

Case C-561/20

Request for a preliminary ruling

Date lodged:

26 October 2020

Referring court:

Nederlandstalige Ondernemingsrechtbank Brussel (Belgium)

Date of the decision to refer:

21 October 2020

Applicants:

Q

R

S

Defendant:

United Airlines, Inc.

[...] 21 OCT 2020

[...] Interlocutory judgment

Reference for a preliminary ruling CJEU

Nederlandstalige (Dutch-speaking)

Ondernemingsrechtbank (Business Court)

Brussels

Judgment

Reference for a preliminary ruling

10th Chamber – Room H [Or. 2]

IN THE CASE OF

1. Ms Q
2. Ms R
3. Mr S

Applicants;

Represented by meester B. SCHAUMONT, loco meester J. DE MAN, [...]
[address];

4. Company governed by foreign law UNITED AIRLINES INC, with its Belgian branch at 1381 Diegem, [...] [address and company number],

Defendant,

Represented by meester M. WOUTERS [...] [address];

.....

[...] [proceedings before the national court]

.....

[Or. 3]

I. THE CLAIMS

1. Applicants

The applicants claim that the defendant should be ordered to pay the applicants the sum of EUR 1 800.00, together with default interest as from 6 September 2018 as well as statutory interest.

They request that the defendant be ordered to pay the costs of the proceedings including the procedural indemnity in the amount of EUR 480.

2. Defendant

The defendant request that the summons be declared inadmissible and unfounded.

It requests that the applicants be ordered to pay the costs of the proceedings in the amount of EUR 480 in respect of the procedural indemnity.

II. THE FACTS

- 1 The applicants booked a trip via the travel agency Your Travel Agency (not involved in the present case), in a single reservation, from Brussels Airport (Belgium) to San José International Airport (United States of America) [...].

They each received an individual ticket issued by the air carrier Deutsche Lufthansa AG, apparent from the prefix number of the ticket ('220') for the entire journey from Brussels to San José [...]. However, it was the defendant which actually physically operated the flights. The defendant is a non-Community airline.

According to the reservation, the applicants were to travel to their final destination with the following flights operated by the defendant:

- flight LH8854 from Brussels (Belgium) to Newark International (United States of America), departing on 26 July 2018 at 10:00 local time and arriving the same day at 12:10 local time;
 - the applicants were then to take flight UA1222 from Newark International (United States of America) to San José International (United States of America), departing on 26 July 2018 at 17:05 local time and arriving the same day at 20:15 local time.
- 2 Flight UA1222 was delayed and arrived at San José, which was also the applicants' final destination, with a delay of 223 minutes, a delay of more than three hours [...].

According to the defendant, the cause of the delay was a technical problem with the aircraft which was to perform flight UA1222. [...]. **[Or. 4]**

- 3 By letter of 6 September 2018, the company Happy Flights (not involved in the present case) informed the defendant that it had taken over a claim lodged by the passengers. It gave the defendant formal notice that it was liable to pay EUR 600 per person, thus EUR 1 800. It cited 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 ('Regulation No 261/2004') as the legal basis for the compensation claim [...].

On 3 October 2018, Happy Flights sent the defendant a reminder due to its failure to reply or to make any payment [...].

The defendant replied to Happy Flights on 4 October 2018, claiming that No 261/2004 did not apply since the delay occurred during the second flight between two airports within the United States of America [...].

Happy Flights provided a detailed reply on 5 October 2018, referring to the case-law of the Court of Justice to refute the defendant's position. It urged the defendant to proceed with payment [...].

The defendant in turn replied in detail by letter of 10 October 2018 [...].

Happy Flights' legal representative, who was also the applicants' representative, served a notice of default on the defendant by letter of 11 October 2018, giving reasons. [...].

On 11 October 2018, the defendant notified the legal representative that it was standing by its position [...].

On 3 May 2019, the applicants' legal representative informed the defendant that the claim assigned to Happy Flights had been reassigned to the applicants. The representative again put the defendant on notice that it was in default of payment [...].

4 The applicants proceeded to issue the defendant with a summons on 22 July 2019.

III. ADMISSIBILITY

5 **[Or. 5]** [...]

6 [...]

