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Case C-49/22

Request for a preliminary ruling

Date lodged:

24 January 2022

Referring court:

Landesgericht Korneuburg (Austria)

Date of the decision to refer:

4 January 2022

Appellant, and defendant at first instance:

Austrian Airlines AG

Respondent, and applicant at first instance:

TW

[…]

The Landesgericht Korneuburg (Regional Court, Korneuburg, Austria), sitting as an appellate court, […] in the case of the applicant, **TW**, […] versus the defendant **Austrian Airlines AG**, […] Vienna Airport, […] concerning **EUR 1 000.00** […], on appeal by the defendant against the judgment of the Bezirksgericht Schwechat (District Court, Schwechat, Austria) of 13 April 2021, 26 C 276/20p-12, […] has made the following order:

[I] The following questions are referred to the Court of Justice of the European Union for a **preliminary ruling** under Article 267 TFEU:

(1) Must 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 (Air Passenger Rights Regulation) be interpreted as

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meaning that a repatriation flight operated in the exercise of the State's sovereign activity is also to be regarded as re-routing, under comparable transport conditions, to the final destination – as must be offered by the operating air carrier in the event of cancellation – where the operating air carrier cannot establish legal entitlement to transport the passenger but could register the passenger for that purpose and bear the costs and, by virtue of a contractual agreement with the State, ultimately operates the flight with the same aircraft and at the same flight times as scheduled for the flight originally cancelled?

(2) Must Article 8(1) of the Air Passenger Rights Regulation be interpreted as meaning that a passenger who registers himself or herself for a repatriation flight as described in Question 1 and who makes an obligatory contribution to costs to the State for that flight has a claim for reimbursement of those expenses against the air carrier, arising directly from the Air Passenger Rights Regulation, even if the costs do not consist exclusively of purely flight-related costs?

[II] […] [stay of proceedings]

GROUNDS:

A. Facts

The defendant is an Austrian air carrier. The applicant and his wife each had confirmed bookings for the flights OS 17 on 7 March 2020 from Vienna (VIE) to Mauritius (MRU) and OS 18 on 20 March 2020 from Mauritius (MRU) to Vienna (VIE), both flights being operated by the defendant. The two flights formed part of a package holiday for the applicants.

While flight OS 17 was operated as scheduled, the defendant cancelled flight OS 18 on 18 March 2020 due to the COVID-19 pandemic and the measures taken by the Austrian Federal Government in connection therewith. Although it had the contact details of the applicant and his wife, it did not contact them and accordingly did not inform them of their rights under Article 8(1) of the Air Passenger Rights Regulation. It was only on 19 March 2020 that the applicant and his wife received a call from the tour operator informing them of the cancellation and of a repatriation flight planned for 20 March 2020 by the Austrian Ministry of Foreign Affairs. No other scheduled flights were being operated at that time.

The applicant and his wife registered online for that flight on the website of the Ministry of Foreign Affairs. They each paid an obligatory contribution to costs of EUR 500 to the Ministry of Foreign Affairs. The flight was operated by the defendant under flight number OS 1024, at the same time as flight OS 18 had been scheduled. The defendant itself had no possibility to rebook passengers onto that repatriation flight, but could have registered the passengers on the website of the Ministry of Foreign Affairs and reimbursed the costs. The defendant received an undeterminable share of the EUR 500 that each passenger was required to pay.

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The applicant's wife assigned to him her claims arising from the cancellation of flight OS 18.

B. Arguments of the parties and forms of order sought

By action of 14 September 2020, the **applicant** initially claimed EUR 900, plus interest. He submitted that flight OS 18 had been operated by the defendant, but had been 'double-charged' for an amount of EUR 900. In a preparatory statement of written observations of 27 January 2021, the applicant increased his claim to EUR 1 000 plus interest, now arguing that, although the defendant had cancelled flight OS 18, it then operated it 'disguised as a government plane', for which the passengers had to pay an amount of EUR 500 each. Therefore, according to the applicant, the flight had been operated, but had been 'double-charged for an amount of EUR 500'. Contrary to Article 8(1)(b) of the Air Passenger Rights Regulation, the defendant not only did not offer or organise re-routing, but it even charged for the transport organised by the applicant himself. Since it breached its obligations under EU law in that regard, it was liable for the damage suffered by the applicant as a result of the fact that he had to find alternatives and solutions at his own expense.

The **defendant** sought the dismissal of the action, contested the claim, and responded by stating, in essence, that flight OS 18 had to be cancelled due to the COVID-19 pandemic. According to the defendant, the applicant reached his final destination through a repatriation operation carried out by the Ministry of Foreign Affairs; it did not itself charge him for this. The booking for flight OS 18 was made as part of a package tour; the applicant has not provided evidence of the ticket price for that booking, with the result that the claim is flawed. The defendant submits that the tour operator had not provided it with the applicant's contact details. The repatriation flight is not an alternative flight within the meaning of Article 3(3) of the Air Passenger Rights Regulation, because the fare for the flight was not available to the public. Other scheduled flights were not available. The Ministry of Foreign Affairs bore sole responsibility for the decision as to who was to be carried on the repatriation flight; therefore, the defendant itself was not able to rebook the applicant onto that flight.

