holding a piece of wheeled hand luggage in each hand. The applicant was holding her handbag in her right hand and had picked up her son and was carrying him in her left arm. AK almost fell on the lower third of the stairway, but managed to stay on his feet. The applicant observed that incident but then fell herself in the same place where her husband almost fell, hitting the edge of the stairway with her left forearm. Neither AK nor the applicant had used the handrail. As a result of the fall, the applicant suffered a fracture of her left forearm and a haematoma on her buttocks. It was not possible to establish why the applicant fell.

The **applicant** seeks payment of EUR 4 675, plus 4% interest from 10 August 2019 and bases that claim, in essence, on the ground that the stairs were so slippery that her husband had already slipped and slid down some steps just beforehand, but did not injure himself. She had observed that incident and had therefore picked up her two-year-old son in her arms to prevent him from slipping. She then walked down the steps very carefully. Nevertheless, she slipped on the same level, or step, on which her husband had also slipped just beforehand. Therefore, the appellant claims that the stairway provided by the defendant in no way complied with its contractual obligation to protect passengers and to ensure the required level of safety, since the slip at issue occurred despite the fact that special care was taken. Despite the wet weather with drizzly rain, the defendant had provided an uncovered stairway, which already **[Or. 5**presented an increased risk of slipping due to the wetness. In addition, the appellant claims that the step on which she had slipped was also oily/greasy. When a transport contract is concluded, there arises an ancillary contractual obligation on the part of the operator of the means of transport to ensure the safety of the passengers and to preserve their physical integrity. In accordance with settled case-law, the relevant duty to protect and the duty of care also concern maintaining entrances to or exits from the means of transport in a condition that enables passengers to use them without risk. The appellant argues that the defendant did not discharge those obligations. In cases where passengers disembark outside, it is standard practice to provide covered boarding stairways and to ensure that they are not greasy/slippery under any circumstances. In the view of the appellant, the defendant is therefore liable, on every conceivable legal ground, for the harm suffered and ought to provide evidence of the alleged absence of fault in accordance with Paragraph 1298 of the Allgemeines Bürgerliches Gesetzbuch (General Civil Code, ‘the ABGB’). The applicant seeks adequate compensation for pain and suffering in the amount of EUR 3 500, reimbursement of the costs of employing a household assistant for a total of 75 hours at EUR 15 per hour, amounting to EUR 1 125, and EUR 50 in expenses.

The **defendant** contests the form of order sought, seeks the dismissal of the action and submits, in summary, that the treads of the stairway were perforated/corrugated, which allowed any water to run off quickly and ensured that the treads were dry almost immediately. The use of such stairways reduces the risk of slipping. The stairway and the treads were in good **[Or. 6]** technical condition and were also not slippery. The defendant claims that it could not be

WORKING DOCUMENT

accused of breaching its contractual duty to protect or duty of care or to have become tortiously liable. Nor had it – or Vienna International Airport – acted culpably or unlawfully. In any event, the defendant claims that it would have been reasonable to expect the applicant to use the handrails on the stairway, especially if she had just noticed that her husband had almost fallen. It cannot be ruled out that the fall also occurred precisely because she was holding her son under or on her arm. The defendant also claims that it has not infringed any ancillary contractual obligations. It had been possible for the applicant to use the stairway without risk. The applicant chose not to seek further treatment in a nearby hospital immediately after the incident, despite the medical instructions and advice given to her. Instead, she travelled back to Linz, where it appears she did not seek treatment until late into the evening of 30 May 2019. In the defendant's view, it cannot be ruled out that the applicant's injuries were aggravated by the delay in treatment or that it was only because of that delay that they reached the degree of intensity claimed. As a result, the applicant breached her duty to minimise the damage suffered.

By the contested **judgment**, Schwechat District Court, ruling at first instance, dismissed the form of order sought in its entirety. On the basis of the established facts set out above, it considered that, under Paragraph 1295(1) of the ABGB, unlawfulness could arise from a breach of a contractual obligation or an obligation in tort. The contractual obligations are to be determined by reference to the **[Or. 7]** specific agreement. It was unlawful to breach either the principal or the ancillary obligations (protection, care, information). Conclusion of a contract of carriage by air brings about a contractual obligation to guarantee the safety of passengers on the part of the operators of an air carrier. That ancillary contractual obligation also includes ensuring that passengers can embark and disembark from the aircraft without risk. However, according to settled case-law, the obligations to ensure safety should not be overstretched in such a way as to give rise, in practice, to liability that is not provided for by law and is independent of fault. Those subject to the obligation to ensure safety therefore need take only those measures that can be reasonably expected of them in the perception of the public. The use of special non-slip surfaces s at least sufficient to ensure that passengers are not injured. The provision of a covered stairway cannot be required. The defendant therefore did not breach any obligation to ensure safety. Irrespective of that, every pedestrian is required to look where he is going. Having observed, prior to her fall, how her husband almost fell in the same place, the applicant did not take any precautions to prevent her own fall. It would have been reasonable to expect her to pause before continuing and then use the handrail. It would have also been possible for her to seek the help of her husband. Her failure to use the handrail even though a danger had already been identified had to be regarded as being primarily her own fault. **[Or. 8]**

The applicant **appealed** against that judgment to the referring court, requesting that the contested judgment be amended to the effect that the form of order sought be granted in its entirety. The appellant argues, in essence, that the defendant's liability arose simply from the fact that it did not use covered stairways. The

WORKING DOCUMENT

appellant had not provided the exculpatory evidence required of it. Nor could the applicant be expected to assume that the steps were so slippery that she could fall even if she walked down them particularly carefully. There was therefore no reason to assume contributory negligence.

