

**Case C-584/18**

**Summary of request for a preliminary ruling under Article 98(1) of the Court's Rules of Procedure**

**Date lodged:**

19 September 2018

**Referring court:**

Eparchiako Dikastirio Larnakas (District Court, Larnaca) (Cyprus)

**Date of the decision to refer:**

3 September 2018

**Applicant:**

D. Z.

**Defendant:**

Blue Air - Airline Management Solutions SRL

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**Subject-matter of the main proceedings**

Area of freedom, security and justice – Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) – Entry requirements for third country nationals – Regulation (EC) No 539/2001 – Visa requirement when crossing the external borders of the Member States – Decision No 565/2014/EU introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by Bulgaria, Croatia, Cyprus and Romania of certain documents as equivalent to their national visas – Kazakhstan national in possession of a temporary residence permit issued by Cyprus wishing to travel to Romania – Denied boarding by air carrier – Regulation (EC) No 261/2004 – Right to compensation

**Subject-matter and legal basis of the reference for a preliminary ruling**

Interpretation of EU law, Article 267 TFEU

## Questions referred

1. Should Decision No 565/2014/EU be interpreted as producing direct legal effect in the form, on the one hand, of the right of a third country national without being required to have a visa to enter the Member State of destination and, on the other hand, an obligation on that Member State of destination not to require him to have such a visa where that national is in possession of a visa or residence permit included in the list of visas and residence permits recognised on the basis of Decision No 565/2014/EU, which the Member State of destination has undertaken to apply?
2. Where an air carrier directly and/or through its authorised and designated representatives at the airport of the Member State of departure denies boarding to a passenger, giving as its reason that the authorities of the Member State of destination have refused him entry to that State because he allegedly has no entry visa, can the air carrier be considered as exercising powers and acting as an emanation of that State, such that Decision No 565/2014/EU can be cited against it by the passenger concerned before the courts of the Member State of departure in order to prove that he had a right of entry without requiring an additional visa and to claim compensation for infringement of that right and, by extension, of his contract of carriage?
3. Can an air carrier directly and/or through its authorised and designated representatives rely upon a decision by the authorities of the Member State refusing a third country national entry to the territory of that State in order to deny that national boarding, without first issuing and/or giving him a written substantiated decision with respect to the refusal of entry (see Article 14(2) of Regulation (EC) No 2016/399, previously Article 13 of Regulation (EC) No 562/2006, which requires a substantiated decision stating the reasons for refusal of entry), in order to safeguard respect for the fundamental rights and, in particular, legal protection of the rights of the passenger concerned (see Article 4 of that Regulation)?
4. Does Article 2(j) of Regulation (EC) No 261/2004 mean that cases of denied boarding are exempt from its scope whenever boarding is denied by decision of the air carrier due to alleged ‘inadequate travel documentation’? Should it be interpreted to mean that denied boarding does fall within the scope of the Regulation where a court finds, based on the particular circumstances of each specific case, that the travel documentation was adequate and that the denial of boarding was unsubstantiated or unlawful in that it infringed EU law?
5. Can a passenger be deprived of the right to compensation granted under Article 4(3) of Regulation (EC) No 261/2004 where the air carrier relies upon a clause precluding or limiting its liability in the event of allegedly inadequate travel documentation, where such a clause is included in the standard terms, published in advance, governing the operation of and/or

provision of services by the air carrier? Does Article 15, read in combination with Article 14, of that Regulation prevent the application of such clauses precluding and/or refusing the air carrier's liability?

### **Provisions of EU law cited**

Treaty on the Functioning of the European Union, Articles 77 and 288

Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1), Recital 12, Article 1(1) to (3), Article 2

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 (OJ 2004 L 46, p. 1), Article 1, Article 2(j), Article 3(1), (2) and (5), Article 4(3), Article 14, Article 15

Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1), Article 13

Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1), Article 2, Article 3, Article 4, Article 6(1), Article 8(3), Article 14

Decision No 565/2014/EU of the European Parliament and of the Council of 15 May 2014 introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by Bulgaria, Croatia, Cyprus and Romania of certain documents as equivalent to their national visas for transit through or intended stays on their territories not exceeding 90 days in any 180-day period and repealing Decisions No 895/2006/EC and No 582/2008/EC (OJ 2014 L 157, p. 23), Articles 1 to 8, Annex III

Information from the Commission about notifications by the Member States of decisions concerning the application of Decision No 565/2014/EU of the European Parliament and of the Council (2014/C 302/01) (OJ 2014 C 302, p. 1)

### **Case-law of the Court cited**

Judgment of 6 October 1970, *Grad*, 9/70, EU:C:1970:78.

