

Anonymised version

Translation

C-826/19 — 1

Case C-826/19

Request for a preliminary ruling

Date lodged:

13 November 2019

Referring court:

Landesgericht Korneuburg (Austria)

Date of the decision to refer:

29 October 2019

Applicant and appellant:

WZ

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, **WZ** [...], against the defendant, **Austrian Airlines AG** [...], concerning EUR 250.00 plus interest and costs [...], on appeal by the applicant against the judgment of the Bezirksgericht Schwechat (District Court of Schwechat, Austria) of 24 June 2019 [...], has made the following

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 Article 8(3) 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 ('the Air Passenger Rights Regulation') to be interpreted as meaning that it is applicable to two airports which are both located in the [Or. 2] immediate vicinity of a city centre, but only one of them is located in the territory of the city and the other is located in a neighbouring federal *Land*?

2. Are Article 5(1)(c), Article 7(1) and Article 8(3) of the Air Passenger Rights Regulation to be interpreted as meaning that, in the event that a flight lands at an alternative airport of destination in the same town, city or region, there is a right to compensation owing to cancellation of the flight?

3. Are Article 6(1), Article 7(1) and Article 8(3) of the Air Passenger Rights Regulation to be interpreted as meaning that, in the event that a flight lands at an alternative airport in the same town, city or region, there is a right to compensation owing to a long delay?

4. Are Articles 5, 7 and 8(3) of the Air Passenger Rights Regulation to be interpreted as meaning that, in order to determine whether a passenger has suffered a loss of time equal to or in excess of three hours within the meaning of the judgment of the Court of Justice of the European Union of 19 November 2009 in Joined Cases C-402/07 and C-432/07, *Sturgeon and Others*, the delay must be calculated on the basis of the point in time at which the flight lands at the alternative airport of destination or the point in time at which the passenger is transferred to the airport of destination for which the booking was made or to another close-by destination agreed with the passenger?

5. Is Article 5(3) of the Air Passenger Rights Regulation to be interpreted as meaning that an air carrier which operates flights as part of a flight rotation system may rely on an incident — specifically on a reduction of the arrival rate brought about by stormy weather conditions — which occurred in relation to the flight three flights back in the rotation sequence of the flight concerned?

6. Is Article 8(3) of the Air Passenger Rights Regulation to be interpreted as meaning that, in the event that a flight [Or. 3] lands at an alternative airport of destination, the air carrier must take the initiative to offer transport to a different location, or the passenger must request the transport?

7. Are Article 7(1), Article 8(3) and Article 9(1)(c) of the Air Passenger Rights Regulation to be interpreted as meaning that the passenger has a right to compensation owing to a breach of the obligations to provide assistance and care provided for in Articles 8 and 9?

II. The proceedings are stayed pending delivery of the preliminary ruling of the Court of Justice of the European Union.

Grounds:

The following facts are undisputed or [...] have been established:

The applicant had a confirmed booking for two flights operated by the defendant: flights OS 940 departing from Klagenfurt (KLU) at 6:35 p.m. on 21 May 2018 and arriving at Vienna (VIE) at 7:20 p.m. on 21 May 2018, and OS 239 departing from Vienna (VIE) at 9:00 p.m. on 21 May 2018 and arriving at Berlin-Tegel (TXL) at 10:20 p.m. on 21 May 2018. The defendant redirected flight OS 239 from Berlin-Tegel to Berlin-Schönefeld (SXF), meaning that the actual flight times were as follows: departure from Vienna (VIE) at 10:07 p.m. on 21 May 2018 and arrival at Berlin-Schönefeld (SXF) at 11:18 p.m. on 21 May 2018. The distance from Vienna to Berlin-Tegel/Berlin-Schönefeld is less than 1 500 km, and the distance from Klagenfurt has not been established. The reason for the redirection of the flight from Berlin-Tegel to Berlin-Schönefeld was that the flight had exceeded the curfew imposed by the ban on night flights at Berlin-Tegel by three minutes. The cause of the delay in departure was the fact that the [Or. 4] flight three flights back in the rotation sequence of the flight at issue should have taken off from Berlin-Tegel at 2:40 p.m. and landed in Vienna at 3:45 p.m., and, owing to stormy weather in Vienna, Eurocontrol allocated the defendant a slot in Vienna for 3:53 p.m. The other flights — two flights back and one flight back in the rotation sequence of the flight at issue — were operated largely as scheduled, but it was not possible to make up for the delay. The defendant did not offer the applicant alternative transport from Berlin-Schönefeld airport to Berlin-Tegel airport. It takes the applicant 41 minutes to get home from Berlin-Schönefeld airport and 15 minutes from Berlin-Tegel airport.