In its **response to the appeal**, the defendant contends, in essence, that the provision of a covered stairway cannot be required of the defendant. It argues that it has not breached an obligation to ensure safety by using an uncovered stairway. Obligations to ensure safety must not be overstretched; rather, they must be limited to what is reasonable.

The referring court, sitting as an **appellate court**, is called on to rule on the applicant's claims at second and final instance.

[Procedural aspects] […] **[Or. 9]** […]

[…]

As regards the **questions referred**, it should be noted at this point that, in the present case, both the court of first instance and the parties overlooked the fact that the defendant's liability must be assessed by reference to the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention, 'the MC'). The application of that convention results from the fact that the flight's place of departure and **[Or. 10]** place of destination were located in different Contracting States (Greece, Austria), thus establishing international carriage within the meaning of Article 1 of the MC.

The Montreal Convention 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. It (therefore) forms an integral part of the EU legal order, meaning that the European Court of Justice has jurisdiction to give a preliminary ruling concerning its interpretation (CJEU, Case C-6/14, paragraph 33; […]).

Question 1:

Pursuant to Article 17(1) of the MC, the carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Pursuant to that provision, the carrier is liable up to the maximum limit laid down in Article 21(1) of the MC (which is not reached by the applicant's present claim) irrespective of whether it was at fault, whereby it can contest its liability only by way of a plea of contributory negligence under Article 20 of the MC.

Liability under Article 17(1) of the MC is incurred where an 'accident' causes a personal injury (death or bodily injury); the occurrence of the accident must be a *conditio sine qua non* for the injury. According to the wording of the convention,

WORKING DOCUMENT

the decisive factor is therefore the existence of an ‘accident’. Neither the Montreal Convention nor the prior Warsaw Convention (‘WC’) contains a definition of this term. In accordance with the case-law developed **[Or. 11]** in relation to the Warsaw Convention, it is a sudden event based on an external factor resulting in the passenger’s death or injury. The person concerned suffers damage which he did not expect […].

In the present case, the applicant suffered bodily injury because, while disembarking, she fell on the lower third of the mobile disembarkation stairway, which was in good condition, whereby the cause of the fall could not be established. The question is whether that incident is to be subsumed under the concept of ‘accident’ within the meaning of Article 17(1) of the MC.

In its decision of 19 December 2019 in Case C-532/18, the Court of Justice states:

Since the concept of ‘accident’ is not defined anywhere in the Montreal Convention, reference must be made to the ordinary meaning of that concept in its context, in the light of the object and purpose of that convention.

The ordinary meaning given to the concept of ‘accident’ is that of an unforeseen, harmful and involuntary event.

It is not consistent with the ordinary meaning of the concept of ‘accident’ referred to in Article 17(1) of the Montreal Convention or the objectives pursued by that convention to make the carrier’s liability subject to the condition that the damage is due to the materialisation of a hazard typically associated with aviation or to there being a connection between the ‘accident’ and the operation or movement of the aircraft. Limiting the obligation on air carriers to pay compensation solely to accidents related to a hazard typically associated with aviation **[Or. 12]** is not necessary in order to avoid imposing an excessive compensation burden on air carriers. Those carriers may exclude or limit their liability (paragraphs 34, 35, 41 and 42). Overall, the Court of Justice therefore concluded in that decision that the concept of ‘accident’ within the meaning of that provision (Article 17(1) of the MC) covers all situations occurring on board an aircraft in which an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether those situations stem from a hazard typically associated with aviation.

Pursuant to the provision of Article 17(1) of the MC, set out above, this must also apply to situations which arise – as in the present case – when embarking on or disembarking from the aircraft.

However, the present situation differs from that on which the decision in C-532/18 was based inasmuch as, in the present case, the fall, and therefore the injury suffered by the applicant, was not caused by an object used when serving passengers, nor were there any other grounds for attributing liability to the defendant, in particular poor condition of the stairway or a breach of its duty of care or obligation to ensure safety.

WORKING DOCUMENT

Question 2:

Article 20 of the MC provides that, if the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the passenger, the carrier is to be wholly or partly exonerated from its liability to that passenger. **[Or. 13]**

In the present case, the applicant failed to hold on to the handrail that was available – despite the fact that she had observed her husband's 'near fall'. It was therefore not possible for her to prevent herself from falling. As a result, the applicant therefore at least contributed to her fall herself. In view of the fact that the stairway was in good condition – and therefore did not show any signs of damage or defects and was not slippery either – and that the injuries suffered by the applicant were not caused by an object used when serving passengers, and therefore (irrespective of the fact that the fall occurred when disembarking from an aircraft) there were no grounds for attributing liability to the defendant, or those grounds were only secondary to the applicant's contributory negligence, the question also arises as to whether the applicant's contributory negligence outweighs any liability on the part of the defendant under Article 17(1) of the MC – which has not breached its duty of care or its safety obligations – in such a way that liability ceases to exist.

As it would appear to the referring court that these questions have not yet been conclusively clarified in the Court's case-law, they must be referred to the Court for a preliminary ruling.

[…]

WORKING DOCUMENT