C. Procedure to date

The **court of first instance** granted the principal claim in its entirety; it dismissed without challenge a minor additional claim for interest. It established the facts as summarised above and concluded, from a legal point of view, that the defendant had cancelled flight OS 18 and was obliged under Article 5(1)(a) of the Air Passenger Rights Regulation to offer assistance within the meaning of Article 8 of that regulation. According to that court, in the event of a breach of that obligation, passengers are entitled to assert a claim for compensation arising directly from EU law. The defendant failed to discharge its obligations by not informing the passengers of the cancellation and the choice offered to them under Article 8 of

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the Air Passenger Rights Regulation, and it is liable for the damage suffered, in the amount of EUR 500 per passenger. The court stated that the declaration of assignment covers the assertion by the applicant of his wife's claims. Even if fault on the part of the defendant were necessary for the assertion of the claim for compensation, the defendant was at fault because it did not itself register the passengers on the website of the Ministry of Foreign Affairs or assume the costs of the repatriation flight.

The defendant's **appeal** is directed against that decision, with the request that the contested judgment be altered to the effect that the action is dismissed; in the alternative, an application for annulment is filed. To the extent relevant for the preliminary ruling procedure, the appellant submits that it cannot be accused of culpable conduct with a causal link with the damage suffered by the passengers. It claims that it did not have the possibility to rebook the passengers. Scheduled flights were no longer being operated and the repatriation flight did not constitute re-routing within the meaning of Article 8 of the Air Passenger Rights Regulation, because it was not able to influence the rebooking of passengers onto that flight. Rather, the flight was a sovereign measure taken by the State to bring citizens back home. According to the appellant, requiring an air carrier to register passengers for such flights exceeds its duty of care. Moreover, the EUR 500 per passenger is not a regular transport charge, but a contribution to costs that is charged by the Republic of Austria. The passengers would have had to pay the contribution to costs even if the defendant had informed them of the repatriation flight organised by the Ministry of Foreign Affairs. Even if that payment were to be regarded as damage, however, the event that caused the damage was the cancellation of flight OS 18. This, in turn, was necessary because of the COVID-19 pandemic and cannot be held against the appellant.

In his **response to the appeal**, the applicant requests that the appeal be dismissed. He argues, in essence, that the view taken by the court of first instance is correct.

The referring court, sitting as an **appellate court**, is called on to rule on the applicant's claims at second and final instance. In so doing, it must confine itself to examining questions of law, on the basis of provisions laid down in national procedural law.

D. Legal basis

The air carrier's obligation to provide assistance arises from the following provisions of the Air Passenger Rights Regulation:

> ***Article 5 – Cancellation***
>
> 1. In case of cancellation of a flight, the passengers concerned shall:
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(a) be offered assistance by the operating air carrier in accordance with Article 8; and

Article 8 – Right to reimbursement or re-routing

1. Where reference is made to this Article, passengers shall be offered the choice between:

(b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity;

E. Reasoning in the request for a preliminary ruling

Question 1

As a preliminary point, it should be stated that the provision of assistance in supporting and repatriating people in emergencies is, as part of consular protection, one of the consular tasks of the Republic of Austria (point 5 of Paragraph 3(2) of the Konsulargesetz (Consular Law; 'the KonsG')). The performance of such tasks is a sovereign activity of the State (see RIS-Justiz RS0132961). The defendant air carrier participated in that task as a contractual partner of the Republic of Austria, but had no influence on the decision-making of the latter.

The outcome of the dispute therefore hinges on the correct interpretation of the words 'offered' in Article 5(1)(b) of the Air Passenger Rights Regulation and 're-routing' in Article 8(1)(b) thereof.

The word 'offered' in Article 5(1)(b) of the regulation might be understood to mean that, although the operating air carrier is not obliged to provide the alternative transport itself, it must provide the passenger with legal entitlement to carriage which is enforceable against another air carrier. This is in line with the view expressed by some authors in the legal literature, according to which the air carrier must purchase tickets for the replacement flight and make them available to the passenger […]. Article 2(f) of the Air Passenger Rights Regulation defines 'ticket' as a valid document giving entitlement to transport, […] issued or authorised by the air carrier or its authorised agent.

This is the crux of the appellant's argument that it was not in a position to provide the passengers with such legal entitlement in the present case.

If the operating air carrier's obligation relates to the provision of legal entitlement, but it cannot provide such entitlement, it might be argued that a failure to take other measures, such as, in the present case, the registration of passengers for a repatriation flight, does not constitute a breach of the duties of assistance under Article 8 of the Air Passenger Rights Regulation and, consequently, there is also

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no connecting factor for a right to compensation within the meaning of the decision of the Court of Justice in Case C-83/10, *Rodriguez* v *Air France*.