The applicant requested that the defendant pay EUR 250 as compensation pursuant to Article 5 in conjunction with Article 7 of the Air Passenger Rights Regulation. He bases this firstly on the delayed arrival of the flight and secondly on the fact that he had not been offered onward transport from Berlin-Schönefeld airport to Berlin-Tegel. According to the applicant, Article 8(3) of the Air Passenger Rights Regulation was not applicable, because Berlin-Schönefeld Airport was not located in Berlin.

The defendant contested the head of claim, requested that the action be dismissed, and argued that the applicant had reached his final destination of Berlin with a delay of 58 minutes; Berlin-Schönefeld airport was located a mere 24 km from the applicant's home address, and Berlin-Tegel airport was located just under 8 km from the applicant's home address. In both cases, the applicant would have needed to use a means of transport to get home. Furthermore, the defendant based its reasoning on the fact that there were extraordinary circumstances within the meaning of Article 5(3) of the Air Passenger Rights Regulation; there had been serious weather problems that had led to the delay.

The District Court of Schwechat dismissed the action and stated that a change of airport from Berlin-Tegel to Berlin-Schönefeld was not to be regarded as [Or. 5] a

significant change to the flight route, meaning that a cancellation of the flight could not be assumed. The delay did not last three hours or more. There was no entitlement pursuant to Article 8(3) of the Air Passenger Rights Regulation, because the passenger had not provided details of what costs he had incurred as a result of the transfer.

The applicant's appeal is directed against that judgment, on the ground that the legal assessment was incorrect, requesting that the contested judgment be amended to the effect that the form of order sought be allowed.

In its response to the appeal, the defendant requests that the appeal be dismissed.

The Regional Court of Korneuburg, sitting as an appellate court, is called on to rule on the applicant's claims at second and final instance.

According to the case-law of the Court of Justice (judgments of 9 July 2009 in Case C-204/08, *Rehder*, paragraph 47, and of 7 March 2018 in Joined Cases C-274/16, C-447/16 and C-448/16, *flightright and Others*, paragraph 48), the fact that neither the initial place of departure nor the final place of arrival in the applicant's journey is located in the territorial jurisdiction of the District Court of Schwechat means that the jurisdiction for the place of performance pursuant to Article 7(1) of Regulation (EU) No 1215/2012 does not exist; this circumstance can no longer be invoked, however, because the defendant entered an appearance in the proceedings within the meaning of Article 26(1) of Regulation (EU) No 1215/2012.

The decision hinges on the interpretation of provisions of the Air Passenger Rights Regulation, the content of which is not so obvious as to assume that this is a case of *acte clair*. The case essentially concerns the interpretation of Article 8(3) of the Air Passenger Rights Regulation, and specifically the questions of whether that provision is applicable to the specific case, whether the facts are to be interpreted as a cancellation, delay or separate situation, whether or not it is possible to invoke extraordinary circumstances and whether there is a right to compensation owing to **[Or. 6]** a breach of the obligations to provide assistance and care.

The questions in detail:

Question 1:

Both the originally scheduled airport of destination, Berlin-Tegel, and the airport used after the change to the flight schedule, Berlin-Schönefeld, are regarded as Berlin airports, but only Berlin-Tegel is located in the city of Berlin. According to the findings of the court at first instance, it takes 41 minutes to get from Berlin-Schönefeld airport to the applicant's home, and 15 minutes from Berlin-Tegel airport. The question of whether the two airports are located within one region is assessed differently by the two parties to the dispute. The appellate court provisionally assumes that Article 8(3) of the Air Passenger Rights Regulation is applicable because the case concerns several airports within one region,

irrespective of the fact that they are located in different federal *Länder*. The appellate court bases this on the fact that, typically, international airports of large cities are not built in the city centre, but on the outskirts of the city or outside the territory of the city.

Questions 2 and 3:

The applicant is entitled to compensation if one of the interruptions in service referred to in the regulation occurs. Denied boarding need not be examined; rather, the question to be considered is whether the redirection of the flight to an alternative airport of destination in the same region is to be regarded as a cancellation of the flight or as delayed operation of the flight. The statements of the Court of Justice in the judgment of 13 October 2011 in Case C-83/10, *Sousa Rodriguez and Others*, paragraph 30, according to which a cancellation is to be assumed where the planning for the original flight is abandoned, support the solution of regarding the facts of the case as a cancellation. However, the District Court of [Or. 7] Schwechat takes the view that the facts of the case are to be regarded as a delay in arrival, because the passenger reached the final destination, namely the city of Berlin, albeit with a delay. Finally, there is the possibility that Article 8(3) of the Air Passenger Rights Regulation governs a separate case of interruption in service which is to be regarded as neither a cancellation nor a delay in arrival. The appellate court comes to this conclusion based on the consideration that, otherwise, the provision would be devoid of scope. The right to be transferred to the original airport of destination or to another destination could just as well be based on Article 8(1) or Article 9(1)(c) of the Air Passenger Rights Regulation. If one were to attribute a scope of application to Article 8(3) of the Air Passenger Rights Regulation, it would be concluded that the provision confers on the passenger only a right to be transferred to the original airport of destination or to another destination, but not the other rights provided for in the event of cancellation or delay, in particular the right to compensation, which has not been asserted in this specific case. It would not be necessary to assess whether extraordinary circumstances within the meaning of Article 5(3) of the Air Passenger Rights Regulation exist.

