

Anonymised version

Translation

C-286/19 — 1

Case C-286/19

Request for a preliminary ruling

Date lodged:

5 April 2019

Referring court:

Tribunal d'instance d'Aulnay-Sous-Bois (District Court, Aulnay-Sous-Bois, France)

Date of the decision to refer:

25 March 2019

Applicants:

JE

KF

Defendant:

XL Airways SA

TRIBUNAL D'INSTANCE (DISTRICT COURT)

[...]

[...] **AULNAY-SOUS-BOIS**

[...]

Judgment delivered [...] on 25 MARCH 2019

[...]

After a public hearing on 10 December 2018

[...]

BETWEEN:

JE, of [...] PARIS

KF, of [...] PARIS,

[...], **APPLICANTS,**

OF THE ONE PART

AND:

XL AIRWAYS, [...] TREMBLAY-EN-FRANCE,

[...], **DEFENDANT,**

OF THE OTHER PART

[...]

By an [...] application of 17 March 2017, [...] JE and KF brought proceedings against XL AIRWAYS [...] seeking an order that it pay each of them the principal sum of EUR 600 to compensate for a cancelled flight, under 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), together with interest at the statutory rate from the date on which the defendant was put on notice. The persons concerned likewise each claimed damages of EUR 400 for wrongful obstruction of legal process by the airline and EUR 500 under Article 700 of the Code of Civil Procedure, as well as costs.

JE and KF stated that they purchased two tickets from the aforementioned air carrier for a flight from Punta Cana (Dominican Republic) to Paris, scheduled to take off at 21.20 on 24 May 2014 and land at Roissy CDG airport at 12.20 on 25 May 2014. However, according to the applicants, that flight was cancelled and they were only put on a replacement flight at 17.35 (local time) on 25 May 2014, meaning that they reached their final destination, Paris, at 07.50 the following day.

Subsequently, on 27 May 2016, through their lawyer, the applicants sent XL AIRWAYS a letter containing a request for payment of the lump-sum compensation of EUR 600 per passenger established in Regulation (EC) No 261/2004 for situations where a flight of more than 3 500 kilometres is cancelled.

The airline having failed to respond to that request, JE and KF made this application so that the dispute could be resolved in accordance with the applicable law.

After several adjournments, the case was set for hearing on 10 December 2018 and the parties appeared at that hearing [...].

At the hearing, envisaging the possibility that the court might reclassify the cancelled flight as a delayed flight, JE and KF [...] applied for a stay of proceedings on the grounds that the present case would then raise the question of how to interpret Article 3(2) of Regulation (EC) No 261/2004, according to which persons who have a confirmed reservation and have presented themselves for check-in in accordance with the terms laid down by the airline and at least 45 minutes before the planned take off time must be regarded as passengers on a flight, although that latter requirement does not apply in the case of a cancellation.

That being so, the applicants have applied for the proceedings to be stayed pending the answer of the Court of Justice of the European Union to the questions on that topic already referred to it for a preliminary ruling and have submitted new questions to the District Court concerning the application of the same provisions, which they likewise request be referred to the European court for a preliminary ruling.

In the alternative, JE and KF have reiterated the claims and pleas in law set out in their application initiating proceedings, although increasing their claims for damages for wrongful obstruction of legal process to EUR 1 000 per passenger, and doing likewise in respect of the claim under Article 700 of the Code of Civil Procedure.

Arguing that the incident at issue was indeed a delayed flight within the meaning of the EU case-law, the representative of XL AIRWAYS objected to that application to stay proceedings on the grounds that the question of determining whether a person is a passenger under Article 3(2) of Regulation (EC) No 261/2004 was established with complete clarity by case-law of the Cour de cassation (Court of Cassation, France). On the substance of the case, the defendant applied for all the claims to be rejected on the grounds that, since this was in its view a delayed flight, and because JE and KF have not proven that they presented themselves for check-in for the flight under the prescribed conditions, they have not established that they are passengers eligible for compensation under the article relied upon.

[...]

GROUND

The application to stay proceedings

[...] [point of national procedural law]

[...] Under Article 267 of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice of the European Union has jurisdiction to give preliminary rulings, in particular concerning interpretation of the Treaties.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice, and this court is aware that under Article R221-37 of the French Code on the organisation of the judiciary, district courts hear disputes at last resort where they relate to amounts of up to EUR 4 000 and subject to appeal where the claim is for more than that amount or is unquantified.

