

**Case C-385/23****Request for a preliminary ruling****Date lodged:**

22 June 2023

**Referring court:**

Korkein oikeus (Finland)

**Date of the decision to refer:**

22 June 2023

**Applicant:**

Passenger A

**Defendant:**

Finnair Oyj

**KORKEIN OIKEUS****ORDER**

[– –]

DATE

[– –]

22 June 2023

APPLICANT: Passenger A

DEFENDANT: Finnair Oyj

SUBJECT MATTER: Dispute concerning a contract for services

**DECISION OF THE KORKEIN OIKEUS (SUPREME COURT)***Subject matter of the proceedings*

- 1 This case concerns the interpretation of Article 5(3) of 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 (OJ 2004 L 46, p. 1). It falls to be decided whether the airline has an obligation to pay the passenger the lump-sum compensation provided for in Article 7 of Regulation No 261/2004, or whether the situation in question constituted an extraordinary circumstance, within the meaning of Article 5(3) of that regulation, which exempts [the airline] from the obligation to pay compensation and could not have been avoided even if all reasonable measures had been taken.

### *Relevant facts*

- 2 Passenger A had booked with Finnair Oyj a flight from Helsinki to Bangkok on 25 March 2016. The flight was to be operated by an Airbus A350 which had been in service for 5.5 months. During refuelling shortly before take-off, the system for measuring the quantity of fuel in the aircraft malfunctioned. That defect was considered so fundamental to the safety of the flight that the flight operated by the aircraft in question was cancelled and was operated by a replacement Finnair aircraft on 26 March 2016. The flight reached its destination some 20 hours late.
- 3 The type of aircraft used was new and the fault was unknown before the aforementioned incident during which the malfunction occurred for the first time anywhere in the world. Consequently, neither the aircraft manufacturer nor the air safety authority had reported the fault. The investigation into the cause of the malfunction was launched immediately. After about a day, the fault was rectified by removing the fuel from the fuel tank and refilling it. The aircraft was then airworthy again. Subsequent investigations by the aircraft manufacturer revealed that the aforementioned malfunction in the fuel quantity measurement system was due to a hidden design defect affecting the entire aircraft type.
- 4 The aircraft type in question continued to fly for several months before a software update in February 2017 eliminated the fault for good. Since then, there have been no further such malfunctions on the Airbus A350.

### *Procedure*

- 5 Passenger A brought before the Käräjäoikeus (District Court) an action against Finnair Oyj for lump-sum compensation in the amount of EUR 600 under Regulation No 261/2004. Finnair Oyj contested that action. It argued that the incident in question had been due to a hidden design defect which constituted for the airline an extraordinary circumstance within the meaning of Article 5(3) of that regulation. What is more, it had taken all reasonable measures.
- 6 The Käräjäoikeus considered that Finnair Oyj should have expected, when using a new aircraft type, to be faced with difficult to predict repair needs arising from design and manufacturing defects such as the one at issue. Such breakdowns are inherent in the normal activity of an airline, and the mere fact that the aircraft manufacturer had not given the airline any instructions on how to proceed in the

event of the occurrence of such a defect did not make that incident extraordinary. The Käräjäoikeus upheld the action.

- 7 Finnair Oyj appealed the judgment of the Käräjäoikeus to the Hovioikeus (Court of Appeal). The Hovioikeus found that there had been an unexpected flight safety shortcoming. In its view, since the malfunction was not inherent in the normal exercise of the activity of Finnair Oyj and was beyond the actual control of that carrier on account of its nature or origin, the incident constituted an extraordinary circumstance. The Hovioikeus released Finnair Oyj from the obligation to pay A compensation for the flight delay.
- 8 The Korkein oikeus allowed A's appeal to proceed. A reasserted his claim for compensation and Finnair Oyj contended that that claim should be dismissed.

*Applicable legislation*

- 9 According to Article 5(1)(c) of Regulation No 261/2004, subject to certain exceptions, passengers have the right to compensation by the operating air carrier in accordance with Article 7. According to Article 5(3) of that regulation, an operating air carrier is not to be obliged to pay compensation in accordance with Article 7 if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
- 10 In accordance with settled case-law of the Court of Justice of the European Union, passengers whose flights are delayed by three hours or more may be treated, for the purposes of the right to compensation provided for in Article 7 of the aforementioned regulation, as passengers whose flights are cancelled (judgment of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 69).
- 11 The term 'extraordinary circumstances' is not defined in the aforementioned regulation. Recital 14 of that regulation states that such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

*Need for the request for a preliminary ruling*

- 12 In the civil case pending before the Korkein oikeus, the adoption of a reasoned decision calls for the interpretation of Article 5(3) of Regulation No 261/2004 with respect to the conditions under which a hidden design defect may be regarded as an extraordinary circumstance. In that case, it has been noted that courts in other Member States of the European Union have also adopted decisions on claims for compensation for flight delays caused by the same defect.

