

Anonymised version

Translation

C-530/19 – 1

Case C-530/19

Request for a preliminary ruling

Date lodged:

11 July 2019

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

17 June 2019

Defendant, respondent and appellant on a point of law:

NM, acting as insolvency administrator in the insolvency proceedings concerning the assets of NIKI Luftfahrt GmbH

Applicant, appellant and respondent in the appeal on a point of law:

ON

As the court dealing with appeals on a point of law ... in the matter of the applicant ON, Guttaring, ... against the defendant NM, lawyer, Vienna ..., acting as insolvency administrator in the insolvency proceedings concerning the assets of NIKI Luftfahrt GmbH, in relation to the admission of insolvency claims ..., payment of EUR 18 916.51 plus interest and costs and a declaratory judgment ..., in the proceedings concerning the ... defendant's appeal against the order of the Oberlandesgericht Wien (Vienna Higher Regional Court) as appeal court of 14 February 2019, ... by which the judgment of the Landesgericht Korneuburg (Korneuburg Regional Court) of 21 November 2018 ... was set aside as a result of the applicant's appeal and the case was remitted to the court of first instance for further consideration and a fresh decision, the Oberster Gerichtshof (Austrian Supreme Court), sitting *in camera*, makes the following [**Or. 2**]

Order:

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

1. Is an air carrier which, under Article 5(1)(b) of Regulation (EC) No 261/2004 (the Flight Passenger Rights Regulation), is required to offer assistance under Article 9(1)(b) of that regulation liable on the basis of that regulation for damage resulting from an injury incurred by the passenger as a result of the negligent conduct of employees of the hotel provided by the air carrier?

2. If Question 1 is answered in the negative:

Is the air carrier's obligation under Article 9(1)(b) of Regulation (EC) No 261/2004 limited to providing the passenger with a hotel and covering the costs of the accommodation, or is the air carrier liable for the accommodation as such?

II. The proceedings are stayed pending receipt of the preliminary ruling pursuant to Paragraph 90a(1) of the Gerichtsorganisationsgesetz (Law on Court Organisation).

Grounds:

A. Facts

The defendant lawyer is the insolvency administrator of an Austrian air carrier. That undertaking was required to operate a flight from Majorca to Vienna for the applicant resident in Austria [Or. 3] within the context of a package travel contract. As a result of the cancellation of that flight, a rebooking was made for the evening of the following day. For that reason, the undertaking was required to offer hotel accommodation under Article 5(1)(b), in conjunction with Article 9(1)(b), of Regulation (EC) No 261/2004 (the Flight Passenger Rights Regulation). It performed that duty by accommodating the applicant in a local hotel.

The applicant is confined to a wheelchair. On the following day, she went out with her husband, who pushed her in the wheelchair. Upon their return to the hotel, the front wheels of the wheelchair got caught in a transverse guttering channel in the asphalt of the pathway. The applicant fell forwards out of the wheelchair and was seriously injured.

B. Arguments of the parties and forms of order sought

The applicant is seeking compensation. She is firstly seeking to have her compensation claim applied for in the insolvency proceedings, but contested there by the defendant insolvency administrator, declared an insolvency claim, and is

secondly requesting that the insolvency administrator be ordered to make payment on penalty of an enforcement action in the cover claim against the liability insurance of the air carrier. She argues that the accident occurred on the hotel premises and that the employees of the hotel operator had acted negligently, because they had neither removed the transverse gutter channel in the path nor otherwise rendered it safe.

The defendant contends that no liability of the air carrier for negligent conduct of the employees of the hotel operator results from either Regulation (EC) No 261/2004 or national law. Rather, it is submitted, the Regulation precludes such liability, because the **[Or. 4]** air carrier's duties are limited to offering accommodation. Liability based on national law would exceed the air carrier's duty to assume responsibility. Furthermore, the hotel employees had not acted negligently; the applicant had to prove that the transverse gutter channel was located on the hotel premises and that it had not been made safe.

