

Anonymised version

Translation

C-616/23 – 1

Case C-616/23

Request for a preliminary ruling

Date lodged:

6 October 2023

Referring court:

Landgericht Düsseldorf (Germany)

Date of the decision to refer:

4 September 2023

Applicants and appellants:

TA

ET

VB

CI

Defendant and respondent:

British Airways plc

... Landgericht Düsseldorf (Regional Court, Düsseldorf)

Order

In the case of

1. Mr TA, ... Cottbus,
2. Mrs ET, ... Cottbus,
3. VB (female child), ... Cottbus,

4. CI (female child), ... Cottbus,

applicants and appellants,

...

v

British Airways PLC, ..., Harmondsworth, ... United Kingdom,

defendant and respondent,

...

On 4 September 2023

... the 22nd Civil Chamber of the Landgericht Düsseldorf

made the following order:

The proceedings are stayed.

The following questions concerning the interpretation of EU law are referred to the Court of Justice of the European Union pursuant to point (b) of the first paragraph and the third paragraph of Article 267 TFEU:

1.

Must Article 5(1)(c) and Article 7(1) of the Air Passenger Rights Regulation be interpreted as meaning that a passenger is entitled to compensation for a long delay at the final destination if, on transferring, the passenger missed the connecting flight even though the feeder flight was operated on time and the reason for the delay at the final destination was that the actual transfer time at the airport between the opening of the doors of the aircraft and the closing of boarding was not sufficient to make it possible to reach the connecting flight in good time, taking into account the distance between the arrival and departure gates and passport and security checks?

2.

If Question 1 is answered in the affirmative: in cases where it is disputed whether the passenger is at fault for missing the connecting flight (because of dawdling, for example), does the operating air carrier bear the burden of proof or must the passenger exonerate himself or herself from the allegation of fault? What is the significance in this context of adherence to the minimum connection time (MCT) between the feeder flight and the connecting flight?

3.

Must Article 8(1)(b) of the Air Passenger Rights Regulation be interpreted as meaning that a passenger whose flight is reasonably expected to be delayed on arrival at the final destination by three hours or more has a right, in the same way as passengers on cancelled flights, going beyond the scope of the wording of Article 6(1) of the Air Passenger Rights Regulation, to re-routing, under comparable transport conditions, to his or her final destination at the earliest opportunity and, in the event of failure to fulfil those obligations, the operating air carrier must reimburse the passenger for the cost of the re-routed flight incurred by him or her?

Grounds:

I.

The applicants each had a confirmed reservation for the flight to be operated by the defendant on 15 September 2019 from Dubai via London to Düsseldorf (flight numbers: BA 106 and BA 936). The feeder flight BA 106 from Dubai to London was scheduled to land at 6.15 local time. The feeder flight took off on time and arrived in London at 6.17 local time with a delay of two minutes. The doors of the aircraft were opened at 6.19 local time. The applicants had seats in row 28. The aircraft had 210 passengers on board. The connecting flight BA 936 from London to Düsseldorf, which was scheduled to take off at 7.25 local time, was intended to connect with the flight. Boarding for the connecting flight commenced at 6.45 local time and closed at 7.05 local time, 20 minutes before the scheduled departure time. The connecting flight actually took off at 7.26 local time with a delay of one minute. There were therefore 46 minutes between the opening of the doors of the aircraft at 6.19 local time and the closing of boarding at 7.05 local time. Both the feeder flight and the connecting flight were handled at Terminal 5. The minimum connection time at London-Heathrow airport for flights where the arrival and departure terminal is the same is 60 minutes.

The applicants missed the connecting flight, the reasons for this being disputed between the parties. They therefore stayed overnight in London and did not reach their final destination until the following day on a flight on the easyJet airline, which they booked themselves.