7 [...] [procedural question]

8 The claim is admissible.

IV. THE MERITS

1. LEGAL FRAMEWORK

9 Under Article 3(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, Regulation No 261/2004 applies '*to passengers departing from an airport located in the territory of a Member State to which the Treaty applies*'.

A 'flight' is '*an air transport operation ... performed by an air carrier which fixes its itinerary*' (see, inter alia, judgment of the Court of Justice of 10 July 2008, *Emirates*, C-173/07, EU:C:2008:400, paragraph 40).

The Court of Justice has ruled that a flight with one or more connections which is the subject of a single reservation constitutes a whole for the purposes of the right

of passengers to compensation provided for in Regulation No 261/2004 (see, inter alia, judgment of the Court of Justice of 11 July 2019, *České aerolinie*, C-502/18, EU:C:2019:604, paragraphs 16 and 27, and Court of Justice, 31 May 2018, *Wegener*, C-537/17, EU:C:2018:361, paragraphs 18 and 19).

This implies that the applicability of Regulation No 261/2004 is to be assessed with regard to the place of initial departure and the place of the final destination of those connecting flights (see, inter alia, Court of Justice, 11 July 2019, *České aerolinie*, C-502/18, EU:C:2019:604, paragraphs 16, and Court of Justice, 31 May 2018, *Wegener*, C-537/17, EU:C:2018:361, paragraph 25).

Where passengers depart from an airport in the territory of a Member State and their final destination is situated in the territory of a third country, and a stopover is made in a third country where the passengers change aircraft, Regulation No 261/2004 applies in principle (see judgment of the Court of Justice of 11 July 2019, *České aerolinie*, C-502/18, EU:C:2019:604, paragraph 18).

- 10 Article 5(1)(c) of Regulation No 261/2004 provides for the right of passengers to financial compensation in case of cancellation of their flight. Passengers whose flights are long delayed are likewise entitled to compensation where, on account of a flight delay, they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier (see, inter alia, judgment of the Court of Justice of 19 November 2015, *Sturgeon*, C-402/07 and C-432/07, EU:C:2009:716, operative part, and confirmed in the judgment of the Court of Justice of 23 October 2012, *Nelson*, C-581/10 and C-629/10, EU:C:2012:657, operative part). **[Or. 6]**

Article 7 of Regulation No 261/2004 sets the compensation at EUR 250 for all flights of 1500 km or less, EUR 400 for all intra-Community flights of more than 1500 km and for all other flights between 1500 and 3500 km, and EUR 600 EUR for flights not falling under those two categories.

2. APPLICATION

- 11 The defendant disputes the applicability of Regulation No 261/2004 in the event of a long delay to a flight departing from and arriving in the territory of the United States of America, even where that flight is the last flight of two directly connecting flights, the first of which departs from an airport in the territory of a Member State.
- 12 The applicants rely on the case-law of the Court of Justice in *Wegener* (C-537/17). Although the facts of that case appear at first sight to be analogous to those of the present dispute, the Rechtbank [Ondernemingsrechtbank] notes that in the *Wegener* case the delay occurred on the first flight (and thus the flight departing from an airport in the territory of a Member State) operated by a non-Community air carrier.

In the present case, the delay occurred on the second flight between Newark (United States of America) and San José (United States of America). Consequently, the solution adopted by the Court of Justice in the *Wegener* case cannot simply be applied to the present case.

- 13 The Court of Justice also dealt with a similar case in the *České aerolinie* judgment (C-502/18).

In that case, the Court of Justice ruled that Regulation No 261/2004 also applies to a second flight in a series of connecting flights where the first flight departs from an airport situated in the territory of a Member State. In that case, the delay occurred on the second flight, which was operated by a non-Community air carrier. In that case, the question arose as to whether the Community carrier that operated the first flight can be required to pay compensation for the long delay caused on the second flight physically operated by a non-Community air carrier.

In the present case, both the first and second flights were operated by the defendant, a non-Community air carrier. In contrast to the *České aerolinie* case [Or. 7], there is no Community air carrier involved in the present dispute. The Community air carrier that issued the tickets is not even a party to the dispute. Accordingly, the solution adopted by the Court of Justice in the *České aerolinie* case cannot simply be applied to the present proceedings.

