

Anonymised version

Translation

C-74/19 - 1

Case C-74/19

Request for a preliminary ruling

Date lodged:

31 January 2019

Referring court:

Tribunal Judicial da Comarca de Lisboa - Juízo Local Cível de Lisboa – Juiz 18 (Portugal) (Court of First Instance of Lisbon - Local Civil Court of Lisbon - Court No. 18)

Date of the decision to refer:

21 January 2019

Applicant:

LE

Defendant:

Transport Aéreos Portugueses S.A. (TAP)

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**Tribunal Judicial da Comarca de Lisboa
(The Court of Justice of the District of Lisbon)**

**Juízo Local Cível de Lisboa - Juiz 18
(Local Civil Court of Lisbon - Court No. 18)**

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ORDER - ...

I- Background:

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I.1- LE ... brought the present proceedings ... against TAP, S.A., seeking an order that the latter pay the sum of EUR 600 plus interest accruing as from the date on which proceedings were issued.

I.2- The applicant bases his claim on the following facts: he purchased an air ticket for a flight operated by the defendant, from Fortaleza (Brazil) to Oslo, with a stopover at Lisbon airport. The flight arrived late in Lisbon, so that he could not board the Oslo flight on that same day (22 August 2017) and had to wait until the next day's flight to leave Lisbon for Oslo and he therefore arrived at his final destination more than three hours late. Accordingly, that the [defendant] is obliged to pay him the amount claimed by way of compensation in accordance with Articles 5(1)(c) and 7(1)(c) of Regulation (EC) No 261/2004, which provides for a minimum compensation in those circumstances (in this case, EUR 600 as it concerns an extra-Community flight of more than 3 500 km).

I.3- The defendant company filed a defence to the claim brought against it, in which it argues that the delay in arrival at the destination was due to a reason beyond its control. It contends that flight TP36 between Fortaleza and Lisbon was carried out by the aircraft that was used for the previous flight from Lisbon to Fortaleza (flight TP35 of 21 August 2017) and that the disruptive behaviour of a passenger [OR.1] on that flight forced the aircraft to be diverted to Las Palmas to disembark that disorderly passenger, thus causing the delay in boarding the [applicant's] flight from Fortaleza to Lisbon, as it involved the same aircraft. It concludes that, despite all efforts having been made, there was a delay due to an extraordinary circumstance. That delay is therefore not attributable to the defendant company and, in view of recital 14 of Regulation EC 261/2004 of 11 February, the defendant is not liable to pay the compensation claimed.

I.4-The applicant replied by challenging the facts relied on by the defendant in its defence and argued that those facts do not justify the delayed arrival in Oslo, his final destination, and that the defendant had not demonstrated that the delay of almost 24 hours could not have been avoided if all reasonable measures had been taken.

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II- The following established facts are set out in the proceedings:

- 1- By means of his reservation MWNBIX, the applicant purchased a ticket for flights TP36 and TP764 operated by the defendant, departing from Fortaleza Airport (FOR) at 23.05 on 21 August 2017 and scheduled to arrive at Oslo Airport (OSL) at 18.00 (local time) on the following day, 22 August 2017, with a stopover at Lisbon Airport (LIS).
- 2- The applicant checked in and boarded flight TP36. [Or.2]

- 3- Flight TP36, referred to above and made on 22 August 2017, which should have arrived in Lisbon at approximately 10.15, did not arrive at its destination, Lisbon Airport (LIS), until 13.33, which prevented the applicant from boarding flight TP764 to Oslo.
- 4- Consequently, the applicant had to board flight TP764 to the final destination, Oslo Airport (OSL) at 13.10 on 23 August 2017, so that he arrived some 24 hours late in relation to the time originally scheduled.
- 5- The flight TP36 from Fortaleza to Lisbon was made by the same aircraft that was used for the flight from Lisbon to Fortaleza.
- 6- Furthermore, flight TP35 from the Lisbon to Fortaleza on 21 August 2017 left Lisbon at 16.11 but had to be diverted to Las Palmas at 17.25 to disembark a disorderly passenger who had bitten another passenger and assaulted various other passengers and flight crew who tried to calm him. The flight commander, for safety reasons, decided to divert to Las Palmas airport to disembark that disorderly passenger and his luggage. The flight eventually arrived in Fortaleza 4 hours and 18 minutes late.
- 7- The facts described in paragraph 6 led to the delay in boarding the flight taken by the applicant (flight TP36) from Fortaleza to Lisbon, since it involved the same plane.
- 8- Taking into account the time of the diversion to Las Palmas, the defendant concluded that, even if it decided to send a new aircraft from Lisbon to Fortaleza, to make the return TP36 flight, that aircraft would also not arrive in time for the scheduled boarding in Fortaleza, considering the necessary preparations [Or.3] prior to departure from Lisbon, both as regards the aircraft itself and organising the crew for those additional flights.
- 9- As a result of the delayed stopover in Lisbon, the [applicant] was no longer able to board flight TP764 to Oslo and had to go on the following day, as TAP has only one daily flight to Oslo.

