

Anonymised version

Translation

C-522/22 – 1

Case C-522/22

Request for a preliminary ruling

Date lodged:

4 August 2022

Referring court:

Landgericht Frankfurt am Main (Germany)

Date of the decision to refer:

17 June 2022

Applicant:

GE

Defendant:

British Airways Plc

Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main) [...]

[...]

Order

In the case of

GE, [...] Berlin,

applicant

[...]

v

British Airways Plc [...], [...] Frankfurt am Main,

defendant

[...]

the 24th Civil Chamber of the Regional Court, Frankfurt am Main, [...]

ordered as follows:

I. The following questions on the interpretation of EU law are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to the second paragraph of Article 267 of the Treaty on the Functioning of the European Union, most recently amended by Article 2 of European Council Decision 2012/419/EU of 11 July 2012 (OJ L 204, p. 131):

1) Must Article 8(1)(a) 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 ('the Air Passenger Rights Regulation'), in conjunction with Article 7(3) thereof, be interpreted as meaning that a passenger who has paid for a flight partly in frequent flyer miles may claim from the operating air carrier, which is not his or her contracting partner, reimbursement (only) in frequent flyer miles in that respect?

2) In the event that the Court answers the first question in the affirmative:

Does the Air Passenger Rights Regulation preclude national legislation under which, in the event of failure to provide reimbursement in the form of frequent flyer miles, contrary to the corresponding obligation under Article 8(1)(a) of the Air Passenger Rights Regulation, compensation in lieu of performance may be claimed from the operating air carrier, or is the passenger bound by his or her original request for reimbursement in frequent flyer miles?

3) In the event that the Court answers the first question in the negative:

In the event that the passenger may also claim reimbursement in money or is reimbursed in money, must Article 8(1)(a) of the Air Passenger Rights Regulation, in conjunction with Article 7(3) thereof, be interpreted as meaning that, as reimbursement of the cost of the ticket (...) at the price at which it was bought, the passenger is reimbursed by the operating air carrier the amount in money which would enable, or would have enabled, him or her to purchase, without using frequent flyer miles, re-routing, under comparable transport conditions, to his or her final destination at the earliest opportunity or at a later date at his or her convenience, subject to availability of seats?

II. The proceedings are stayed.

Grounds:

I.

The dispute rests on the following facts:

On 27 December 2020, the applicant booked flights from Frankfurt am Main to Chicago (USA), via London, in a single booking with the air carrier Iberia [...]. The defendant was to operate both flight BA901 from Frankfurt am Main to London on 4 March 2021, on which the applicant was in business class, and the onward flight BA295 on the same day from London to Chicago, on which he was in first class.

The applicant used 75 750 frequent flyer miles – under Iberia’s bonus programme (‘Avios’) – from his Iberia frequent flyer card to pay Iberia for the flights, making an additional payment of EUR 363.90. The Avios had been credited to the applicant on the basis of his membership and previous flight bookings with Iberia under the airline’s frequent flyer programme. [...] Had he booked the flights using money, he would have had to pay EUR 8 677.90. The flights in question were available at that price.

The flights were cancelled by the defendant on 18 January 2021. By email of 18 January 2021, the applicant requested that the defendant reimburse the miles used and the additional payment, setting a deadline of 26 January 2021. [...] On 26 January 2021, the defendant refused to reimburse the applicant and referred him to Iberia. On 28 January 2021, the [...] applicant requested that the defendant henceforth pay him the sum of EUR 8 677.90. On 5 February 2021, the defendant once again refused to make payment. The applicant then brought an action against the defendant seeking, inter alia, payment of the sum of EUR 8 677.90.

II.

The referring court takes the view that it is relevant to the present dispute how Article 8(1)(a) of the Air Passenger Rights Regulation, in conjunction with Article 7(3) thereof, is to be interpreted, because the applicant has a claim against the defendant under Article 8(1)(a) of the Air Passenger Rights Regulation in principle, since the defendant, as the operating air carrier, cancelled the flight booked by the applicant as a single booking, which comes within the scope of the Air Passenger Rights Regulation pursuant to Article 3(1)(a) thereof.

