

Anonymised version

Translation

C-146/20 — 1

Case C-146/20

Request for a preliminary ruling

Date lodged:

20 March 2020

Referring court:

Landgericht Düsseldorf (Germany)

Date of the decision to refer:

17 February 2020

Applicants and appellants:

AD

BE

CF

Defendant and respondent:

Corendon Airlines

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[...]

Landgericht Düsseldorf (Regional Court, Düsseldorf)

Order

In the case of

EN

1. Mr AD, [...] Ratingen,
2. Mrs BE, [...] Ratingen,
3. Child CF, [...] Ratingen,

applicants and appellants,

[...]

v

Corendon Airlines, [...] Muratpasa/Antalya, Turkey

defendant and respondent,

[...]

On 17 February 2020, the 22nd Civil Chamber of the Regional Court, Düsseldorf
[...]

made the following order:

The proceedings are stayed.

The following questions on the interpretation of EU law are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU: **[Or. 2]**

1. Is there a cancellation of a flight within the meaning of Article 2(l) and Article 5(1) 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 (OJ 2004 L 46, p. 1) where the operating air carrier brings forward a flight, which has been booked as part of a package tour, from the scheduled departure time of 10.20 (LT) to 8.40 (LT) on the same day?
2. Is a notification, 10 days prior to the start of the journey, about the bringing forward of a flight from 10.20 (LT) to 8.40 (LT) on the same day an offer of re-routing within the meaning of Article 5(1)(a) and Article 8(1)(b) 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 (OJ 2004 L 46, p. 1)?

Grounds

I.

The applicants booked, through a travel agency, a package tour to Antalya, Turkey, offered by tour operator Öger Tours GmbH. They received a confirmed booking for the flight departing on 18 May 2018 from Düsseldorf to Antalya (CAI 5408) with the defendant air carrier. The scheduled departure time was 10.20 (LT) and the scheduled arrival time 14.50 (LT). The defendant air carrier brought the flight forward to 8.40 (LT) on the same day, while maintaining the same flight number. The applicants, who were not there at the rescheduled departure time, booked flights to Antalya through their travel agency, spending EUR 380.44 for each of the first two applicants and a further EUR 318.44 for the third applicant. There is a dispute between the parties as to whether the applicants were informed by an email from the tour operator on 8 May 2018 that the flight had been brought forward.

The applicants brought a claim against the defendant air carrier for compensation amounting to EUR 400.00 each pursuant to Article 5(1)(c) and Article 7(1)(b) of [Or. 3] Regulation (EC) No 261/2004 of the [European] Parliament and of the Council 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') and for reimbursement of the costs incurred for the replacement flights plus default interest.

The Amtsgericht (Local Court) dismissed the claim, stating that bringing the flight forward by 1 hour and 40 minutes does not constitute a cancellation of the flight within the meaning of Article 5(1)(c) and Article 7(1)(b) of the Air Passenger Rights Regulation. It referred to the press release of the Bundesgerichtshof (Federal Court of Justice) No 89/2015 on the judgment by consent of 9 June 2015 [...], according to which there is a cancellation of a scheduled flight, which could give rise to a right to compensation, where that flight is brought forward by a period of time that is more than negligible. According to the Local Court, the bringing forward of a flight by 1 hour and 40 minutes in no way constitutes a bringing forward by a period of time that is more than negligible, whereby the original flight planning is abandoned. It is therefore irrelevant whether the applicants were informed in good time about the flight being brought forward. Owing to the absence of a contractual relationship between the parties, there is no discernible basis for entitlement to the costs incurred for the replacement flights.

II.

That does not stand up to legal scrutiny if the bringing forward of the flight by 1 hour and 40 minutes implies the non-operation of that flight within the meaning of Article 2(1) of the Air Passenger Rights Regulation and the notification about

the flight being brought forward does not constitute an offer of re-routing in accordance with Article 8 of the Air Passenger Rights Regulation.

1.

If it is found that there was a cancellation of the flight owing to it being brought forward, the applicants could be entitled to compensation under Article 5(1)(c) and Article 7(1)(b) of the Air Passenger Rights Regulation amounting to EUR 400.00 each if the passengers were not informed in good time for the purpose of Article 5(1)(c)(ii) of the Air Passenger Rights Regulation, which remains to be established. The defendant air carrier has not contended that there were extraordinary circumstances within the meaning of Article 5(3) of the Air Passenger Rights Regulation. **[Or. 4]**

2.

In addition, if it is accepted that there was a cancellation, the applicants could each have a claim for reimbursement of the costs incurred for the replacement flights under Paragraph 280(1) of the Bürgerliches Gesetzbuch (German Civil Code; ‘the BGB’) in conjunction with Article 5(1)(a) and Article 8(1)(b)(2) of the Air Passenger Rights Regulation.

Under Article 8(1)(b) and (c) of the Air Passenger Rights Regulation, the operating air carrier is to offer passengers in the event of cancellation of a flight, besides reimbursement of the cost of the ticket, re-routing, under comparable transport conditions, to their final destination at the earliest opportunity or at a later date at the passenger’s convenience, subject to availability of seats. According to the facts, which are not disputed, the defendant did not offer the applicants — who only arrived at the airport in time for the original departure time — any (future) replacement flights and also did not fully inform them about all of the options provided for in Article 8(1) of the Air Passenger Rights Regulation (see judgment of the Court of Justice of the European Union 29 July 2019, C-354/18 [...]).

However, should the flight which was brought forward constitute the earliest possible re-routing in accordance with Article 8(1)(b) of the Air Passenger Rights Regulation, the defendant air carrier will have complied with its obligations with the result that the applicants have no claim for reimbursement of the costs of the replacement flights if they received the information about the flight being brought forward from the tour operator on 8 May 2018, which remains to be established.

III.

The success of the applicants’ appeal depends crucially on whether the bringing forward of the flight by 1 hour and 40 minutes implies the non-operation of that flight within the meaning of Article 2(1) of the Air Passenger Rights Regulation. Furthermore, in the event that the communication of 8 May 2018 was received, the issue is whether the notification about the flight being brought forward

constitutes an offer of re-routing within the meaning of Article 8(1)(b) and (c) of the Air Passenger Rights Regulation.

1.

According to the legal definition in Article 2(1) of the Air Passenger Rights Regulation, ‘cancellation’ means the non-operation of a flight which was previously planned and on which at least one place was reserved. The ‘non-operation’ of a flight which was previously planned is to be distinguished from a ‘delay’ and is characterised by the fact that the planning for the original flight is abandoned (see judgment of the Court of Justice of the European Union of 19 November 2009, C-402/07 and C-432/07, *Sturgeon and Others v Condor and Böck and Others v Air France SA*, [...] paragraphs 33 et seq.). It has not yet been clarified by the Court of Justice whether the planning [Or. 5] for a flight is to be regarded as abandoned if the flight is brought forward by 1 hour and 40 minutes.

2.

The comparable transport conditions under Article 8(1)(b) and (c) of the Air Passenger Rights Regulation relate to the flight which was originally booked and therefore to that contract of carriage by air. Another issue not yet clarified is whether a flight which has been brought forward by 1 hour and 40 minutes is comparable in that sense to the flight which was originally booked and constitutes the earliest possible re-routing, so that the defendant air carrier fulfils its obligations under that provision by providing notification 10 days prior to the start of the journey.

IV.

[...]