C. Proceedings to date

The court of first instance dismissed the action. The applicant, it ruled, could not derive any entitlement from Regulation (EC) No 261/2004, as the air carrier had been obliged only to provide accommodation; liability for consequential damage due to allegedly negligent conduct on the part of hotel employees did not result therefrom. National law also provided no basis for a claim, because there was no contractual relationship between the applicant and the air carrier and there was only limited vicarious liability in the non-contractual area; the applicant had not submitted any appropriate arguments in this respect. On the basis of that legal assessment, the court of first instance did not make any findings on the question of whether the accident had at all occurred on the hotel premises and whether hotel employees had acted negligently.

The appeal court set that judgment aside and remitted the case to the court of first instance for a new decision following supplementary proceedings.

In the specific case, the operating air carrier was under an obligation to provide a service pursuant to Article 9(1)(b) of Regulation (EC) No 261/2004. If it had not fulfilled that obligation, it would have had to reimburse the applicant for expenses incurred as a result within appropriate and reasonable limits. As a consequence of non-performance, this **[Or. 5]** claim results from the national law applicable under Article 12 of Regulation (EC) No 261/2004 in addition to that regulation. The same has to apply to the case alleged here of poor performance by the hotel operator (or employees thereof) appointed by the air carrier. Such poor performance also justifies a claim under national law, with the air carrier being liable under Austrian law for negligent conduct of the hotel employees. As the court of first instance, by reason of its different legal view, had not made any findings on the more detailed circumstances of the accident, the judgment under

appeal had to be set aside and the court of first instance ordered to supplement the proceedings.

The Oberster Gerichtshof is required to rule on an appeal on a point of law brought by the defendant, by which she seeks restoration of the negative judgment delivered at first instance. The air carrier, it is argued, performed its duties under Article 9 of Regulation (EC) No 261/2004 by providing the accommodation free of charge. An application of national law based on Article 12 of Regulation (EC) No 261/2004 should not lead to further duties subsequently being imposed on the air carrier. However, that is the result of the view taken by the appeal court, because, in order to eschew liability, the air carrier would have had to check the hotel facilities offered thereby. Apart from that, it is argued, the comments of the appeal court regarding Austrian law are also incorrect for reasons set out in greater detail.

D. Legal basis

1. The air carrier's obligation to provide assistance results from the following provisions of *Regulation (EC) No 261/2004 [Or. 6] 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:*

Article 5: Cancellation

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

(b) be offered assistance by the operating air carrier [...], 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); [...]

Article 9: Right to care

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

(a) [...]

(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;*

...

2. Article 12(1) of Regulation (EC) No 261/2004 provides as follows:

Article 12: Further compensation

1. This Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation. [Or. 7]

3. Paragraph 1313a of the Austrian Allgemeines Bürgerliches Gesetzbuch (General Civil Code; ABGB) reads as follows:

Any party obliged to provide another party with a service shall be liable thereto for any fault on the part of its legal representatives and persons whom it employs for the performance to the same extent as for its own.

E. Basis for the request

1. Question 1

1.1. The wording of Regulation (EC) No 261/2004 firstly provides only for the air carrier's duty, in the case of the second alternative of Article 5(1)(b), to offer hotel accommodation free of charge. However, the Court of Justice has stated that non-performance of that duty gives the passenger a right to redress which cannot be classified as 'compensation' within the meaning of Article 12 of Regulation (EC) No 261/2004 (Court of Justice, C-83/10, *Sousa Rodriguez and Others*, paragraphs 43 and 44). The compensation may not exceed what is necessary, appropriate and reasonable under the specific circumstances to make up for the shortcomings of the air carrier in the provision of care (Court of Justice, C-12/11, *McDonagh*, paragraph 51).

1.2. In the opinion of the present Chamber, it is clear from the Court of Justice's comments that the claim in question is based directly on the Regulation. Recourse to bases for claims under national law is therefore not required (as also the widely prevailing opinion in the more recent German-language literature [...] [Or. 8] ...).

