Anonymised version

Case C-308/21

Request for a preliminary ruling

Date lodged:

14 May 2021

Referring court:

Tribunal Judicial da Comarca dos Açores (Juízo Local Cível de Ponta Delgada – Juiz 4) (District Court, Azores – Civil Chamber, Ponta Delgada – Court No 4) (Portugal)

Date of the decision to refer:

25 January 2021

Applicants:

KU

OP

GC

Defendant:

SATA International – Azores Airlines SA

Tribunal Judicial da Comarca dos Açores

Juízo Local Cível de Ponta Delgada – Juiz 4

(District Court, Azores – Civil Chamber, Ponta Delgada – Court No 4)

[…]

Application in ordinary proceedings

[…]

Reference for a preliminary ruling to the CJEU – Article 94 of the Rules of Procedure of the CJEU

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1) Brief presentation of the dispute and the relevant facts

In the present case, in which three separate sets of proceedings have been joined, the three applicants purchased airline tickets for two flights between Lisbon airport and the Autonomous Region of the Azores (islands of São Miguel and Pico) that were due to operate on 10 May 2017. One of the flights was cancelled and the applicant was offered an alternative flight; the other flight departed late. In all cases, the applicants arrived at their destination more than three hours after the scheduled time.

The cause of the delay was an unforeseen and unexpected breakdown of the fuel supply system which occurred at 13:19 on 10 May 2017 at Lisbon Airport. This required all air operations based in Lisbon, not only the airline's operations, to be reorganised and necessitated the making of trips to fuel centres at nearly airports in order to remedy the breakdown. It should also be noted that the established facts show that Lisbon Airport is not responsible for the fuel supply system at its own airport, which is operated by a third party.

The question is whether a delay of more than three hours to, or the cancellation of, a flight as a result of a breakdown of the fuel supply system at the airport of origin, in the case where the latter is responsible for managing the fuel supply system, constitutes an '**extraordinary circumstance**' within the meaning and for the purposes of **Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004**.

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The following have emerged as the **relevant facts** in this case:

a.1) Proceedings 957/20.5T8PDL

1. The applicant KU purchased a ticket, under booking [reference] NM8E8P, for flights S4321 and SP107, operated by the defendant and scheduled to depart from Lisbon Airport (LIS) at 12:50 on 10 May 2017 and to arrive at Santa María Airport (Azores) (SMA) at 19:15 (local time) on the same day, with a stopover at Ponta Delgada Airport (Azores) (PDL), where it was due to arrive at 14:15 and depart at 18:45 (local time).

2. The applicant checked in for and boarded that flight.

3. Flight S4321 arrived at its destination, Ponta Delgada Airport (Azores) (PDL), at 19:30, making it impossible for the applicant to board flight SP107.

4. The distance between Lisbon and Santa María is 1 407.62 km.

a.2) Proceedings 963/20.0T8PDL

5. The applicant GC purchased a ticket, under booking [reference] NW53AK, for flight S4321, operated by the defendant and scheduled to depart from Lisbon Airport (LIS) at 12:50 on 10 May 2017 and to arrive at Ponta Delgada Airport (Azores) (PDL) at 14:15 (local time) on the same day.

6. The applicant checked in for and boarded that flight.

7. That flight was delayed and arrived at Ponta Delgada Airport (Azores) (PDL) at 19:30, that is to say 5 hours and 15 minutes after the original scheduled arrival time.

8. The distance between Lisbon and Ponta Delgada is 1 422.09 km.

a.3) Proceedings 961/20.3T8PDL

9. The applicant OP purchased a ticket, under booking [reference] 6I9R8M, for flight S4142, operated by the defendant and scheduled to depart from Isla de Pico Airport (Azores) (PIX) at 17:35 on 10 May 2017 and to arrive at Lisbon Airport (LIS) at 21:05 (local time) on the same day.

10. Flight S4142 was cancelled by the defendant.

11. Following that cancellation, the applicant was offered, by way of an alternative, flight S4136, departing from Terceira Airport (TER) at 21:25 and bound for Lisbon Airport (LIS) on 10 May 2017.

12. The distance between Isla de Pico and Lisbon is 1 662.34 km.

a.4) The defendant's defence

13. The fuel supply system at Lisbon Airport broke down at 13:19 on 10 May 2017.

14. That event was unforeseen and unexpected.

15. That event required all air operations based in Lisbon, not only the defendant's operations, to be reorganised and necessitated the making of trips to fuel centres at nearly airports in order to remedy the breakdown.

16. Lisbon Airport is not responsible for the fuel supply system at its own airport, which is operated by a third party.

17. Flight S4321 had to be operated via the route Lisbon – Porto – Ponta Delgada.

18. Since it had not been possible to operate flight S4143, which would have taken the route Lisbon – Isla de Pico, the aircraft was not in Pico to make the return (Pico – Lisbon) at the time scheduled for flight S4142.