... [arguments of the applicants, which are reproduced in detail below]

Applicants 1, 3 and 4 – applicant 2 withdrew her action at first instance – are each claiming compensation of EUR 600.00. They are also claiming hotel costs of EUR 265.00, transfer costs from the airport to the hotel and back of EUR 115.63, food costs of EUR 9.50 and costs for booking an alternative flight of EUR 871.90, thus totalling a further EUR 1 262.03.

The defendant disputes the claims made by the applicants. ... [arguments of the defendant, which are reproduced in detail below]

The Amtsgericht (Local Court) dismissed the action ... at first instance by judgment delivered on 27 March 2023 ...

Applicants 1, 3 and 4 ... lodged an appeal against that judgment delivered at first instance.

Before the appeal court, the applicants are now claiming that ... the defendant should be ordered to pay them each EUR 600.00 plus interest ... and to applicant 1 a further EUR 1 262.03 plus interest ...

The defendant defends the judgment delivered at first instance.

II.

The outcome of the action depends crucially on the questions set out in the operative part.

Specifically:

1.

The applicants could, first of all, each have a right to compensation for long delay of EUR 600.00 under Article 5(1)(c) and point (c) of the first sentence of Article 7(1) of the Air Passenger Rights Regulation.

(a)

According to the case-law of the Court of Justice of the European Union, passengers have a right to compensation, by *mutatis mutandis* application of Article 5(1)(c) and Article 7(1) of the Air Passenger Rights Regulation, if they reach their planned final destination with a delay of three hours or more (see Court of Justice of the European Union, judgment of 19 November 2009, Case C-402/07, *Sturgeon and Others v Condor* ...; judgment of 23 October 2012, Case C-581/10, *Nelson and Others v Lufthansa* ...). If, as in the present case, that destination is not reached by a direct flight but by means of directly connecting flights (Article 2(h) of the Air Passenger Rights Regulation), the obligation of the operating air carrier to pay compensation for long delay does not require there to have been a delay in departure of the magnitude provided for in Article 6 of the Air Passenger Rights Regulation; rather, the only relevant factor is whether the destination of the last flight was reached at least three hours later than the scheduled arrival time (see Court of Justice of the European Union, judgment of 26 February 2013, Case C-11/11, *Air France v Folkerts* ...).

The applicants were scheduled to arrive at their final destination in Düsseldorf by the connecting flight BA 936 at 9.45 local time on 15 September 2019. The feeder flight BA 106 was delayed by only two minutes and the applicants nevertheless missed their connecting flight BA 936. ... It is true that the Court of Justice of the European Union has regard, in respect of the right to compensation for long delay,

solely to a delay of at least three hours at the final destination, which is indubitably the case here. However, the decision in *Folkerts* was based on a situation where the feeder flight ... was delayed by two and a half hours and the passengers in that case thus indisputably missed their connecting flight because of that delay in the feeder flight (see Court of Justice of the European Union, judgment of 26 February 2013, Case C-11/11, *Air France v Folkerts* ...). In the present case, by contrast, the feeder flight had only a minimal delay of two minutes, which was apparently not the (sole) reason for missing the connecting flight.

The applicants claim that the transfer time had not been sufficient for them to catch the connecting flight. They argue that they did not dawdle but quickly made their way to the departure gate. Being aware of the short transfer time, the defendant's staff even tried to fast track the applicants from the aircraft directly for processing for the onward flight. However, this did not succeed. Because of a further security check, they were no longer able to catch the connecting flight. The defendant contends that the applicants were themselves at fault for missing the connecting flight. The minimum connection time (MCT) of 60 minutes was respected. It asserts that two other passengers who had also made reservations for the connection to Düsseldorf, but had been sitting ten rows (row 38) behind the applicants (row 28) in the aircraft from Dubai still managed to catch the connecting flight. It was therefore apparent that the applicants did not make sufficient haste.

(b)

Consequently, it is doubtful whether passengers also have a right to compensation under Article 7(1) of the Air Passenger Rights Regulation in the case where the feeder flight for a flight connection consisting of several flights is operated on time but the passengers nevertheless miss the connecting flight and claim that the transfer time in the specific case was not sufficient to enable them to reach the connecting flight in good time and they therefore suffer a long delay on arrival of more than three hours at the final destination.