Question 4:

If the Court of Justice concludes that a case of delay is involved here, the problem of calculating the delay arises. In view of the fact that Article 8(3) of the Air Passenger Rights Regulation expressly takes account of the original airport of destination or another agreed destination, it would seem logical for the calculation of the delay to be bounded not by making the landing at the alternative airport decisive, but rather the point in time at which the passenger reaches the original airport of destination or another agreed destination. Although the District Court of Schwechat assumes that the delay in arrival did not last three hours under any circumstances, it overlooks the fact that the applicant's initial place of departure [Or. 8] was Klagenfurt, and the journey began in Klagenfurt (KLU) at 6:35 p.m.

on 21 May 2019 (judgment of the Court of Justice of 26 February 2013 in Case C-11/11, *Folkerts*, paragraph 47).

Question 5:

If the Court of Justice concludes that there is a right to compensation due to cancellation or long delay in arrival, consideration should be given to the defendant's argument that the cancellation/delay is attributable to an extraordinary circumstance. As far as is apparent to the appellate court, it has not yet been clarified by the case-law of the Court of Justice whether incidents which have occurred in relation to the flight three flights back in the rotation sequence of the flight concerned entitle the air carrier to attribute a cancellation or long delay to such an incident, even if it occurred on the same day (see recital 15 of the Air Passenger Rights Regulation). The reduction of the number of slots in the present case was undoubtedly the cause of the failure of the defendant's plan to be able to operate the flight to Berlin-Tegel before the ban on night flights came into effect. However, in order to ensure a high level of protection for passengers, it is necessary to examine whether there should be a restriction to a closer temporal connection (irrespective of recital 15 of the Air Passenger Rights Regulation) or a number of rotations in the flight rotation system.

Question 6:

The defendant did not provide the applicant with the transport provided for pursuant to Article 8(3) of the Air Passenger Rights Regulation. The appellate court takes the view that it is irrelevant that the applicant would have required onward transport to his home in any event. It could be that he parked his vehicle at the original airport of destination or organised his journey home by other means, meaning that, irrespective of the short distance from Berlin-Schönefeld airport to his home, he still has an interest in **[Or. 9]** onward transport to Berlin-Tegel airport. The German-language literature proceeds on the basis that the provision of care such as meals and refreshments, hotel accommodation, and also transport between the airport and the passengers' place of accommodation must be offered, and this is interpreted in such a way that the air carrier must provide these services on its own initiative, not only at the request of the passengers [...]. Article 8 of the Air Passenger Rights Regulation is generally regarded as the provision of assistance and is distinguished from the provision of care under Article 9 of the Air Passenger Rights Regulation. Owing to the proximity between the provision of transport under Article 9(1)(c) of the Air Passenger Rights Regulation and the right to transport pursuant to Article 8(3) of the Air Passenger Rights Regulation, the appellate court provisionally assumes that the air carrier must offer this service to the passenger even if it is not requested (see also the Opinion of Advocate-General Sharpston in Case C-83/10, *Sousa Rodriguez and Others*, paragraph 62).

Question 7:

If it is assumed that the defendant air carrier has failed to discharge its obligation to provide transport to the original airport of destination or to another destination, it has breached its obligation under Articles 8 and 9 of the Air Passenger Rights Regulation. National courts assume that a breach of the obligation to provide assistance and care will (only) render the air carrier liable to pay compensation (e.g. Amtsgericht Königs Wusterhausen (Local Court of Königs Wusterhausen), 2 February 2017, 4 C 1350/16 [...]). However, the appellate court infers from the statements of the Court of Justice in the judgment of 13 October 2011 in Case C-83/10, *Sousa Rodriguez and Others*, paragraph 44, that a breach of the obligation to provide assistance and care (also) results [**Or. 10**] in passengers being entitled to compensation (Regional Court of Korneuburg, 7 September 2017, 21 R 246/17z [...]). As the views taken by the national courts on this matter differ, it requires clarification from the Court of Justice of the European Union.

[...] [Stay of proceedings]

Regional Court of Korneuburg [...]

Korneuburg, 29 October 2019

[...]

[...] [Signature]

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