

Anonymised version

Translation

C-546/22 – 1

Case C-546/22

Request for a preliminary ruling

Date lodged:

16 August 2022

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

29 June 2022

Applicant:

GF

Defendant:

Schauinsland-Reisen GmbH

...

The Oberster Gerichtshof (Supreme Court, Austria), ruling on a point of law ... in the case opposing the applicant, GF, ... and the defendant, Schauinsland-Reisen GmbH, D-47051 Duisburg, ... concerning EUR 21 821.82 ... in the appeal on a point of law brought by the applicant against the judgment of the Oberlandesgericht Graz (Higher Regional Court, Graz, Austria), ruling on appeal on 27 January 2022, ... by which it upheld the judgment of the Landesgericht für Zivilrechtssachen Graz (Regional Civil Court, Graz, Austria) of 13 July 2021 ..., gives the following

Order

A. 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 12(3) of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (package travel directive) to be interpreted as meaning that, for an organiser to rely on unavoidable and extraordinary circumstances preventing performance of a contract, it is sufficient that the authority authorised in the customer's Member State to issue travel warnings has issued the highest-level warning for the destination country before the start of the proposed journey?

2. If the answer to Question 1 is in the affirmative:

Is Article 12(3) of Directive (EU) 2015/2302 to be interpreted as meaning that there are no unavoidable and extraordinary circumstances in a case where the traveller, who is aware of the travel warning and the uncertainty as to the subsequent development of the pandemic, has nevertheless stated that he wishes to proceed with the journey and that it would not have been impossible for the organiser to carry it out?

B. ... [Stay of proceedings]

G r o u n d s:

1. On 13 May 2020, the applicant, a medical consultant in private practice, and his wife booked a package trip to the Maldives organised by the defendant for the period from 26 December 2020 to 2 January 2021 for a total price of EUR 8 620.

Owing to the COVID-19 pandemic, the Maldives received, at the latest from December 2020, a travel warning from the Austrian Ministry of Foreign Affairs at the highest level 6 ('warning against all tourist and non-essential travel to this country, including holidays and travel for the purpose of visiting family'). At that time, the seven-day incidence rate in the Maldives, at 34.7, was lower than in Austria, at 220.

On 3 December 2020, as a result of the travel warning, the defendant cancelled the booked trip. The applicant was informed of the reasons no later than 9 December 2020 and the deposit paid by him was refunded. The alternative travel offers made by the defendant did not meet the expectations of the applicant and his wife.

2. Forms of order sought and arguments of the parties

The applicant claims damages on his own behalf and on behalf of his wife for loss of holiday enjoyment and a fixed amount of costs. In addition, he seeks reimbursement of loss of earnings on the ground that he closed his practice because of the holiday booked from 23 December 2020 to 5 January 2021. He claims that it was no longer possible to reverse the closure at short notice after the cancellation. In his view, the Ministry's travel warning was not an unavoidable and extraordinary circumstance that would have prevented the defendant from

fulfilling the travel contract, especially since the seven-day incidence would have been more favourable in the Maldives, there was also sufficient medical care there and, moreover, the applicant and his wife had taken out travel health insurance.

The defendant contended that it could not reasonably have been expected to carry out the trip. It would have had to accept incalculable liability consequences if it had disregarded the travel warning issued by the Ministry of Foreign Affairs. It claims that, owing to the exit restrictions applicable in Austria from 26 December 2020, the applicant would not even have been allowed to start the journey. He did not suffer any loss of earnings as a result of the cancellation.

3. Earlier proceedings

The court of first instance dismissed the claim. The defendant relied on justified unavoidable and extraordinary circumstances for its termination. For that reason alone, no damages were due.

The court of appeal did not uphold the appeal brought by the applicant. Even if the travel warning were only regarded as an indication of extraordinary obstacles, the defendant was in any event not at fault in view of the uncertainty as to the development of the pandemic prevailing at the time of the cancellation.

The Supreme Court is called upon to decide the appeal on a point of law brought by the applicant. The defendant also takes the view in the appeal on a point of law proceedings that it was entitled to terminate the travel contract without any further obligation to pay compensation owing to unavoidable and unforeseeable circumstances in the form of the travel warning.

4. Legal basis

4.1. European Union law

Article 12(3) of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (package travel directive), is worded, in part, as follows:

‘The organiser may terminate the package travel contract and provide the traveller with a full refund of any payments made for the package, but shall not be liable for additional compensation, if:

(a) the number of persons enrolled for the package is smaller than the minimum number stated in the contract and the organiser notifies the traveller of the termination of the contract within the period fixed in the contract, ...

or

(b) the organiser is prevented from performing the contract because of unavoidable and extraordinary circumstances and notifies the traveller of the termination of the contract without undue delay before the start of the package. ...’

According to the definition in Article 3(12) of the package travel directive, ‘unavoidable and extraordinary circumstances’ means ‘a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken’.

4.2. Austrian law

According to the second case envisaged by Paragraph 10(3) of the Pauschalreisegesetz (Law on package travel), the organiser may terminate the package travel contract before the start of the package in return for a full refund of all payments made for the package, but without having to pay any additional compensation, ‘where the organiser is prevented from performing the contract owing to unavoidable and extraordinary circumstances and his notice of termination is received by the traveller without undue delay, but no later than before the start of the package’.

5. Questions referred for a preliminary ruling

5.1. In the case in question, approximately three weeks before the start of the booked trip, a travel warning of the highest level was issued, owing to the Covid 19 pandemic, by the Ministry of Foreign Affairs of the applicant’s country of residence, which was combined with a recommendation to the population to refrain from tourist travel to the booked destination.

Neither the course of the Covid 19 pandemic nor the issuing of the travel warning were under the control of the defendant organiser. It also clearly had no possibility of avoiding the consequences of the pandemic in general or the travel warning in particular by taking appropriate precautions of his own.

5.2. However, there is doubt as to whether the travel warning issued by a ministry on account of a pandemic situation constitutes, in itself, a circumstance which justified the defendant, as an organiser, to terminate the contract, on the ground that it indicates a high risk for safely carrying out the journey and that possible measures at the holiday location were to be expected which could have impeded the stay or return of travellers, or whether, as the applicant assumes, it is for the organiser to assess the situation itself, irrespective of the public warning, and to conduct a risk assessment, taking into account all the circumstances of the individual case.

For the relevance of the public travel warning, it could be argued that it is issued by an uninvolved qualified body and is unambiguous, with the result that the need of the relevant public for clarity and legal certainty is met. In addition, a State authority, in particular a Ministry of Foreign Affairs, usually has more reliable means of monitoring the risk situation than an undertaking.

On the other hand, an argument in favour of the interpretation put forward by the applicant would be that the official travel warning, in view of the constantly changing pandemic activity and the constantly shifting affectedness of the different regions of the world, may no longer be completely up-to-date and may not reflect the actual risk situation at the time of travel. The case-law has so far only upheld the ground of termination for the traveller (8 Ob 99/99p) but has not yet taken a position on a termination by the organiser.

5.3. The second question referred for a preliminary ruling seeks to ascertain whether the organiser may not rely on being ‘prevented from performing the contract owing to unavoidable and exceptional circumstances’, even where a highest-level travel warning is in place, where the performance of the trip would, in principle, be possible on account of the availability of the means of transport and accommodation booked and because the customer, aware of the travel warning, stated that he wished to accept the indicated risk or whether, in that case too, the organiser has a right of termination without any further obligation to pay compensation.

6. ... [Comments on the obligation to make a reference]

... [Stay of proceedings]

... Vienna, 29 June 2022 ...

WORKING DOCUMENT