Case C-52/23

Request for a preliminary ruling

Date lodged:

3 February 2023

Referring court:

Amtsgericht Frankfurt am Main (Germany)

Date of the decision to refer:

24 January 2023

Applicant:

flightright GmbH

Defendant:

TAP Dpt. Fale Connosco SA

…

Amtsgericht Frankfurt am Main Frankfurt am Main, 24.1.2023

…

Order

In the case of

Flightright GmbH, […] Potsdam

Applicant

…

v

TAP S.A. Dpt. Fale Connosco, […] Lisbon, Portugal

Defendant

…

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the court has ordered as follows:

I. The proceedings are stayed.

II. The following questions on the interpretation of Article 5 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 are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:

1. **Do extraordinary circumstances within the meaning of Article 5(3) of the regulation exist where meteorological conditions occur which are incompatible with the operation of a flight, irrespective of whether those meteorological conditions are extraordinary?**

2. **If the answer to Question 1 is in the negative, can the extraordinary nature of the meteorological conditions be determined by reference to their regional and seasonal frequency at the place and time at which they occur?**

Reasons

I.

The applicant is seeking compensation from the defendant under Regulation No 261/2004, on the basis of rights assigned to it by two passengers.

The assignors reserved a flight with the defendant as the operating air carrier and that reservation was confirmed. Flight TP1860 from Ponta Delgada (Azores) to Lisbon, with an onward flight TP572 to Frankfurt am Main, was scheduled to depart at 1.30 p.m. on 23 March 2019. The connecting flight was scheduled to depart at 6.15 p.m. and arrive at 10.25 p.m. Flight TP1860 was cancelled. The assignors were transported on another flight on 24 March 2019 and reached Frankfurt am Main over 24 hours later than scheduled. Dangerous winds may prevail in Ponta Delgada.

The defendant contends that the cancellation was due to the fact that the aircraft intended for the flight at issue – TP1860 – had not been able to land in Ponta Delgada on 23 March 2019. According to the defendant, the reason for this was that a storm had led to a crosswind component for a landing in Ponta Delgada of 41.16 knots, which was too high an Airbus A319, a fact disputed by the applicant, pleading a lack of knowledge in that respect. Other comparable aircraft were also unable to land. The assignors were booked on the next available connection.

II.

The resolution of the dispute depends on whether extraordinary circumstances within the meaning of Article 5 of the regulation should be admitted, as argued by the defendant.

The action is well-founded if the defendant's submissions themselves do not describe an extraordinary circumstance.

1. Article 5 of the Regulation does not oblige an operating air carrier to pay compensation if it can prove that cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

(a) Extraordinary circumstances are circumstances which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond the actual control of that carrier on account of their nature or origin (judgment of 22 December 2008, C-549/07 …), that is to say, rather than arising in the normal course of events, they fall outside what is or may generally be involved in air passenger transport operations (Bundesgerichtshof (Federal Court of Justice) judgment of 21 August 2012, Case X ZR 138/11 …). In practice, as in this case, airlines regularly cite meteorological conditions that are incompatible with the operation of a flight.

(b) It is true that, according to the legislature itself, meteorological conditions that are incompatible with the operation of a flight are capable of constituting extraordinary circumstances (recital 14). As a starting point, it therefore suffices, first, that the meteorological conditions prevent the operation of a flight. That would appear to be reasonable in principle, since the weather is beyond the air carrier's control. It is hard to see why an air carrier should be held liable, irrespective of fault, for circumstances which it is in no position to influence. No negligence as regards the operation of the flight arises in such a case. Moreover, the mere existence of extraordinary circumstances does not exempt the air carrier from liability for compensation, as it is also required to take reasonable measures to avoid the consequences of extraordinary circumstances (see Article 5(3) of the Regulation).

(c) On the other hand, the fact that exposure to the elements is inherent in aviation cannot be overlooked. It is inherent in the very nature of the business. Weather influences are always present; they change constantly and sometimes in such a way that a flight cannot or can no longer be safely operated. If these circumstances occur regularly, they must in principle always be expected. The court therefore has doubts as to whether the fact that meteorological conditions disrupted a scheduled flight is sufficient in general. It would seem rather that the meteorological conditions must, in accordance with the wording of Article 5(3) of the Regulation, be extraordinary in nature.

For example, it is not clear why an air carrier should be exonerated where it schedules a flight to Funchal in Madeira, an airport where wind shear is known to

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occur frequently. It is operating a flight in full knowledge of the fact that there is an increased risk of meteorological conditions incompatible with the operation of a flight, for example where a disturbance actually occurs in the operation of the flight due to such wind shear. The case here is similar; it is undisputed that dangerous winds can prevail in Ponta Delgada. It seems more logical that an air carrier must be prepared for such occurrences.

(d) The court considers that a narrow interpretation is required.

(aa) It does not appear that the legislature considered, in recital 14 of Regulation No 261/2004, that meteorological conditions that are incompatible with the operation of a flight constitute, as a rule, extraordinary circumstances. Rather, that recital states that such circumstances may occur in such meteorological conditions. That supports or, in any event, does not preclude a narrow interpretation in keeping with the legislature's objective of ensuring a high level of protection for passengers (recital 1).

