

Anonymised version

Translation

C-54/23 – 1

Case C-54/23

Request for a preliminary ruling

Date lodged:

3 February 2023

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

10 January 2023

Applicant:

WY

Defendant:

Laudamotion GmbH

Ryanair DAC

BUNDESGERICHTSHOF

ORDER

[...]

[...]:

10 January 2023

[...]

in the case of

WY, [...] Düsseldorf,

applicant and appellant on a point of law,

[...]

v

1. Laudamotion GmbH, [... Schwechat (Austria),
defendant and respondent in the appeal on a point of law,
2. Ryanair DAC, [...] Dublin (Ireland),
defendant

[...]

Further to the hearing held on 10 January 2023, the Tenth Civil Chamber of the Bundesgerichtshof Federal Court of Justice, Germany) [...]

Hereby orders:

The proceedings are stayed.

The following questions on the interpretation 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 (OJ 2004 L 46, p. 1 et seq.), are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Is a right to compensation for a flight delay of at least three hours precluded in general under Articles 5, 6 and 7 of the Regulation where, faced with a long delay, the passenger uses a self-booked replacement flight and thereby reaches the final destination with a delay of less than three hours, or can a right to compensation exist in that situation in any event where, before the time by which the passenger must present himself for check-in, there is already sufficiently reliable information indicating that the flight will arrive at its final destination with a delay of at least three hours?
2. In the event that Question 1 is to be answered in the latter sense: does a right to compensation for a flight delay of at least three hours under Articles 5, 6 and 7 of the Regulation in that situation require the passenger to present himself for check-in in good time under Article 3(2)(a) of the Regulation?

Grounds:

- 1 I.The applicant is claiming compensation from the first defendant under 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

2

flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1 et seq.; hereinafter: Flight Passenger Rights Regulation).

2 The applicant booked a return flight with the second defendant from Düsseldorf to Palma de Mallorca. The first defendant was the operating air carrier. The outward flight was scheduled for 31 October 2019. The departure was delayed by six hours. The defendants did not offer the applicant an earlier replacement flight. Since he had to meet a deadline at his destination, the applicant independently booked a replacement flight and reached Palma with a delay of less than three hours.

3 The applicant maintains that he presented himself at the check-in in good time and was informed of the delay by the first defendant.

4 The applicant is claiming compensation of EUR 250 and reimbursement of pre-judicial legal fees from the first defendant and, by way of an action by stages, information on the amount of unused taxes and payment of the amount resulting from that information from the second defendant. The local court, by a part judgment, ordered the second defendant to provide the information and dismissed the action against the first defendant.

5 The appeal court dismissed the applicant's appeal against the partial dismissal of the action. By its appeal on a point of law, the applicant is continuing to pursue his application at first instance against the first defendant, which opposes the appeal.

6 II. The appeal court assumed that the first defendant is not obliged to pay compensation under Article 5(1)(c) and Article 7(1) of the Flight Passenger Rights Regulation even though the flight which it operated arrived more than three hours late, since the applicant had not boarded that flight and arrived at his destination with a delay of less than three hours. The fact that the applicant arranged the replacement flight himself was irrelevant. The applicant was no worse off than if he had used the flight operated by the first defendant. Subject to the conditions laid down in Paragraph 280(1), Paragraph 281(1) and (3) and Paragraph 281 of the Bürgerliches Gesetzbuch (German Civil Code), he could claim for reimbursement of the cost of the self-booked replacement flight.

7 III. The decision on the appeal on a point of law depends on the interpretation of Article 3(2), Article 5(1)(c) and Article 7(1) of the Flight Passenger Rights Regulation.

8 1. According to the case-law of the Court of Justice of the European Union, air passengers have a right to compensation under Article 5(1)(c) of the Air Passenger Rights Regulation, read together with Article 7(1) of that regulation, where they suffer, upon arrival at their final destination, a loss of time equal to or in excess of three hours (see only the judgment of 19 November 2009 – C-402/07 and C-432/07, [...] paragraphs 61 and 69 – Sturgeon; the judgment of 23 October

2012 – C-581/10 and C-629/10, [...] paragraph 37 – Nelson; the order of 12 November 2020 – C-367/20, [...] paragraph 27 – KLM).