Judgment of 26 February 1986, *Marshall*, 152/84, EU:C:1986:84.

Judgment of 12 July 1990, *Foster and Others*, C-188/89, EU:C:1990:313.

Judgment of 17 January 2013, *Zakaria*, C-23/12, EU:C:2013:24;

### **Brief summary of the facts and proceedings**

- 1 The applicant, D.Z., is a national of a third country (Kazakhstan). The defendant, Blue Air, is a Romanian air carrier registered as a foreign company in Cyprus.
- 2 The material time for the present case is 6 September 2015, the date on which the applicant was denied boarding on a defendant's flight from Larnaca Airport to Bucharest Airport scheduled for that date, on which the applicant had a confirmed seat reservation.
- 3 The applicant was due to stay in Bucharest from 6 September 2015 to 12 September 2015, the date of his scheduled return flight from Bucharest to Larnaca with a different air carrier. The purpose of the applicant's trip was to sit two examinations of the Association of Chartered Certified Accountants (ACCA) being held at an examination centre in Bucharest on 7 September 2015.
- 4 At the material time, Cyprus and Romania had not acceded fully to the Schengen Area, in that the Council had not yet adopted a decision finding that those Member States fulfilled all the requirements for the implementation of all aspects of the relevant *acquis*. Therefore, border controls at their external borders, which included the airports in those two States, had not been abolished.
- 5 At the material time, the applicant was not in possession of a visa issued by the Romanian authorities permitting him entry to Romania. However, at that time, the applicant did hold a temporary residence permit allowing him to stay on the territory of the Republic of Cyprus, issued in Nicosia on 15 June 2015 and valid until 6 April 2016.
- 6 Before his scheduled departure date for Romania, the applicant had applied online for a Romanian entry visa via the website of the Romanian Ministry of Foreign Affairs. In reply to the related questions, the applicant stated that he fell under the following category: 'I hold a short-stay issued by Bulgaria, Cyprus or Croatia'. Decision No 565/2014/EU was in force and was being applied by both Cyprus and Romania when the applicant submitted his application.
- 7 Based on his statement that he held a short-stay residence permit issued by Cyprus, the Romanian Ministry of Foreign Affairs replied that he did not require an entry visa for Romania, as his intended stay would not exceed 90 days in any 180-day period.
- 8 On 6 September 2015 the applicant arrived at the airport and presented his travel documentation at check-in to the staff of the private company acting as Blue Air's handling agent in Cyprus. Together with his passport and temporary resident

permit issued by Cyprus, the applicant presented the application for a Romanian entry visa which he had made and the reply which he had received online. The staff of that company forwarded those documents to a member of staff of Blue Air's ground control at Bucharest Airport, which replied as follows: 'I am sorry but they said that without a visa or a family member residence card, he can't enter Romania'.

- 9 Accordingly, it was decided to deny boarding to the applicant, in part because his carriage would be unlawful and would expose the defendant to criminal and administrative penalties. The applicant reacted by demanding the reasons for denied boarding in writing, but he never received any. Nor was he given any written substantiated decision by the Romanian authorities refusing him entry to Romania.
- 10 As his efforts to an out-of-court settlement of the dispute failed, the applicant brought the action under consideration.

#### **The principal arguments of the parties to the main proceedings**

- 11 The applicant argues that, even though he had all the necessary travel documentation in keeping with Decision No 565/2014/EU and had been advised by the Romanian Ministry of Foreign Affairs that he did not require an entry visa for that State, he was denied boarding on the defendant's aircraft without any explanation, without due warning, as a result of negligence and ignoring the provisions of that decision, unlawfully and/or in breach of contract.
- 12 The applicant is seeking compensation before the referring court for the lost cost of his return ticket, the cancellation fee for the hotel reservation in Bucharest, the entry fees for the examinations which he did not sit because he was unable to travel to Bucharest, the sum in wages not paid by his employer because he had requested and taken study leave in order to prepare for the examinations he was due to sit in Bucharest, and compensation for the non-financial damages which he sustained because his preparations for the examinations were wasted and he needed to prepare again to sit similar examinations on a different date.
- 13 The defendant contends that it was the applicant's responsibility to obtain any entry visa required under laws or regulations, that he knew or should have known that he required a visa to enter Romania, that the Romanian authorities had powers of discretion to refuse him entry to Romania if he did not have a visa, and that the defendant bears no liability for refusal of entry. The travel conditions published on the air carrier's website in connection with travel documentation produced for check-in and embarkation expressly state that the airline bears no liability if the authorities of the Member State of destination refuse the passenger entry to the country, or for the documentation which the passenger is required to have, or for the application of the laws, rules or instructions of the State of destination.