- 1) Accordingly, by its **first question**, the referring court seeks to ascertain how Article 8(1)(a) of the Air Passenger Rights Regulation, in conjunction with Article 7(3) thereof, is to be interpreted where tickets are paid for (partly) with frequent flyer miles. This is necessary in order to clarify for the referring court whether the applicant is entitled to reimbursement of the

frequent flyer miles or reimbursement in money under the Air Passenger Rights Regulation.

Under Article 8(1) of the Air Passenger Rights Regulation, in the event of – as in the present case – a cancellation within the meaning of Article 5(1)(a) of the Air Passenger Rights Regulation by the operating air carrier of a flight which – as in the present case – comes within the scope of that regulation in accordance with Article 3(1)(a) thereof, passengers may choose between re-routing to their final destination, return transportation to the airport of departure or, in accordance with the first indent of Article 8(1)(a), reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought (...).

However, the referring court takes the view that, having regard to the wording, scheme, and spirit and purpose of the Air Passenger Rights Regulation, it is not clear – and this matter has not been ruled on to date – whether the passenger, in this case the applicant, can, or is even required to, seek reimbursement in frequent flyer miles from the operating air carrier, which is not his or her contracting partner, where that passenger had ‘paid for’ a flight using those miles.

The wording of Article 8(1)(a) initially seems to indicate that flights booked using frequent flyer miles must always be reimbursed in money, in so far as that provision refers to the cost of the ticket and the *price* at which it was *bought*. In any event, however, the Air Passenger Rights Regulation proceeds on the basis that, as a general rule, tickets within the meaning of Article 2(f) of that regulation are paid for in money, as also shown by recital 13 of that regulation. On the other hand, the concepts of ‘price’ and ‘cost of the ticket’ could also be understood in a broader sense as consideration, especially in so far as reference is made to the ticket as a document in which, in the present case, the Avios are also mentioned. Article 8(1)(a) of the Air Passenger Rights Regulation also refers to Article 7(3) thereof, which regulates the means by which compensation is to be paid following the cancellation of a flight, a long delay in arrival or denied boarding. It provides that the compensation is to be paid, in principle, in cash, by electronic bank transfer or by bank cheque. However, the passenger, with his or her ‘signed agreement’, may also request reimbursement in the form of travel vouchers and/or ‘other services’. In the view of the referring court, the concept of ‘other services’ therefore also covers frequent flyer miles. The referring court takes the view that, from a schematic viewpoint, the reference to Article 7(3) of the Air Passenger Rights Regulation militates in favour of the passenger having the possibility, or potentially even the (primary) obligation, to claim reimbursement only in miles if the flight was ‘paid for’ with those miles. This would be in line with the purpose of reimbursement pursued by Article 8(1)(a) of the Air Passenger Rights Regulation. The fact that, at the same time, frequent flyer programmes under which frequent flyer miles are awarded are not alien to

the Air Passenger Rights Regulation and that the latter does indeed apply to tickets purchased with such miles follows, furthermore, from the second sentence of Article 3(3) of the Air Passenger Rights Regulation. This also militates in favour of the possibility of reimbursement in miles. Lastly, recitals 1 and 4 of the Air Passenger Rights Regulation can also be taken into consideration for the purposes of interpretation in the present case. In accordance with those recitals, the Air Passenger Rights Regulation aims at ensuring a high level of protection for passengers. Accordingly, if the passenger chooses to be reimbursed in miles – as in the present case – the operating air carrier should be required to honour that choice.