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2) National provisions applicable to this dispute and any relevant national case-law

Given that this case is concerned with the application of an **EU regulation** [**Regulation (EC) No 261/2004 of 11 February 2004**], there are no relevant national provisions.

There is nonetheless, at national level, a degree of unanimity in the case-law relating to the classification of the circumstances referred to above as '**extraordinary circumstances**' within the meaning and for the purposes of **Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004**, which has prompted a number of reservations on the part of this court, for the reasons set out below.

Thus, in **proceedings Nos 968/20.0T8PDL, 960/20.5T8PDL, 959/20.1T8PDL, 954/20.0T8PDL and 955/20.9T8PDL**, which concerned the same flights and which were heard and determined by two different courts, it was decided that the airline was under no obligation to pay compensation as provided for in Articles **5(1)(c) and 7 of Regulation (EC) No 261/2004 of the European Parliament and the Council of 11 February 2004**.

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3) Statement of the reasons why the referring court has been prompted to question the interpretation or validity of certain provisions of EU law

In the present case, this court has serious doubts about the interpretation to be given to the concept of '**extraordinary circumstances**' laid down in **Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004** in the context of the facts set out above, in the light of the case-law established by the Court of Justice in connection with that provision.

Thus, in the judgment in ***Wallentin-Hermann* (C-549/07)**, [1] the Court of Justice referred in the first place to **recital 14** of that regulation, in accordance with which

[1] Judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, **EU:C:2008:71**).

it was established as a rule of interpretation that obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, such circumstances including, in particular, **meteorological conditions incompatible with the operation of the flight**. Nonetheless, the Court of Justice interpreted that provision restrictively as meaning that the circumstances cited as examples in recital 14 may be regarded as extraordinary only in the case where they relate to an event which, ***by its nature or origin, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond its actual control*** **(paragraphs 15 to 34, in particular paragraphs 22 and 23)**. There is some value in reading the very clear reasoning on which the judgment in question is based:

> *19. As is apparent from recital 12 in the preamble to, and Article 5 of, Regulation No 261/2004,* ***the Community legislature intended to reduce the trouble and inconvenience to passengers caused by cancellation of flights by inducing air carriers to announce cancellations in advance and, in certain circumstances, to offer re-routing meeting certain criteria.*** *Where those measures could not be adopted by air carriers,* ***the Community legislature intended that they should compensate passengers, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.***
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> *20. In that context, it is clear that, whilst Article 5(1)(c) of Regulation No 261/2004 lays down the principle that passengers have the right to compensation if their flight is cancelled,* ***Article 5(3), which determines the circumstances in which the operating air carrier is not obliged to pay that compensation, must be regarded as derogating from that principle. Article 5(3) must therefore be interpreted strictly.***
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> *21. In this respect, the Community legislature indicated, as stated in recital 14 in the preamble to Regulation No 261/2004, 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 airline.*
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> *22. It is apparent from that statement in the preamble to Regulation No 261/2004 that* ***the Community legislature did not mean that those events, the list of which is indeed only indicative, themselves constitute extraordinary circumstances, but only that they may produce such circumstances.*** *It follows that all the circumstances surrounding such events are not necessarily grounds for exemption from the obligation to pay compensation provided for in Article 5(1)(c) of that regulation.*
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> *23 Although the Community legislature included in that list 'unexpected flight safety shortcomings' and although a technical problem in an aircraft*

> *may be amongst such shortcomings,* ***the fact remains that the circumstances surrounding such an event can be characterised as 'extraordinary' within the meaning of Article 5(3) of Regulation No 261/2004 only if they relate to an event which, like those listed in recital 14 in the preamble to that regulation, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that air carrier on account of its nature or origin.***

As is clear from those paragraphs, the Court of Justice states that **Article 5(3) of the Regulation must be interpreted strictly** in order to increase the level of protection for passengers. The circumstances mentioned in recital 14 are not to be understood as '*extraordinary circumstances*' in themselves, but as circumstances which may be classified as extraordinary provided that they are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control on account of their nature or origin. In that case, it held that technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves, 'extraordinary circumstances' under Article 5(3) of Regulation No 261/2004 (paragraph 25).

In the judgment in ***McDonagh*** **(C-12/11)**, [2] the Court of Justice developed the case-law set out in the foregoing paragraph and stated that, in everyday language, the words 'extraordinary circumstances' literally refer to circumstances which are 'out of the ordinary'. In the context of air transport, they refer to **an event which is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.** It goes on to say that they relate to all circumstances which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity. In that case, it held that the eruption of the Eyjafjallajökull volcano and the consequent closure of European airspace could be described as 'extraordinary circumstances' **(paragraphs 26 to 34)**.