The case-law of the Court of Justice does not provide sufficient elements for the factual framework of the present dispute.

- 14 In addition, the defendant points out that, if Regulation No 261/2004 were to apply to the situation in which the second flight in a series of connecting flights is subject to a long delay, it would have an extraterritorial effect contrary to international law if that second flight occurs entirely within the territory of a third country.

More particularly, the defendant points out that the delay arose in the territory of the United States of America and its consequences occurred exclusively within its territory. The principle of sovereignty would preclude Regulation No 261/2004 from applying to a situation occurring within the territory of a third country.

In the *Air Transport Association of America* judgment of 21 December 2011, the Court of Justice recognised the customary international law principle that each State has complete and exclusive sovereignty over its own airspace. The Court of Justice also indicated that those general principles are codified, inter alia, in Article 1 of the Convention on International Civil Aviation, signed in Chicago (United States) on 7 December 1944 (judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraphs 103 and 104).

Secondary EU law, such as Regulation No 261/2004, must observe higher legal standards such as (customary) international law.

If the defendant's assertion is correct, the question arises as to the validity of Regulation No 261/2004 in the light of international law. A national court or tribunal does not have jurisdiction to rule on the invalidity of a regulation.

- 15 Under Article 267, first paragraph, of the Treaty on the Functioning of the European Union ('TFEU'), the Court of Justice of the European Union has jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the institutions.

Where a question is raised before a court or tribunal, that court or tribunal may, if it considers a decision on the question necessary to enable it to give judgment, request the Court to give a ruling thereon (Article 267, second paragraph, TFEU).
[Or. 8]

The jurisdiction of the Court of Justice to give preliminary rulings on the interpretation or validity of EU law is exercised solely on the initiative of the national courts or tribunals, irrespective of whether or not the parties to the main proceedings have expressed the wish to have recourse to the Court of Justice.

A request for a preliminary ruling may be particularly useful where a new question of interpretation is raised which is relevant to the uniform application of EU law, or where the existing case-law is not sufficiently clear to deal with a new factual or legal framework.

- 16 Although the Rechtbank is not obliged to refer a question to the Court of Justice, the Rechtbank is of the view that the resolution of the dispute requires an answer to the questions referred for a preliminary ruling.

At issue here, after all, is a problem of interpretation that has a decisive influence on whether Regulation No 261/2004 applies and, if so, whether Regulation No 261/2004 is valid.

Moreover, the facts in the present proceedings are not identical to those on which the Court of Justice has already given a ruling.

The question of the validity of Regulation No 261/2004 in the circumstances of the present proceedings is new. The Court of Justice alone has jurisdiction to rule on the invalidity of Regulation [No 261/2004].

- 17 Consequently, the Rechtbank concludes that it is necessary to request a preliminary ruling from the Court of Justice on the questions set out in the operative part of this judgment.

[...] [clarification regarding anonymisation]

[...] [suspension of proceedings before the national court] [...]

.....

[Or. 9]

FOR THESE REASONS,

The Rechtbank, [...] [note on procedure]

Declares the claim admissible,

Before making any further ruling, suspends the proceedings and refers the following questions to the Court of Justice of the European Union for a preliminary ruling:

- Should Article 3(1)(a) and Article 7 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, as interpreted by the Court of Justice, be interpreted as meaning that passengers are entitled to financial compensation from a non-Community air carrier when they arrive at their final destination with a delay of more than three hours as a result of a delay of the last flight, the place of departure and the place of arrival of which are both situated in the territory of a third country, without a stopover in the territory of a Member State, in a series of connecting flights commencing at an airport situated in the territory of a Member State, all of which have been physically operated by that non-Community air carrier and all of which have been reserved in a single booking by the passengers with a Community air carrier which has not physically operated any of those flights?
- If the first question is answered in the affirmative, does 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, as interpreted in the first question, infringe international law and, in particular, the principle of the exclusive and complete sovereignty of a State over its territory and airspace, in making EU law applicable to a situation taking place within the territory of a third country?

[...] [Or. 10]

[...] [referral to the Court of Justice of the European Union and concluding formula]