

Case C-164/20**Request for a preliminary ruling****Date lodged:**

20 April 2020

Referring court:

Landesgericht Korneuburg (Austria)

Date of the decision to refer:

27 February 2020

Appellant:

Airhelp Limited

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 appellant **Airhelp Limited**, Central Hong Kong, [...] versus the respondent **Austrian Airlines AG**, [...] Vienna Airport, [...] concerning **EUR 1 200.00** [...], on appeal by the appellant against the judgment of the Bezirksgericht Schwechat (District Court of Schwechat, Austria) of 21 October 2019 [...], has made the following

Order

[1] The following question is referred to the Court of Justice of the European Union for a **preliminary ruling** pursuant to Article 267 TFEU:

Are Articles 5, 6 and 7 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 to be interpreted as meaning that the illness

and associated unfitness to fly, as diagnosed by an airport doctor, of a passenger who has already boarded an aircraft which has not yet taken off **[Or. 2]** — after which the air carrier refuses to carry that passenger, with the result that the passenger must leave the aircraft and his baggage must be unloaded — must be regarded as an ‘extraordinary circumstance’ within the meaning of Article 5(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?

[2] The proceedings are stayed pending delivery of the preliminary ruling of the Court of Justice of the European Union.

G r o u n d s

I. Main proceedings:

a. The following **facts** are undisputed [...]:

R***** M***** and H***** M***** had a confirmed reservation with the respondent for the following flights:

- OS 872 from Tehran (IKA) to Vienna (VIE); scheduled to depart at 3:50 a.m. on 9 January 2018; scheduled to arrive at 6:00 a.m. on 9 January 2018;
- OS 451 from Vienna (VIE) to London (LHR); scheduled to depart at 6:40 a.m. on 9 January 2018; scheduled to arrive at 8:15 a.m. on 9 January 2018;
- AC 8283 from London (LHR) to Halifax (YHZ); scheduled to depart at 11:10 a.m. on 9 January 2018; scheduled to arrive at 2:00 p.m. on 9 January 2018. **[Or. 3]**

Flight OS 872 was delayed by 53 minutes and did not actually take off from IKA until 4:30 a.m. on 9 January 2018 and it landed in VIE at 6:53 a.m. The flight from IKA to YHZ covers a distance of more than 3 500 km.

A proportion of 40 minutes of the delay to flight OS 872 was attributable to the following events: After boarding in IKA had commenced, and only once she was on board, the senior crew member of the respondent noticed that a passenger was clearly in a poor state of health. According to the respondent’s operations manual, persons who are deemed to be unfit to fly due to health-related impairments must not be transported. There are exceptions to this rule if the passenger is carrying a medical document, but this was not the case here. The senior crew member consulted with the airport doctor to check her initial assessment. He also considered the passenger to be unfit to fly, as a result of which the respondent refused to carry the passenger. The passenger had to disembark the aircraft and his luggage also had to be unloaded. The precise nature of the health-related impairment could not be established.

Flight OS 872 was delayed for a further 13 minutes, although the reasons for this could not be established.

The minimum connecting time at VIE Airport is 25 minutes. Had the flight been delayed by only 13 minutes, and had the further delay of 40 minutes not occurred, the passengers could have made their connecting flight.

b. The **appellant** seeks compensation of EUR 1 200 plus interest pursuant to Article 5 in conjunction with Article 7 of Regulation (EC) No 261/2004 [**Or. 4**] 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.

As its grounds, it submits — in so far as still relevant to the appeal proceedings — that R***** M***** and H***** M***** had assigned their claims to it, and it had accepted them. Flight OS 872 had been delayed, meaning that R***** M***** and H***** M***** missed their connecting flight and reached their destination with a delay of more than three hours. There were no extraordinary circumstances, in particular poor weather conditions, or other grounds for exclusion under that regulation.

c. The **respondent** requests that the action be dismissed. It submits — to the extent relevant to the appeal proceedings — that a four-year-old (H***** M*****) could not submit a legally effective declaration of assignment. The delay to flight OS 872 from IKA to VIE was caused by extraordinary circumstances, because, on 9 January 2018, a passenger on flight OS 872 fell ill or died and, as a result, the flight was delayed by 40 minutes.