The German Bundesgerichtshof (Federal Court of Justice) awarded a right to compensation for a long delay at the final destination to a passenger who is reliant on a wheelchair and missed his connecting flight because, contrary to Article 11(1) of the Air Passenger Rights Regulation, he was not given a priority transfer (see Bundesgerichtshof (Federal Court of Justice), judgment of 20 June 2023 – X ZR 84/22, NJW 2023, p. 2487). The Bundesgerichtshof stated in this regard that, according to the case-law of the Court of Justice of the European Union, a right to compensation for long delay requires only a delay on arrival of three hours at the final destination. A right to compensation for long delay does require that the operating air carrier caused the delay in breach of its obligations. However, a right to compensation is possible in such cases not only where a connecting flight was missed because of a delay in a feeder flight (as in the

Folkerts case) but also in other cases where the air carrier is at fault for causing the delay (Bundesgerichtshof, loc. cit., paragraphs 20 and 21).

According to the apparently prevailing opinion expressed in the case-law of the German lower courts and in the legal literature, it is intended to be sufficient if the passenger actually suffers a delay on arrival of at least three hours. The passenger does not need to explain the reasons for the delay. The question whether the delay is attributable to the air carrier need be examined only in the context of exculpation under Article 5(3) of the Air Passenger Rights Regulation. The operating air carrier must explain and demonstrate that it is not responsible for the delay that occurred, which is not therefore attributable to it. Even where a connecting flight is missed on account of (alleged) fault on the part of the passenger, there is an extraordinary circumstance within the meaning of Article 5(3) of the Air Passenger Rights Regulation, as this is also an event falling outside normal flight operations which cannot be influenced by the air carrier. Accordingly, if there is a delay at the final destination in an air travel journey consisting of a feeder flight and a connecting flight because, despite sufficient transfer time, the passenger does not catch the connecting flight – for example because he or she dawdles, gets lost despite having sufficient information or fails to observe the boarding times despite having adequate instructions – there is likewise an extraordinary circumstance which exonerates the air carrier (see Amtsgericht Hannover (Local Court, Hanover), judgment of 9 October 2020 – 409 C 503/20, BeckRS 2020, 44160, paragraph 17 et seq.; judgment of 14 March 2017 – 523 C 12833/16, NJW-RR 2017, p. 951, 952 et seq., paragraph 7 et seq.; Amtsgericht Köln (Local Court, Cologne), judgment of 24 October 2016 – 142 C 482/15, BeckRS 2016, 1099; ...).

According to both views, a right to compensation for long delay is therefore also possible if – unlike in Case C-11/11, *Folkerts* – the feeder flight is operated on time but the passenger misses the connecting flight for other reasons for which the air carrier is at fault and arrives at his or her final destination with a delay of three hours or more.

An argument in favour of this view could be that, according to the decision of the Court of Justice of the European Union of 12 May 2011 in Case C-294/10, *Eglītis and Others v Latvijas Republikas Ekonomikas ministrija*, the operating air carrier must take account of a sufficient reserve time at the stage of organising the flight (see Court of Justice of the European Union, judgment of 12 May 2011, Case C-294/10, *Eglītis and Others v Latvijas Republikas Ekonomikas ministrija* ...). This could support the view that the operating air carrier must also ensure that the reserve time between a feeder flight and a connecting flight booked as a single reservation is calculated on the basis of the specific circumstances of the transit airport such that passengers are able to catch the connecting flight comfortably, taking into account normal times for exiting the aircraft, covering the walking distance between the arrival and departure gates and security and passport checks.

2.

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It is also unclear, in connection with the right to compensation, who bears the duty to adduce evidence and the burden of proof in respect of a missed connecting flight on account of fault attributable to the air carrier and what is the significance in this context of the minimum connection time (MCT) between the feeder flight and the connecting flight.