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III- ...

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IV- The provisions set out in Regulation (EC) No 261/2004 apply with regard to the issue under consideration.

IV. 1- The applicant invokes the case-law of the Court of Justice of the European Union, according to which cases where the delay of a flight is more than three hours must be treated as a cancellation and gives rise to a right to compensation, unless the delay is due to circumstances of force majeure over which the air

carrier concerned has no effective control and which could not have been avoided, even if all appropriate measures had been taken; consequently, a technical problem on an aircraft does not constitute such a circumstance unless it is proved that this results from sabotage (see the judgment of the Court of Justice of 19 November 2009, *Sturgeon and Others*, [Or.4] C-402/07 and C-432/07, EU:C:2009:716). He also invokes Article 5(1)(c) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004, which states that each passenger is entitled to compensation by the defendant pursuant to Article 7 of that regulation. According to the applicant, since this concerns an extra-Community flight of more than 3 500 km, under Article 7(1)(c) of Regulation (EC) No 261/2004 the passenger is entitled to compensation of EUR 600, payable by the defendant.

IV.2- For its part, the [defendant] invokes recital 14 of Regulation No 261/2004, considering that the established fact constitutes an extraordinary circumstance which exempts it from the payment of any compensation.

IV.3- Regulation (EC) No 261/2004 establishes common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. Article 6 of that Regulation makes provision for cases of significant delay, worthy of legal protection, when the delay exceeds three hours, which is established when the arrival at destination is three or more hours after the time of arrival initially scheduled by the airline. The right to minimum compensation for passengers on affected flights is laid down in Article 7 of Regulation (EC) No 261/2004, which EU case-law considers applicable not only in cases of denied boarding and cancellation, but also in cases of long delay of flights. Therefore, it establishes the right to compensation for passengers whose flights are affected [Or.5].

IV.4- However, recital 14 of the Regulation provides as follows:

‘As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.’

IV.5- Under national law, given that the present case concerns contractual liability (since an air transport contract was concluded between the parties), Article 798 of the Civil Code is relevant. That article provides that a debtor who wrongfully fails to comply with this obligation is to be liable for any damage caused to the creditor. Article 799(1) of the Civil Code is also relevant, which provides that it is the debtor who, in the event of inadequate performance or non-performance of an obligation, must prove that he is not at fault. Those national rules of a general nature may be reconciled with those of the abovementioned EU Regulation

applicable to the present case, which is of a more specific nature, in so far as it follows from those two rules that it is for the defendant air carrier, which is presumed to be at fault, to prove that the delay caused is the result of circumstances beyond its control, that it was not at fault in that regard and that it acted diligently and is not liable for the delay, even as a result of negligence. It should also be pointed out that, with regard to the case-law of the national higher courts, there is only one known judgment that is relevant to this case (judgment of the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon) [Or.6] of 23 November 2017 ...) which, while analysing in detail the regime applicable to those cases of flight delay, refers specifically to a delay due to maintenance of the aircraft decided by the airline, a reason which has already been dealt with in the EU case-law cited in the above-mentioned judgment.

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V- The reference for a preliminary ruling:

V.1- Having established the facts set out above, the position of the parties and the abovementioned EU legislation, a reference for a preliminary ruling is submitted to the Court of Justice in so far as the answer to the questions raised, concerning the interpretation of recital 14 and Articles 5 and 7 of Regulation (EC) No 261/2004 (see Article 267 TFEU), is necessary to enable it to give judgment in the main proceedings.

V.2- Indeed, the factual framework set out above is unprecedented and finds no answer in the case-law of the Court of Justice that has been consulted.

V.3- Furthermore, under Portuguese procedural law, no appeal lies against the final decision taken in the present proceedings ... [Or.7]

V.4- Accordingly, the referring court seeks the interpretation of the EU provisions referred to above, which are considered to be applicable to the present case, by referring the following questions to the Court for a preliminary ruling:

1. Does the fact that a passenger, in the course of a flight, bites other passengers and assaults crew members who attempt to calm him to such an extent as to justify, according to the flight commander, a diversion to the nearest airport to disembark that passenger and unload his luggage, which results in the delayed arrival of the flight at its destination, fall within the concept of 'extraordinary circumstances', referred to in recital 14 of Regulation (EC) No 261/2004?
2. Is an 'extraordinary circumstance' which occurs on an outward flight immediately preceding the return flight made by the same aircraft, relevant to exempt the air carrier from liability for the delay in the take-off of that latter flight onto which the complainant passenger (the applicant in this case) has boarded?

3. For the purposes of Article 5(3) of Regulation No 261/2004, does the analysis carried out by the airline (the defendant in this case), which concluded that sending another aircraft would not avoid the situation of delay and therefore the transfer of the transit passenger (the applicant in this case) to a flight scheduled for the following day, since the airline operates only one daily flight to the passenger's final destination, correspond to conduct by the airline in which it took all reasonable measures, even if it was not possible to remedy the delay? **[Or.8]**

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Lisbon, 21 January 2019 **[Or.9]**