[...]

[...] [point of national procedural law]

In the present case, it is common ground that, since JE and KF's claims do not exceed the EUR 4 000 maximum that the court can award, the substance of the dispute must be decided by a decision made at last resort and accordingly not subject to appeal under Article 267 TFEU.

Furthermore, since in this specific case there are reasonable grounds for envisaging that the incident on which the claim is based will be reclassified as a delayed flight instead of a cancellation, it is undisputed that an interpretation of Article 3(2) of Regulation (EC) No 261/2004, on the points raised in the new questions for a preliminary ruling put to the district court, can determine whether the compensation provisions under Regulation (EC) No 261/2004 apply to the dispute.

Accordingly, [...] the application to stay proceedings made by the applicants should be granted [...] until such time as the Court of Justice of the European Union makes a ruling on the preliminary questions referred [...].

The questions referred for a preliminary ruling

The Tribunal d'instance d'Aulnay-Sous-Bois (District Court, Aulnay-Sous-Bois) is encountering a significant increase in cases brought before it under its jurisdiction in the judicial district of Roissy-Charles-de-Gaulle airport, which challenge the methods of proving that passengers have presented themselves for check-in for delayed flights that are potentially eligible for the lump-sum compensation mechanism established by Regulation (EC) No 261/2004.

By two judgments of 14 February 2018 [...] and 12 September 2018 [...], the Cour de cassation (Court of Cassation) confirmed judgments delivered by the Tribunal d'instance d'Aulnay-Sous-Bois (District Court, Aulnay-Sous-Bois) that rejected claims for lump-sum compensation brought against an operating carrier on the basis of the aforementioned regulation for a delay of more than three hours in a flight arriving at its final destination. In those cases, the applicants produced only

electronic proof of a confirmed reservation and, for one of them, a certificate of delay not relating to a named individual.

Notwithstanding that case-law interpreting Article 3(2) of Regulation (EC) No 261/2004 on the basis of the law of obligations, many passengers, who no longer have evidence capable of formally proving that they actually presented themselves for check-in for the flights at issue and who argue that there have been technological developments, having the effect in particular that ‘paper’ boarding cards are being phased out, are creating a large amount of litigation on that question.

It has been argued in particular that holding a confirmed reservation on a flight constitutes a simple presumption that a passenger has presented him or herself for check-in which it is for the airline to rebut. That view has been validated by the rulings of a number of district courts that have ordered air carriers to produce PNR (Passenger Name Record) data for the flight at issue, subject to a penalty if necessary.

Given that 2 700 airline litigation cases were brought before the Tribunal d’instance d’Aulnay-Sous-Bois (District Court, Aulnay-Sous-Bois) in 2017 and more than 5 000 cases in 2018, the proper administration of justice requires definitive clarification of the conditions under which the aforementioned Article 3(2)(a) applies, in order, in the interests of passengers themselves, to harmonise the decisions made by the courts called upon to decide those disputes, generally at last resort.

A request for a preliminary ruling arising from the same topic in proceedings before the Tribunal d’instance d’Aulnay-Sous-Bois (District Court, Aulnay-Sous-Bois) has already been sent to the Registry of the Court of Justice of the European Union and lodged on 3 December 2018 [...], registered with the Court of Justice as Case C-756/18. The question referred related to whether passengers can rely on a simple presumption to prove that they have presented themselves for check-in.

In the present case, JE and KF argue first of all that the case-law according to which a delay of at least three hours can be treated as cancellation of the flight does not mean that Article 3(2)(a) of Regulation (EC) No 261/2004 applies to delayed flights, and that if it did apply in that situation the question would in any event arise of whether the reference time for departure of the flight would be the originally scheduled take off time or the actual departure time of the delayed flight.

In relation to the burden of proving whether they presented themselves for check-in, the applicants, pleading recent technological developments and especially electronic boarding cards, raise the question of whether the conditions laid down in Article 3(2)(a) of Regulation (EC) No 261/2004 are preconditions for that regulation to apply, which it is for the consumer to prove are satisfied, or grounds

for exonerating the airline from its obligation to pay compensation, for which the airline would have to produce evidence.