The MCT is a minimum time which airports state is supposedly necessary, at the very least, to transfer successfully within a connection of two flights. However, these times are set and defined by each airport operator itself. The times are normally calculated very tightly by the airport operator for reasons of competition, as computer reservation systems only combine and offer flights for which the MCT is adhered to. In addition, flight connections are sorted by total duration in computer reservation systems and the fastest connections are therefore displayed to the passenger first when choosing a flight connection. However, as a rule, the transfer time actually available is much less. The MCT designates the timespan between the on-block time (arrival at the parking position) and the off-block time (departure from the parking position), whereas the actual transfer time is the time between leaving the feeder flight (opening of doors) and the closing of boarding. Passengers generally have no control over when they leave the aircraft when it is emptied or whether the feeder flight finishes at a parking position with a connecting bus transfer to the airport or at a gate. Nor do passengers have any control over when boarding for the connecting flight ends and the gate is closed. Ultimately, the time actually available for transfer must be calculated in such a way that each passenger can be reasonably expected to reach his or her connecting flight. This means that the time must be calculated in such a way that families with small children, those with reduced mobility or elderly passengers with hand luggage are able to navigate the links between the arrival and the connecting gates. Account must be taken of time for orientation and for passport and security checks, which means that the time actually available for a transfer is not, as a rule, the same as the MCT, which is meant to be sufficient for a transfer.

For those reasons, adherence to the MCT between the arrival of the feeder flight and the departure of the connecting flight does not, in the view of the present Chamber, permit the generalised conclusion (*prima facie* evidence) that the missing of the connecting flight is attributable, on the basis of a generalised approach, to fault on the part of the passenger.

In the view of the present Chamber, the passenger must therefore merely explain and demonstrate that he or she suffered a delay on arrival at the final destination of three hours or more. The air carrier, on the other hand, must explain and demonstrate that the missing of the connecting flight was the fault of the passenger because, in the ordinary course of events and taking account of distances walked, transfer times and passport and security checks at the airport, it would have been possible for the passenger to catch the connecting flight.

It has not yet been clarified in EU law – so far as can be seen – under what conditions passengers have a right to compensation if they miss their connecting

flight and arrive at the final destination with a long delay, even though the feeder flight lands on time or with only a very minor delay and there is adherence to the minimum connection time (MCT) between the two flights. This question therefore had to be referred to the Court of Justice of the European Union for a preliminary ruling.

3.

Applicant 1 is also claiming, on the basis of Article 8(1)(b) and Article 9(1) of the Air Passenger Rights Regulation, a right to reimbursement of hotel costs of EUR 265.00, transfer costs from the airport to the hotel and back of EUR 115.63, food costs of EUR 9.50 and alternative flight costs of EUR 871.90, thus totalling EUR 1 262.03.

(a)

In the case where the air carrier fails to fulfil the obligations under Article 8 and Article 9 of the Air Passenger Rights Regulation and the passenger arranges an alternative independently and at his or her own expense, according to the case-law of the Court of Justice of the European Union, the passenger may have a right to reimbursement of the costs incurred from the operating air carrier, based directly on those provisions. Prior reliance on those provisions by the passenger is not necessary. However, he or she may be reimbursed only for the amounts which, in the light of the specific circumstances of each case, would prove necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in re-routing or in the provision of care to the passenger, this being a matter which it is for the national court to assess (see Court of Justice of the European Union, judgment of 13 October 2011, Case C-83/10, *Aurora Sousa Rodriguez and Others v Air France ...*; judgment of 31 January 2013, Case C-12/11, *McDonagh v Ryanair ...*; judgment of 22 April 2021, Case C-826/19, *WZ v Austrian Airlines, ...* paragraph 69 et seq.).