1.3. If the non-performance of the duty of care leads to the passenger making a compensation claim directly on the basis of the Regulation, the case of poor performance being treated in the same way is not excluded. It might therefore be assumed that an air carrier which is required to offer hotel accommodation has to assume liability for defective performance on the part of the hotel operation appointed thereby directly on the basis of the Regulation.

1.4. However, that opinion is countered by the fact that the compensation for non-performance (1.1. above) is to be regarded as equivalent to the non-provided service. This indicates a (secondary) claim based directly on the Regulation, including because failure to fulfil the primary claim would otherwise remain

without sanction under EU law. By contrast, the case of poor performance involves compensation for damage which goes beyond the expenditure for the accommodation and therefore comes under Article 12 of the Regulation according to the scheme thereof. Therefore, the claims in this regard would have to be assessed according to the applicable national law, apart from where an international convention applies. **[Or. 9]**

1.5. It is, however, not excluded that the Court of Justice of the European Union – for instance with the aim of creating uniform framework conditions for all air carriers operating within the European Union (recital 4 of Regulation [EC] No 261/2004) – may equate poor performance with non-performance and, in this case too, assume a right to compensation directly on the basis of the Regulation. Point 1 of the request for a preliminary ruling serves to clarify this question.

2. Question 2

2.1. If the (alleged) misconduct of the hotel employees does not lead to a claim directly on the basis of the Regulation, it is necessary to examine whether there is a right to compensation within the meaning of Article 12 of Regulation (EC) No 261/2004. Whether that is the case is a matter to be assessed according to any applicable international convention, or otherwise according to the applicable national law.

2.2. In the specific case, it is not disputed that the damage occurred outside of the care period under Article 17(1) of the Montreal Convention, which means that the compensation claim cannot in any event be based on that provision. There is also no damage occasioned by delay within the meaning of Article 19 of that Convention, because the applicant is not taking action against the air carrier due to a flight being delayed, but due to the defective provision of assistance under Regulation (EC) No 261/2004. Those services do not come within the scope of application of the Convention (Court of Justice, C-344/04, *IATA*, paragraphs 44 *et seq.*, regarding assistance under Article 6 of Regulation [EC] No 261/2004). The same must apply to claims resulting from the non-performance or poor performance of such services. **[Or. 10]**

2.3. If Question 1 is answered in the negative, a claim by the applicant could therefore result only from the applicable national law. As the matter has a cross-border element due to the damage having occurred in Spain, this law is to be determined according to the rules of private international law. In the specific case, it can be left open here whether the applicant's claim is to be categorised as contractual or non-contractual, since all the relevant conflict-of-law rules point to Austrian law: If categorised as contractual (for claims directly based on the Regulation, Court of Justice, C-274/16, C-447/16 and C-448/16, *flightright GmbH and Others*), the application thereof would result from Article 5(2) of the Rome I Regulation (habitual residence of the applicant and place of destination of the transport in Austria), and if categorised as non-contractual from Article 4(2), in

conjunction with Article 23(1), of the Rome II Regulation (habitual residence of the applicant and the air carrier in Austria). An implied choice of this law under Article 3(1), in conjunction with Article 5(2), of the Rome I Regulation or under Article 14(2) of the Rome II Regulation could also be derived from the fact that both parties have submitted arguments regarding provisions of Austrian law ...

2.4. Under Austrian law, the liability of the air carrier requires it to be possible for negligent conduct of the hotel employees to be attributed thereto. A possible basis for this is Paragraph 1313a of the ABGB, according to which any party obliged to provide another party with a service is to be liable for any fault on the part of those persons whom it employs for fulfilling that obligation. Although that provision primarily covers the breach of contractual duties, according to established case-law it is [Or. 11] also to be applied to the breach of duties resulting from a special legal relationship absent the existence of a contract ... Such a special relationship exists here on the basis of the duty of assistance under Article 5(1)(b), in conjunction with Article 9(1)(b), of Regulation (EC) No 261/2004.