d. The **court of first instance** dismissed the form of order sought in its entirety and, as its grounds, essentially stated that the illness or death of crew members did not generally constitute a sufficient ground within the meaning of Article 5(3) of Regulation (EC) No 261/2004, since that circumstance fell within the scope of the risks assumed by the air carrier. The illness or death of a passenger, on the other hand, had to be viewed differently, irrespective of whether that event occurred during the relevant flight [**Or. 5**] or during the preceding flight; this circumstance did not fall within the scope of the risks assumed by the air carrier, since only a general risk to life arose in that respect. In any event, it could not be expected that a passenger would be in such a poor state of health prior to the scheduled departure that he could not take the flight, and this also did not form part of the normal and expected processes of air travel. This circumstance could not have been avoided or controlled by the respondent, since the respondent had no influence on the state of health of the passenger. The respondent was not required to specify either the illness concerned or the degree of seriousness of that illness, because it was prohibited from collecting and storing health data on passengers for data protection reasons. If a passenger fell ill shortly before the scheduled departure, this constituted an extraordinary circumstance. The respondent subsequently took all necessary steps to disembark the passenger and unload his

luggage. In this situation, there were no reasonable measures that could have been taken to speed up the transportation of the other passengers. Making a replacement aircraft available or booking the passengers onto another flight would have led to even longer delays. The respondent therefore took all reasonable measures to ensure that passengers were transported with the shortest possible delay. The further delay of 13 minutes did not cause the passengers to miss the connecting flight.

e. The appellant's **appeal** is directed against that decision. It essentially submits that the [Or. 6] court of first instance's legal assessment was incorrect: the German Bundesgerichtshof (Federal Court of Justice, 'BGH') had already ruled on several occasions that the legislature did not allow every unavoidable event to suffice as an extraordinary circumstance, but rather only those that were not in line with the normal course of events, that is to say went beyond the normal and expected processes of air travel. Therefore, neither the death nor the illness of a passenger was to be regarded as an extraordinary circumstance, since such events are not rare in the day-to-day happenings of air transport. Particularly on long-haul flights, such as that in the present case, the illness of a passenger was therefore likely, for the simple reason that long-haul flights carried a relatively high number of passengers. It should be noted that appropriate procedures were put in place for such situations. The operations manual contained a process for dealing with passengers who had fallen ill, and this demonstrated that the respondent had to and also did expect that passengers would fall ill. For that reason alone, there was no extraordinary circumstance within the meaning of Regulation (EC) No 261/2004. Even if frequency alone was not a sufficient criterion for the existence of an extraordinary circumstance, both the frequency and the fact that there were predefined processes specifically for that purpose in any event constituted an indication that it was a normal occurrence in air transport. Another relevant factor was how much of the 40-minute delay was attributable to the disembarkation of the passenger and unloading of his baggage and how much time was spent on the actual medical intervention.

f. In its **response to the appeal**, the respondent requests that the appeal be dismissed, refers to decisions of German courts that deem the [Or. 7] illness of a passenger to be an extraordinary circumstance, and essentially endorses the content of the statements made by the court of first instance.

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

It should be noted in advance that, regarding the claims of R***** M*****, the question of effective assignment has been clarified. The question of whether there was also an effective assignment in relation to the claims of H***** M***** is not considered to be a question of EU law. For reasons pertaining to national procedural law, and based on the appellate court's legal considerations, it would be necessary to consider this question only if the Court of Justice of the European Union were to answer the question referred in the negative. The decision therefore

depends — at least with regard to R***** M***** — on the interpretation of the provisions of Article 5(3) of Regulation (EC) No 261/2004.

II. The question referred:

In application of the EU case-law to date, the Regional Court of Korneuburg, sitting as an appellate court, assumes that an event always constitutes an ‘extraordinary circumstance’ under Article 5(3) of Regulation (EC) No 261/2004 if it is caused by an occurrence which is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin (C-549/07, C-402/07, C-432/07, C-12/11, C-257/14).

Furthermore, there are numerous divergent decisions of Austrian and German courts concerning the question of whether a medical emergency caused by the [Or. 8] illness of a passenger constitutes an extraordinary circumstance within the meaning of Article 5(3) of Regulation (EC) No 261/2004. This alone shows that the content of that provision is not so obvious as to assume that this is a case of *acte clair*.

A further differentiation as to what proportion of the 40-minute delay is attributable to the actual medical intervention and what proportion is attributable to the disembarkation of the passenger and unloading of his baggage does not appear to be necessary to the appellate court, especially since the disembarkation and unloading were a direct and unavoidable consequence of the outcome of the medical examination.

[...]

Korneuburg Regional Court, Section 22

Korneuburg, 27 February 2020

[...]