(b)

Under Article 6(1)(c)(i) of the Air Passenger Rights Regulation, the passenger is entitled to food pursuant to Article 9(1)(a) of the Air Passenger Rights Regulation when departure can be reasonably expected to be delayed by at least four hours for flights in excess of 3 500 km. Under Article 6(1)(c)(ii) of the Air Passenger Rights Regulation, the passenger is also entitled to hotel accommodation together with transfer pursuant to Article 9(1)(b) and (c) of the Air Passenger Rights Regulation when the reasonably expected time of departure is at least the day after the time of departure previously announced. If the actual delay in departure is at least five hours in accordance with Article 6(1)(c)(iii) of the Air Passenger Rights Regulation, the passenger may additionally choose reimbursement of the cost of the ticket pursuant to Article 8(1)(a) of the Air Passenger Rights Regulation. Because delayed transportation was not envisaged in the case at issue until the following day, applicant 1 would appear to have a right to reimbursement of food,

transfer and hotel costs. On the other hand, provision is not actually made in Article 6 of the Air Passenger Rights Regulation for a right to re-routing at the earliest opportunity within the meaning of Article 8(1)(b) of the Air Passenger Rights Regulation in the case of delays (in departure).

In the view of the present Chamber, this legal situation has been contrary to the principle of equal treatment since the decision in *Sturgeon and Others*. In that decision, the Court of Justice of the European Union awarded compensation, by *mutatis mutandis* application of Article 5(1)(c) and Article 7(1) of the Air Passenger Rights Regulation, to passengers affected by a long delay on arrival. As grounds, it stated that the situations of cancellation and of long delay on arrival of three hours or more are comparable in every respect and in this connection emphasised the principle of equal treatment (Court of Justice of the European Union, judgment of 19 November 2009, Joined Cases C-402/07 and C-432/07, *Sturgeon and Others v Condor Flugdienst and Others*, ... paragraph 60). In the view of the present Chamber, however, in order to comply with the principle of equal treatment, passengers on flights with a long delay should be treated equally in every respect not only as regards compensation under Article 7(1) of the Air Passenger Rights Regulation, but also as regards care and assistance under Article 8 and Article 9 of the Air Passenger Rights Regulation, as the situation of passengers whose flight has been cancelled and that of passengers whose flight can be reasonably expected to be delayed on arrival by three hours or more is comparable in every respect. Both groups of passenger suffer similar inconvenience.

This is also borne out by the fact that, in the decision in Case C-74/19, *LE v Transportes Aéreos Portugueses SA*, the Court of Justice of the European Union inferred from, inter alia, Article 8(1) of the Air Passenger Rights Regulation, in the context of the reasonable measures under Article 5(3) of the Air Passenger Rights Regulation in the case of a long delay at the final destination, the 'requirement of reasonable, satisfactory and timely re-routing of passengers affected by a cancellation or long delay of a flight' (see Court of Justice of the European Union, judgment of 11 June 2020, Case C-74/19, *LE v Transportes Aéreos Portugueses SA*, ... paragraph 58). This suggests that the Court of Justice of the European Union possibly also wished to accord a right to re-routing pursuant to Article 8(1)(b) of the Air Passenger Rights Regulation to passengers affected by an expected long delay on arrival.

(c)

After the applicants had missed their connecting flight, the defendant did not offer them a re-routed flight and the earliest bookable flight was not until the following day, it was undoubtedly reasonably expected that the applicants would reach their final destination with a long delay of more than three hours. In such cases of an expected long delay on arrival, the operating air carrier should be obliged, going beyond the scope of the wording of Article 6 of the Air Passenger Rights Regulation, to offer the applicants timely and satisfactory re-routing, by *mutatis*

mutandis application of Article 5(1)(a) and Article 8(1)(b), and, in the event of failure to fulfil that obligation, to reimburse them for the costs incurred in connection with the re-routed flight.

This question has also not yet – so far as can be seen – been (definitively) clarified in EU law, and for that reason it has had to be referred to the Court of Justice of the European Union for a preliminary ruling.

...

WORKING DOCUMENT