- 13 The Court of Justice of the European Union has commented in several decisions on the question of whether technical problems constitute extraordinary circumstances. In its decision in *van der Lans* (judgment of 17 September 2015, *van der Lans*, C-257/14, EU:C:2015:618) the Court held that, since the functioning of aircraft inevitably gives rise to technical problems, air carriers are confronted as a matter of course in the exercise of their activity with such problems (paragraph 37). However, certain technical problems may constitute extraordinary circumstances. That would be the case in the situation where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety (paragraph 38). In the *van der Lans* case, the Court considered it relevant that neither the manufacturer of the aircraft in the fleet of the air carrier concerned nor a competent authority had disclosed that not only that specific aircraft but also others in the fleet were affected by a hidden manufacturing defect affecting the safety of flights (paragraphs 39 and 40).
- 14 In its more recent case-law, (see, for example, the judgment of 7 July 2022, *SATA International – Azores Airlines*, C-308/21, EU:C:2022:533, paragraph 25), the Court noted that, when it comes to assessing the concept of ‘extraordinary circumstances’, events whose origin is ‘internal’ must be distinguished from those whose origin is ‘external’ to the operating air carrier. That concept thus encompasses, by way of the occurrence of such ‘external’ events, those which result in part from the activity of the air carrier and in part from external circumstances which are more or less frequent in practice but which the air carrier does not control because they arise from a natural event or an act of a third party, such as another air carrier or a public or private operator interfering with flight or airport activity.
- 15 The assessment of the case to be disposed of here raises the question as to how the foregoing is to be interpreted in the case where the flight delay is attributable in the first place to a defect which occurred for the first time only on the aircraft concerned, which had not previously been discovered by either the aircraft manufacturer or the competent authority, but which was later identified by the manufacturer as being a hidden design defect affecting the entire new aircraft type.
- 16 The *Korkein oikeus* considers it to be open to interpretation whether a technical problem such as that at issue in the present case, which occurred on a new aircraft, is to be regarded as an ‘external’ or ‘internal’ event. Is an event to be classified as ‘external’ solely because it became apparent, after the defect had been identified, that other aircraft of the type concerned were also affected by the same flight security shortcoming? By extension, is the mere fact that the manufacturer subsequently discovered that the defect is a ‘type defect’ enough to render the circumstances extraordinary, or is the expression ‘act of a third party’ to be understood rather as referring, for example, to sudden flight bans for certain types of aircraft?

- 17 If a defect such as that at issue is not be regarded as an extraordinary circumstance solely because it became apparent, after the discovery of the defect that prevented the flight from operating, that other aircraft of the type concerned were affected by the same hidden defect, it falls to be examined whether such a defect, which occurred on one aircraft and was eventually rectified, may constitute an extraordinary circumstance on other grounds. In accordance with settled case-law of the Court of Justice of the European Union, in the case of technical problems, the extraordinary circumstances must concern an event which fulfils two cumulative conditions. First, the event must not be inherent in the normal activity of the air carrier concerned. Second, it must be beyond the actual control of that carrier on account of its nature or origin (see, for example, the judgment of 22 December 2008, *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 23).
- 18 The judgment in *Lans* (paragraphs 41 and 43) states that a breakdown caused by the premature malfunction of certain parts of an aircraft is intrinsically linked to the very complex operating system of the aircraft, which is operated by the air carrier in conditions which are often difficult or even extreme. In such a case, it is assumed that not even the prevention of such a breakdown or of the repairs occasioned by it is beyond the actual control of the air carrier concerned, since the latter is required to ensure the maintenance and proper functioning of the aircraft it operates for the purposes of its business. The Court has thus held, in judgments including that in *Finnair*, for example, that the premature, even unexpected, failure of certain parts of an aircraft does not constitute an extraordinary circumstance, since such a breakdown is, in principle, intrinsically linked to the operating system of the aircraft (see, for example, the judgment of 12 March 2020, *Finnair*, C-832/18, EU:C:2020:204, paragraph 41).
- 19 The question arises as to whether the abovementioned interpretation of the premature failure of certain parts of an aircraft also applies to a hidden manufacturing or design defect such as that at issue here, which occurred for the first time on a new aircraft type and the rectification of which required a software update. The defect in the present case differs from the hidden manufacturing or design defect discovered (in a technical follow-up) in the *Finnair* case inasmuch as neither the manufacturer nor the air carrier knew at the time when the flight was cancelled what had caused the defect in the new aircraft type at issue here or how it could be rectified. On the other hand, according to the evidence presented in this case, it is not unusual for a new aircraft type to have hidden defects during the initial phase of its entry into service.

#### *Questions referred for a preliminary ruling*

The Korkein oikeus, after giving the parties an opportunity to submit their observations on the content of the request for a preliminary ruling, has decided to stay the further proceedings and to seek from the Court of Justice of the European Union a preliminary ruling on the following questions:

**1. Can an air carrier rely on extraordinary circumstances within the meaning of Article 5(3) of Regulation No 261/2004 on the sole ground that the aircraft manufacturer discovered the existence of a hidden design defect detrimental to flight safety and affecting the entire aircraft type, even though that discovery was not made until after the flight was delayed and cancelled?**

**2. If the first question is answered in the negative, and it falls to be examined whether the circumstances in question are the result of events which are inherent in the normal exercise of the activity of the air carrier concerned and are not beyond the actual control of that carrier on account of their nature or origin, is the case-law of the Court of Justice of the European Union on the premature failure of certain technical parts of an aircraft applicable in a case such as that here, in which, at the time when the flight was cancelled, neither the manufacturer nor the air carrier knew the nature of the defect in the new aircraft type at issue or how it could be rectified?**

After receiving a preliminary ruling, the Korkein oikeus will give judgment in this case.

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