According to the definition of extraordinary circumstances, it is necessary that the two criteria referred to above, that is control and the normal exercise of the activity of the air carrier, are not fulfilled. Although the former may not be fulfilled, the latter certainly is, if it is assumed that exposure to the weather is inherent in the normal exercise of the activity of the air carrier.

In that regard, Article 5(3) of the regulation suggests a narrow understanding. By definition, the word 'extraordinary' indicates a rare occurrence. Something that occurs regularly cannot be extraordinary. It would appear to be appropriate, in the interests of a high level of protection for passengers, to examine what is inherent in the normal exercise of the activity of the air carrier concerned based on the actual circumstances of each individual case.

The legal approach would be similar to that taken to technical problems. In its judgment of 22 December 2008 in Case C-549/07 …, the Court held that the courts must ascertain whether the technical problems cited by the air carrier stemmed from events which are not inherent in the normal exercise of its activity and were beyond its actual control (see paragraphs 26 and 27). The resolution of a technical problem caused by failure to maintain an aircraft must therefore be regarded as inherent in the normal exercise of an air carrier's activity (paragraph 24). That would not be the case, for example, where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism (paragraph 26). The Court also held in that judgment that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded (paragraph 36).

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Therefore, it might be necessary to ascertain in the present case whether the meteorological conditions relied on by the air carrier stemmed from events that are not inherent in the normal exercise of its activity, which are beyond its actual control and – this being a matter to be clarified by way of the request for a preliminary ruling – are not inherent in the normal exercise of its activity.

(bb) The case-law of the Court of Justice, which distinguishes between ‘external’ and ‘internal’ events, would not preclude that assessment.

Contrary to what the defendant suggests in its submission of 15 December 2022, the Court of Justice no longer draws a distinction only on the basis of ‘spheres of influence’ and ‘control’, but also according to whether the events, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond that carrier’s actual control (Judgment of 23 March 2021 – C-28/20 paragraph 23). The Court's distinction between ‘external’ and ‘internal’ events rather serves to apply the criterion of control (see loc. cit., C-28/20, paragraph 41). The lack of control is not disputed in the present case. No other inference can be drawn from the judgment of 7 July 2022 – C-308/21 (see paragraph 24 et seq.).

(cc) The court has already submitted a reference for a preliminary ruling in Case C-388/22, in which, in addition to adverse weather conditions, decisions of air traffic management were also the subject of the questions referred for a preliminary ruling. The Commission's observations of 21 September 2022 in that case also do not provide any compellingly opposing points of view.

As far as weather conditions were concerned, the Commission focused, first of all, largely on the issue of (lack of) control, which is not relevant to the question of interpretation, since, as in the present case, the issue of control is not in dispute (paragraph 33). Furthermore, the Commission then also at least expressed the view that weather conditions ‘such as thunderstorms or lightning strikes in general’ cannot be part of the normal exercise of the activity of the air carrier concerned (paragraph 37). It then apparently draws the line as to the occurrence of an extraordinary circumstance solely on the basis of the incompatibility with the operation of the flight in question (see paragraph 38). In the view of the referring court, the Commission did not specifically address the question of the extraordinary nature of weather conditions in those observations.

(dd) Criteria indeed exist for distinguishing between extraordinary and ordinary circumstances in such cases.

It might be possible to establish if meteorological conditions are extraordinary based on worldwide variations in regional and seasonal climatic conditions. Where certain meteorological conditions occur more frequently at certain times than elsewhere, they cease to be extraordinary. Air carriers which operate flights in regions or at times of particular weather phenomena then run the risk of being

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affected by what are then merely ordinary circumstances … [reference to national literature].

(ee) Such an interpretation would not impose an unreasonable burden on air carriers.

Advocate General Jääskinen raised similar considerations with regard to Article 17 of Regulation (EC) No 1371/2007 in his Opinion of 14 March 2013 in Case C-509/11, point 40 [Internet link] …: ‘In the context of railway passenger transport contracts, the most usual causes of *force majeure*, namely difficult weather conditions, railway infrastructure damages, and labour market conflicts, in fact have a foreseeable statistical frequency even if their individual instances cannot be predicted with certainty. This means that the prospect of them occurring is known to railway undertakings in advance. This also means, therefore, that they can be taken into account when calculating ticket pricing.’

Similarly, in calculating their ticket pricing, air carriers can also take account of weather-related events which de facto have a foreseeable statistical frequency and may give rise to flight disruptions for which compensation is payable, in the event that the financial burden of compensation payments due to weather-related circumstances exceeds what is reasonable.

2. In the present case, as noted above, it is known that there is a particular risk of dangerous winds in Ponta Delgada. Consequently, the defendant can properly invoke extraordinary circumstances within the meaning of Article 5(3) of the Regulation only if that factor is not decisive.

[…]

[Formalities]

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