However, the referring court considers that there are also arguments militating in favour of the view that the obligation under Article 8(1)(b) of the Air Passenger Rights Regulation is not limited to cases in which the air carrier can provide such legal entitlement.

On the one hand, the Court of Justice has stated, with regard to Article 9(1)(b) of the Air Passenger Rights Regulation, that that provision does not establish detailed rules governing the contractual relationships that may arise from the implementation of that obligation (C-530/19, *NM* v *ON* [paragraph 28]). Therefore, the Court of Justice ultimately found that the air carrier is not obliged under EU law to take care of the accommodation arrangements as such. Given that the two provisions pursue the same objective, that outcome could be transferred to the present case. Accordingly, it would appear to be correct that the air carrier's obligations are not limited to providing the passenger with a direct claim against a third party.

On the other hand, when interpreting the Air Passenger Rights Regulation, the Court of Justice has repeatedly referred to the objective following from recital 1 thereof to ensure a high level of protection for passengers, (C-74/19, *TAP* [paragraphs 54 and 58]; C-826/19, *WZ* v *Austrian Airlines AG* [paragraphs 26 and 27]). The obligation to provide replacement transport at the earliest possible opportunity now includes not only the obligation to offer it, but also to bear the costs for it. It is true that the passenger is not obliged to contribute actively to seeking adequate replacement transport (C-354/18, *Rusu* [paragraph 55]). However, if the passenger nevertheless does so and is able to obtain replacement transport under comparable conditions, which the air carrier itself could not have provided to him or her, it would be contrary to the objective of ensuring a high level of protection if the air carrier's obligation to bear the costs of replacement transport ceased to exist for that reason alone.

Ultimately, however, the decision also depends on whether a repatriation flight organised by the State is to be regarded as 're-routing, under comparable transport conditions' within the meaning of Article 8(1)(b) of the Air Passenger Rights Regulation.

In that regard, the referring court takes the view that the element 'comparable travel conditions' relates first and foremost to the factual circumstances of the journey, such as the means of transport used, the scheduled departure and arrival times and the itinerary. It therefore has no doubts as to the fact that the flight at issue in the present case was operated under comparable conditions.

However, the appellant argues that there is no re-routing within the meaning of Article 8(1)(b) of the Air Passenger Rights Regulation because the repatriation flight was operated at a fare which is not available directly or indirectly to the

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public and is therefore not subject to the regulation in accordance with Article 3(3) thereof.

The referring court does not consider that argument to be convincing either. It should be noted that Article 8(1)(b) of the Air Passenger Rights Regulation refers only to 're-routing, under comparable transport conditions, to their final destination'. It cannot be inferred from that provision that only flights which are themselves subject to the regulation enter into consideration as replacement transport. It is true that the Court of Justice has held that a flight which is offered to passengers as replacement transport in accordance with Article 8(1) of the Air Passenger Rights Regulation and is accepted by them also falls within the scope of that regulation (C-832/18, *Finnair*). However, that finding was made in a case where the passengers were actually re-booked onto another scheduled flight. Therefore, it cannot be clearly understood to mean that replacement transport would in any event have to be provided in the form of a flight falling within the scope of the regulation.

Question 2

The Court of Justice has already ruled that when a carrier fails to fulfil its obligations under Articles 8 and 9 of the Air Passenger Rights Regulation, air passengers are justified in claiming a right to compensation on the basis of the factors set out in those articles, which is not based on national law on compensation (C-83/10, *Sousa Rodriguez* (*Air France* [paragraph 43 et seq.]). With regard to Article 9(1)(b) of the Air Passenger Rights Regulation, the Court of Justice has already ruled that the passenger's right to reimbursement is determined according to the criteria of necessity, appropriateness and reasonableness (C-12/11 [paragraph 66], *McDonagh* v *Ryanair*, C-530/19, *NM* v *ON* [paragraph 36]).

The referring court proceeds on the assumption that the same criteria must also be applied to a right to reimbursement in the event of failure to discharge the obligation under Article 8(1)(b) of the Air Passenger Rights Regulation. Accordingly, in a case such as the present one, the air carrier would have to reimburse those costs in their entirety, even if they do not relate exclusively to the transport per se.

It appears to the referring court that that interpretation is possible in so far as it is the most likely to contribute to achieving the objectives pursued by Article 8(1)(b) of the Air Passenger Rights Regulation, namely that the passenger reaches his or her destination as soon as possible […]. Otherwise, passengers who, for whatever reason, were able to organise adequate alternative transport which was in fact impossible for the air carrier to organise could find themselves in the situation of not being able to use that transport because of the costs that they would have to bear themselves.

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F. Matters of procedural law

[…] [statements regarding matters of procedural law]

[…] [stay of proceedings]

Regional Court, Korneuburg […]

Korneuburg, 4 January 2022

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