### Brief summary of the basis for the reference

- 14 The referring court is of the opinion that, although on the basis of Regulation No 539/2001 nationals of third countries, including Kazakhstan, require a visa, both Cyprus and Romania, which have applied Decision No 565/2014 since 6 September 2014 and will continue to do so pending their full implementation of all aspects of the Schengen *acquis*, have undertaken by notification to the European Commission to recognise as equivalent to their national visas for transit through their territories or for intended stays on their territories which do not exceed 90 days in any 180-day period the visas and/or residence permits listed in Annex III to Decision No 565/2014, which include the temporary residence permit issued to the applicant, a Kazakhstan national, by the Cypriot authorities.
- 15 In the above circumstances and given that neither Cyprus nor Romania has notified the European Commission of any exemption from Decision No 565/2014 in respect of the visas and residence permits attached to travel documentation issued by Kazakhstan, the referring court finds that the applicant was entitled at the material time to rely upon the notification given by those two Member States concerning the application of Decision No 565/2014 and on Article 3(2) of the Decision, read in combination with Annex III to the Decision, and thus assume that the temporary residence permit issued to him in Cyprus would be recognised.
- 16 As regards Questions 1 to 3, the issue that concerns the referring court is whether Decision No 565/2014 produces direct legal effect which the applicant is entitled to rely upon horizontally before the referring court in order to claim an actionable right against a private individual (the air carrier) for the losses which he sustained due to infringement of the provisions of that decision and, by extension, for infringement of the contract of carriage.
- 17 It follows from Article 288 TFEU and the relevant case-law of the Court that the provisions of a decision addressed to the Member States cannot produce direct legal effect horizontally, i.e. they cannot be cited by one private individual against another private individual for the purpose of imposing an obligation on the other private individual, as its provisions impose obligations on the States to which they are addressed, not on private individuals. Therefore, the issue that must be considered in each particular case is whether the defendant acted as a ‘private individual’ or as a ‘State’ to which the decision was addressed. If, as a private individual, the defendant acted in the exercise of powers vested in it by the State for the purpose of providing a public mission or public service controlled by the State, then its provisions imposing an obligation can be relied upon directly. Further, in order for the provisions of a decision to produce direct effect, they must be sufficiently clear and unconditional in terms of their content. It is necessary to check if the provision allows a number of derogations, the details of which need to be stipulated by the Member States, and/or if their wording is unclear and subsequent implementing measures therefore need to be taken.



- 18 Decision No 565/2014 does not appear to impose an obligation on the Member States, rather an option to derogate from the provisions of a regulation introducing a simplified visa regime. However, it is clear that the Member States to which that decision is addressed have exercised their discretion and stipulated derogations from the stricter framework of Regulation No 539/2001; in other words, they have undertaken to be bound by the result sought by the decision by publishing that undertaking in the *Official Journal of the European Union*.
- 19 In light of that undertaking, the referring court is of the opinion that, had the applicant been allowed to board the flight and land on Romanian territory, he would be able to rely directly before a Romanian court upon his right of entry to that country pursuant to Decision No 565/2014. However, at no time did the applicant have to deal with a decision of the Romanian administrative authorities refusing him entry to the country, as he was never allowed to land there for the purpose of undergoing controls by the Romanian administrative authorities based on the laws of that country. Nor did the defendant or its representatives give or notify him of any written substantiated decision by the Romanian authorities refusing him entry to Romania. In fact, in this case, the only harmful act which the applicant suffered was being denied boarding on the defendant's aircraft. That is why he has taken action in the civil courts in Cyprus in order to prove that, in the circumstances, denied boarding infringed the contract of carriage and/or was unlawful.
- 20 As regards Questions 4 and 5, the issue of concern to the referring court is whether, under the circumstances of this particular case, the decision qualifies as 'denied boarding' within the meaning of Regulation No 261/2004, which would give rise to an actionable right for payment of compensation to the applicant by the air carrier that operated the flight at issue by which he would have travelled to Bucharest.