Lastly, JE and KF contend that placing the burden of proving that they presented themselves for check-in exclusively on passengers may be incompatible with the principle that Regulation (EC) No 261/2004 must be effective in the light of its objectives of providing a high level of protection for consumers, which here means those passengers.

Oral arguments were exchanged on those preliminary questions raised by the applicants. The defendant objected to the proceedings being stayed, arguing that the preliminary questions raised by the applicants were baseless because the Cour de cassation (Court of Cassation), in its judgments of 14 February and 12 September 2018, clearly established case-law to the effect that passengers are required to produce evidence that they actually presented themselves for check-in on the flight, by submitting their boarding card or other evidence capable of providing the required proof.

That said, it should be found that the questions raised by the applicants, although they fundamentally reiterate the issues at play in the question previously referred to the Court of Justice of the European Union for a preliminary ruling on 3 December 2018 in a similar case, nevertheless broaden the scope of that question by taking different perspectives for its legal analysis, and therefore appear to be conducive to a more comprehensive examination of the topic now at issue.

Accordingly, since the decision to be made on the substance of the matter is at last resort, the following questions should be referred to the Court of Justice of the European Union for a preliminary ruling:

[...]

[...] [wording of the questions referred, reproduced in the operative part]

[...] [decision to stay proceedings]

[...] [statement relating to costs]

ON THOSE GROUNDS

The court [...]

ORDERS that the following questions be referred to the Court of Justice of the European Union for a preliminary ruling:

1. Whether both limbs of Article 3(2)(a) apply in the case of a delayed flight:

- (a) Having regard to the fact that as the result of a case-law construct (judgment of 19 November 2009, *Sturgeon*, C-402/07 and C-432/07, EU:C:2009:716) the right to compensation that Article 7 of Regulation (EC) No 261/2004 of 11 February 2004 establishes for denied boarding or cancellation was extended to include delayed flights, does the express condition that passengers must present themselves for check-in laid down in Article 3(2)(a) of Regulation (EC) No 261/2004 of 11 February 2004, which applies only in the case of denied boarding, apply in the context of compensation claimed by a passenger who has not been denied boarding but whose flight has been delayed?
- (b) If the answer to question 1(a) is in the affirmative, having regard to the objectives of the time limit laid down by Article 3(2)(a) of Regulation (EC) No 261/2004 of 11 February 2004 ('not later than 45 minutes before the published departure time') that relate to overbooked flights and security objectives, must that time limit be interpreted, in that case, as being 'not later than 45 minutes before the new departure time of the delayed flight published on the airport information boards or communicated to passengers'?
2. The burden of proving 'presentation at check-in'

If the answer to question 1(a) is in the affirmative, that is to say, if Article 3(2)(a) of Regulation (EC) No 261/2004 of 11 February 2004 does apply to compensation applied for by a passenger whose flight has been delayed:

- (a) Are the conditions established in Article 3(2)(a) preconditions that the consumer must prove have been satisfied in order for the regulation to apply, or grounds for exonerating the airline by allowing it to produce the passenger list in order to show that the consumer did not present him or herself for check-in 'as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent, or, if no time is indicated, not later than 45 minutes before the published departure time' to which Article 3(2)(a) of Regulation (EC) No 261/2004 of 11 6 refers, in the light of technological developments that now allow boarding cards to be issued electronically, the absence of any time stamp on paper boarding cards, the correlative absence of any obligation for passengers to present themselves physically at a check-in counter and the fact that the airlines alone hold all the information about passenger check-in until check-in operations are closed?
- (b) Do the principle of effectiveness, the objectives of Regulation (EC) No 261/2004 of 11 February 2004 and the high level of protection of passengers and consumers in general guaranteed by Regulation (EC) No 261/2004 of 11 February 2004 or other provisions of Community law preclude placing exclusively on passengers alone the burden of proving that

they presented themselves for check-in ‘as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent, or, if no time is indicated, not later than 45 minutes before the published departure time’ to which Article 3(2)(a) of Regulation (EC) No 261/2004 of 11 February 2004 refers, in the light of technological developments that now allow boarding cards to be issued electronically, the absence of any time stamp on paper boarding cards, the correlative absence of any obligation for passengers to present themselves physically at a check-in counter and the fact that the airlines alone hold all the information about passenger check-in until check-in operations are closed?

[...]

WORKING DOCUMENT