Ultimately, that interpretation is not unambiguous, however, as the high level of protection, considered in conjunction with the wording of Article 8(1)(a) of the Air Passenger Rights Regulation, might also militate in favour of reimbursement in money, particularly in the case where a passenger turns to the operating air carrier, with which he or she is in any event not in a contractual relationship. This could militate in favour of the operating air carrier always being required to make reimbursement in money (see, for example, Oberlandesgericht Köln (Higher Regional Court, Cologne), order of 26 July 2017, 17 U 69/15[...]). In 2017, the abovementioned Higher Regional Court, Cologne, by order for reference of 26 July 2017, had referred a question to the Court of Justice, which was subsequently removed from the register of the Court of Justice.

- 2) The referring court takes the view that, should the interpretation by the Court of Justice establish that the passenger can accordingly be reimbursed by the operating air carrier in frequent flyer miles or is even required to claim reimbursement (only) in frequent flyer miles where he or she had purchased the ticket from his or her contracting partner using those miles, the **second question** arises – as a follow-up question which would then be relevant to the decision to be given and which was formulated for that reason – as to whether the Air Passenger Rights Regulation precludes national legislation under which a creditor, in this case a passenger, may claim compensation in lieu of performance due to non-fulfilment of an obligation arising from a contractual or statutory obligation, in this case the Air Passenger Rights Regulation (Paragraph 280(1) and (3) of the Bürgerliches Gesetzbuch (German Civil Code; ‘the BGB’), in conjunction with Paragraphs 281 and 283 thereof), irrespective of the question whether such fulfilment is impossible for the operating air carrier, as claimed by the defendant, or whether the operating air carrier does not make reimbursement in frequent flyer miles, despite being requested to do so.

In that respect, an initial argument militating against an effect by which national law is blocked is that the Air Passenger Rights Regulation seeks to regulate minimum rights only within its scope of application (Court of Justice, judgment of 13 October 2011, C-83/10 [...], *Aurora Sousa Rodríguez and Others v Air France SA*) and constitutes a separate set of

rules; it does not exclude national rules. Recital 22 also expressly allows for procedures under national law in addition to the designation of an appropriate body for the enforcement of rights. The first sentence of Article 12(1) of the Air Passenger Rights Regulation, in accordance with which that regulation is to apply without prejudice to rights to further compensation, also militates against such a blocking effect (see also Bundesgerichtshof (Federal Court of Justice; ‘BGH’), NJW-RR 2010, 1641).

If the Air Passenger Rights Regulation were to have a blocking effect, the action in the present case would have to be dismissed. Otherwise, it would be necessary to assess, under national law on compensation, what harm the passenger has suffered as a result of the failure to make reimbursement in frequent flyer miles.

- 3) However, in the event that, in respect of the first question referred, the Court of Justice interprets Article 8(1)(a) of the Air Passenger Rights Regulation, in conjunction with Article 7(3) thereof, as meaning, contrary to expectations, that the passenger can, or even must, always claim the cost of the ticket in money from the operating air carrier, even where the passenger ‘paid for’ the flight (partly) by using frequent flyer miles in the transaction with his or her contracting partner, the referring court takes the view that, in that case, the **third question** arises as to how the value of the frequent flyer miles and thus the amount of the reimbursement is to be calculated. The answer to that question depends (once more) on how the concepts of ‘cost of the ticket’ and ‘price’ in Article 8(1)(a) of the Air Passenger Rights Regulation are to be interpreted.
- (1) One possibility would be, in line with the legal position taken by the defendant, to determine an actual market value for the frequent flyer miles and accordingly to set the value at the cost of the ticket, within the meaning of Article 8(1)(a) of the Air Passenger Rights Regulation, at which the passenger would be able to recover the frequent flyer miles used in part, provided that the possibility to purchase frequent flyer miles exists.

The referring court takes the view that such an interpretation is supported by the fact that, as with reimbursement of the cost of the ticket in money where the passenger had paid for the flights in money, the passenger would ultimately be placed in the same financial position as he or she was in before booking the flight (negative interest). As stated above, this is the spirit and purpose of Article 8(1)(a) of the Air Passenger Rights Regulation, as distinct, specifically, from the payment of compensation.