- 9 2. Taking that as a starting point, there is much to support the view that compensation is not due where, faced with a long delay, the passenger uses a self-booked replacement flight and thereby arrives at his destination with a delay of less than three hours.
- 10 (a) According to the case-law of the Court of Justice, passengers claiming compensation for a long delay are not, in principle, required to prove by means of a boarding card that they were present for check-in for that flight; it may be otherwise if it can be established that those passengers were not transported on the delayed flight (see judgment of 24 October 2019, C-756/18, [...] paragraph 33 et seq. – easyJet).
- 11 This may be based on the premiss that a claim for compensation for a long delay is, in principle, due only to passengers who have used the flight concerned and have actually arrived at the final destination with a delay of at least three hours.
- 12 (b) That premiss is consistent with the fundamental considerations from which the Court of Justice derives the requirement laid down in the Regulation to pay compensation in the event of a long delay in arriving.
- 13 The Court of Justice supports that legal consequence, in particular, on the EU principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. In that regard, it considers the circumstance to be decisive that passengers whose flights arrive very late and those whose flights are cancelled are in comparable situations, for the purposes of compensation provided for under the Regulation, because those passengers suffer similar inconvenience, namely, a loss of time equal to or in excess of three hours in relation to the original planning of their flight (judgment of 19. November 2009 – C-402/07 and C-432/07, [...] paragraph 50 et seq. – Sturgeon; judgment of 23 October 2012 – C-581/10 and C-629/10 [...] – Nelson).
- 14 Therefore, it is, in principle, a condition of a situation requiring equal treatment that the passengers concerned have actually arrived at the final destination with a delay of at least three hours. It might be inferred from this that it is not sufficient for approval of a claim for compensation if a passenger suffered such a delay in the case of a hypothetical causal chain.
- 15 (c) In these circumstances, the fact that the air carrier failed in its duty to offer a replacement flight by which the delay could have been avoided would not, in itself, change that assessment.
- 16 (aa) However, according to the case-law of the Court of Justice, it is one of the measures required of an air carrier to offer the passenger in the event of a delay or cancellation any possible direct or indirect re-routing with a flight operated by the

air carrier concerned or another air carrier which arrives with less delay than the next flight of the air carrier concerned, unless the implementation of such re-routing constitutes an intolerable sacrifice for that air carrier in the light of the capacities of its undertaking at the relevant time (judgment of 11 June 2020 – C-74/19, [...] paragraph 61 – LE/TAP; Bundesgerichtshof, judgment of 6 April 2021 – XZR 11/20, [...] paragraph 41).

- 17 The infringement of that requirement does not in itself, however, give rise to the right to any compensation under Article 7(1) of the Air Passenger Rights Regulation. Although it serves the purpose of avoiding a cancellation or delay where possible, a right to compensation under the Regulation exists only in the event of a loss of time of at least three hours.
- 18 (bb) A right to compensation in such situations cannot be derived from the principle of equal treatment merely from the fact that the infringement of a requirement to change a reservation to another flight may also lead to inconvenience for passengers.
- 19 The Regulation does not provide for compensation under Article 7(1) for any kind of inconvenience but only for a situation which is characterised by a loss of time of at least three hours. That provision cannot be transposed by applying the principle of equal treatment to situations where such a loss of time has not occurred.
- 20 Accordingly, the Court of Justice has decided that, although a change to a (first) flight reservation results in inconvenience for the passenger concerned, such inconvenience cannot be regarded as ‘serious’, within the meaning of that regulation, in the case where the passenger arrives at his or her final destination on the second booked flight with a delay of less than three hours (judgment of 30 April 2020 – C-191/19, [...] paragraph 32 – Air Nostrum).
- 21 3. A different assessment might at least be required in situations where, even before the latest time by which the passenger must present himself for check-in, there is sufficiently reliable information indicating that the flight will arrive at its final destination with a delay of at least three hours.
- 22 In the case of a cancellation, a right to compensation already exists under Article 5(1)(c) of the Air Passenger Rights Regulation where the passenger is not offered re-routing with a loss of time of less than three hours.
- 23 Where those conditions are fulfilled, it is, in principle, irrelevant whether the passenger actually boards the scheduled flight and when he arrives at the final destination. Nor is the passenger required in that situation to present himself for check-in in good time. Where it is established that the flight is cancelled, such speculation would, in any case, serve no purpose.
- 24 As the Chamber has already explained in another context (Bundesgerichtshof, order of 3 May 2022 – X ZR 122/21, paragraph 16), a comparable situation might

arise where, before the latest time by which the passenger must present himself for check-in, there is already sufficiently reliable information indicating that the flight can be operated only with a delay in arrival at the final destination of more than three hours. In that situation, consideration of whether a person has presented himself for check-in in good time could be as pointless as in the case of a cancellation.

- 25 It may be concluded from this that a right to compensation in that situation as in the case of a cancellation does not depend on whether the passenger boarded the scheduled flight or when the passenger arrived at the final destination.
- 26 4. In the case at issue, the applicant's appeal on a point of law has proved to be unfounded, in so far as a right to compensation is, in general, precluded where a passenger reaches the final destination with a delay of less than three hours.
- 27 5. If, on the other hand, a right to compensation should come into consideration, in so far as, before the latest time by which the passenger must present himself for check-in, there is already sufficiently reliable information indicating a long delay, the further question arises whether a right to compensation in that situation is still dependent on the passenger presenting himself for check-in in good time, in order to give the air carrier the opportunity to change the flight reservation.
- 28 The Chamber has already referred that question to the Court of Justice for a preliminary ruling in other proceedings. Under the abovementioned premiss, it is also decisive in the present case.
- 29 The lower courts have not, so far, made any findings on whether the applicant presented himself for check-in in good time, as claimed. If this is not required for a right to compensation, the Chamber can make a definitive ruling in the case. Otherwise, the case will have to be referred back to the appeal court for further clarification of the facts.

[...]