2.5. However, the conduct of a person will be attributed to the party owing the obligation only if that person is active in the performance of the duties incumbent on the party owing the obligation ... The actual duty of the air carrier in the specific case is therefore of decisive importance. As this duty results from Article 5(1)(b), in conjunction with Article 9(1)(b), of Regulation (EC) No 261/2004, this is a question of EU law. In the opinion of the present Chamber, there are two possible interpretations:

(a) On the one hand, the air carrier might be obliged only to organise the overnight stay, that is to say, to provide a hotel and cover the costs. The contracting partner of the hotel operator would in this case be the passenger himself, at most represented by the air carrier in the conclusion of the contract. In this case, the air carrier would be liable for fault only in the selection of the hotel; the passenger, by contrast, would have to assert claims for damages due to negligent conduct of hotel employees against the hotel operator. Fault in selection cannot be identified in the specific case, including in consideration of Article 9(3) of Regulation (EC) No 261/2004 (attention to the needs of persons with reduced mobility). The action would therefore have to be dismissed. [Or. 12]

(b) On the other hand, it could be argued that the air carrier is liable for the accommodation as such. This accommodation could possibly take place in a hotel of the undertaking itself, or otherwise through the air carrier concluding contracts with third-party hotel operators for this purpose. In this case, the air carrier employed the hotel operator to perform its own duties. Under Austrian law, this would lead to liability for negligent conduct of the hotel employees, with the air carrier having to prove lack of fault in the case of an objective deficiency in the sphere of the hotel ..., since, according to established case-law, an independent undertaking and the employees thereof may also be persons whom a party employs to perform its own duties and therefore has to assume liability for any

fault on their part The liability would also not be excluded by the fact that the air carrier is unable to issue more detailed instructions to the hotel employees or to monitor their conduct

2.6. However, in the opinion of the Oberster Gerichtshof, the interpretation that the air carrier is liable for the accommodation as such is also possible.

Although the wording of Article 9(1)(b) of Regulation (EC) No 261/2004 requires only that hotel accommodation be ‘offered’, which could indicate a mere duty to provide a hotel and cover the costs, the Regulation, according to recital 1 thereof, pursues the objective of ensuring a high level of protection for passengers. Such a level of protection would [Or. 13] not be guaranteed if the air carrier in fact only had those limited duties, since in that case the passenger would be the contracting partner of the hotel operator and would have to bring compensation claims due to defective performance against the latter. The court for his place of habitual residence would then only be available thereto for this purpose, if the conditions of Article 17 of the Brussels Ia Regulation were met (direction of the activity of the hotel operator to the State of the consumer); otherwise the passenger would have to take action in the State of the hotel operator under Article 4 of the Brussels Ia Regulation. By contrast, the court with jurisdiction for the place of arrival is usually available for actions against the operating air carrier (Court of Justice, C-204/08, *Rehder*; most recently, C-274/16, C-447/16 and C-448/16, *flightright GmbH and Others*), which would make the pursuit of claims considerably easier. Conversely, the air carrier would not be disproportionately burdened by a duty to pay damages, because it would in any event not ultimately have to bear the loss in the case of liability, but could take recourse in accordance with its contract with the hotel operator. As the passenger had to stay overnight in the hotel provided by the air carrier only because of an (at least objective) deficiency in the sphere of the latter, it would seem logical to impose the risk of foreign proceedings and the recoverability of a recourse claim on the undertaking and not on the passenger.

2.7. Liability under Austrian law thus depends on the preliminary question under EU law as to the extent of the air carrier’s duties under Article 5(1)(b), in conjunction with Article 9(1)(b), of Regulation (EC) No 261/2004. This is intended to be clarified by Question 2.

C. Procedure [Or. 14]

1. There is no *acte clair* or case-law of the Court of Justice of the European Union in respect of either Question 1 or Question 2. The Oberster Gerichtshof, *qua* court of last instance, therefore has an obligation to refer.

2. The proceedings concerning the appeal brought by the applicant are to be stayed pending the ruling by the Court of Justice of the European Union.

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