In the present case, that interpretation would have the result that, in the event that it is possible, as claimed by the defendant, to purchase Avios from Iberia at the ‘price’ of an Avios of approximately EUR 0.018 to 0.0187, the

applicant would be reimbursed an amount of EUR 1 363.50 to EUR 1 416.53.

- (2) Furthermore, it would be possible, within the framework of that interpretation, for the value of the frequent flyer miles to be placed – on the basis of a legal concept from the (national) law on compensation within the meaning of Paragraph 249 et seq. of the BGB – at what it would be had the passenger booked, without using the frequent flyer miles, the same transport or re-routing, under comparable conditions, to the final destination at the earliest possible opportunity or at a later date at the passenger's convenience, subject to availability of seats (positive interest).

The passenger would thereby, in the context of the reimbursement of the cost of the ticket, be placed in the same position in which he or she would have been had the operating air carrier not cancelled the flight.

However, the fact that Article 8(1)(a) of the Air Passenger Rights Regulation does not provide for entitlement to compensation going beyond reimbursement militates against that interpretation. Having regard to recital 13 of the Air Passenger Rights Regulation, the spirit and purpose of Article 8(1)(a) of that regulation is to ensure that passengers are able to obtain reimbursement of their tickets. This is also supported by the fact that the passenger expressly did not choose re-routing within the meaning of Article 8(1)(b) of the Passenger Rights Regulation, that is to say he or she no longer wished to be transported to his or her final destination.

On the other hand, cancellation already constitutes an infringement of the passenger's rights under the Air Passenger Rights Regulation, and the Court of Justice has already ruled, in respect of a breach of an obligation under Article 9(1) of the Air Passenger Rights Regulation, that, in the case of non-fulfilment of an obligation to provide care, the passenger is entitled to claim compensation from the operating air carrier for the amount that he or she spent instead of the operating air carrier (Court of Justice, judgment of 31 January 2013, C-12/11 [...], *Denise McDonagh v Ryanair Ltd.*). In addition, the question whether or not a passenger's entitlement to reimbursement of costs incurred for replacement transport arises directly from Article 8(1)(a) of the Air Passenger Rights Regulation is the subject of highly controversial discussion in the national case-law and legal literature [...].

In the present case, that interpretation would lead to the applicant being able to claim reimbursement in the amount of EUR 8 677.90 from the defendant.

- (3) Furthermore, it could be argued that frequent flyer miles have no 'value' at all. Having regard to the wording of Article 8(1)(a) of the Air Passenger Rights Regulation, this could be justified on the ground that, if a passenger uses the frequent flyer miles made available to him or her and 'earned'

solely by booking flights in advance, he or she would not have paid any price for the ticket at all and, accordingly, there is nothing to be reimbursed.

However, the fact that, as stated above, the European legislature extended the applicability of the Air Passenger Rights Regulation precisely to situations within the framework of frequent flyer programmes and confirmed bookings or tickets issued by the operating air carrier under such programmes (second sentence of Article 3(3) of the Air Passenger Rights Regulation) militates against that argument. The referring court takes the view that the Air Passenger Rights Regulation thus makes clear that the passenger has in any event previously provided his or her contracting partner with consideration for the tickets thus received.

Nevertheless, that interpretation would lead to the applicant in the present case being reimbursed the sum of only EUR 363.90, or being awarded that sum by judgment.

- (4) Another possibility for calculating the reimbursement of the cost of a ticket in cash in the case where frequent flyer miles had been used previously would be to reimburse the passenger in cash for the amount that he or she would need in order to obtain from his or her contracting partner – in this case Iberia – the number of frequent flyer miles again by booking flights. The referring court takes the view that that interpretation would result in overcompensation of the passenger – which is not covered by the spirit and purpose of Article 8(1)(a) of the Air Passenger Rights Regulation and recital 13 thereof – in such a way that, as a result of the reimbursement, the passenger would in fact receive free flights or even further flights at the expense of the operating air carrier.

[...]