In the judgment in ***van der Lans*** **(C-257/14)**, [3] it held that **the exception provided for in Article 5(3) of the Regulation must be interpreted strictly** and that, in the case of technical problems, such circumstances may be classified as 'extraordinary' only under very strict conditions, set out in the foregoing paragraph. It cited as an example a situation in which the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or a competent authority, reveals that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same holds for damage to aircraft caused by acts of sabotage or terrorism. **In that case, the Court of Justice held that the premature malfunction of certain components of an aircraft did not constitute an unexpected event that was beyond the actual**

[2] Judgment of 31 January 2013, *McDonagh* (C-12/11, **EU:C:2013:43**).

[3] Judgment of 17 September 2015, *van der Lans* (C-257/14, **EU:C:2015:618)**.

control of the air carrier concerned, but was inherent in the normal exercise of the activity of the air carrier (paragraphs 32 to 49).

In the order in ***Siewert*** **(C-394/14),** [4] the Court of Justice held that the collision of an airport's set of mobile boarding stairs with an aircraft is not to be classified as an 'extraordinary circumstance' capable of exempting the air carrier from the obligation to pay the passengers compensation in the event of a long delay to a flight operated by that aircraft **(paragraphs 12 to 23)**.

In the judgment in **[*Pešková and Peška*] (C-315/15)**, [5] the Court of Justice held that, even though the collision between an aircraft and a bird could be regarded as an '*extraordinary circumstance*', the fact that the cancellation of the flight was due to the fact that the airline did not trust a duly qualified expert to carry out the security inspection on the aircraft and requested a second inspection by an expert which it did trust rules out the presence of an '*extraordinary circumstance*' within the meaning and for the purposes of Article 5(3) of the Regulation (paragraphs 18 to 26).

More recently, in the judgment in ***Krüsemann and Others*** **(C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17),** [6] the Court of Justice maintained that a **'wildcat strike' by flight crew staff** does not constitute an '***extraordinary circumstance***' enabling the airline to evade its obligation to pay compensation in the event of the cancellation of, or a long to delay to, a flight. Thus, the Court of Justice decided that the spontaneous absence of a significant part of flight crew staff (a 'wildcat strike' such as that which occurred in that case) is not included in the concept of '***extraordinary circumstances***' because air carriers may, as a matter of course, when carrying out their activity, face disagreements or conflicts with all or part of their members of staff. Consequently, the risks arising from the social consequences that go with [restructuring] measures must be regarded as inherent in the normal exercise of the activity of the air carrier concerned **(paragraphs 29 to 49)**.

As can easily be inferred from the foregoing selection of case-law, the Court of Justice has already held that situations such as **(a)** technical problems identified during aircraft maintenance or due to a failure to carry out such maintenance, **(b)** the premature malfunction of certain components of an aircraft, **(c)** the collision of an airport's set of mobile boarding stairs with an aircraft, **(d)** the lack of trust in a duly qualified expert's ability to carry out security inspections on an aircraft and [**(e)**] a 'wildcat strike' by cabin crew staff do not constitute '***extraordinary***

4 Order of 14 November 2014, *Siewert* (C-394/14, **EU:C:2014:2377**).

5 Judgment of 4 May 2017, [***Pešková and Peška***] (C-315/15, **EU:C:2017:342)**.

6 Judgment [of 17 April 2018,] *Krüsemann and Others* (Joined Cases C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, **EU:C:2018:258**).

circumstances' within the meaning and for the purposes of **Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004**, given the restrictive interpretation which has been adopted of that provision and the objective of increasing the level of protection for consumers.

More specifically, [this court] has serious doubts about whether a situation such as that set out above **is not inherent in the normal exercise of the activity of the air carrier concerned**, given the interpretation which has been developed in the case-law of the Court of Justice.

Consequently, in the light of the circumstances of the case at issue, this court doubts whether a situation such as that forming the subject of the dispute is included in the concept of '**extraordinary circumstances**' within the meaning and for the purposes of **recital 14 and Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004**.

In so far as, in accordance with national law, this is a decision against which no appeal lies on account of the amount involved, this court has an obligation to make a reference for a preliminary ruling.

In the light of the foregoing considerations, the following question must be referred to the Court of Justice for a preliminary ruling:

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'Does a delay of more than three hours to, or the cancellation of, a flight as a result of a breakdown of the supply of fuel at the airport of origin, in the case where that airport is responsible for the management of the fuel system, constitute an 'extraordinary circumstance' within the meaning and for the purposes of Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004?'

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[subsequent processing of the proceedings]