Anonymised version

Case C-502/18

Request for a preliminary ruling

Date lodged:

30 July 2018

Referring court:

Městský soud v Praze (Czech Republic)

Date of the decision to refer:

17 May 2018

Applicants:

CS

DR

EQ

FP

GO

HN

IM

JL

KK

LJ

MI

Defendant:

České aerolinie a.s.

(Omissis)

ORDER

The Městský soud v Praze (Prague City Court, Czech Republic) has decided, as the first-instance appellate court …in the case of:

a/ CS…

b/ DR…

c/ EQ…

d/ FP…

e/ GO…

f/ HN…

g/ IM…

h/ JL…

ch/ KK…

i/ LJ…

j/ MI…

(the applicants at first instance)

v

České aerolinie, … with its seat in Prague 6 …

(the defendant at first instance)

seeking payment of EUR 6 600 plus default interest and costs.

concerning an appeal brought by the defendant at first instance against the judgment of the Obvodní soud pro Prahu 6 (District Court, Prague 6, Czech Republic) dated 12 January 2016 (Omissis) [,] after the setting aside of the judgment of the Městský soud v Praze (Prague City Court) by a decision of the Ústavní soud (Czech Constitutional Court) dated 31 October 2017…,

as follows:

[national proceedings]…

II. The Městský soud v Praze (Prague City Court) refers the following question to the Court of Justice of the European Union for a preliminary ruling:

"Is there an obligation on a Community carrier to pay compensation to passengers under Article 3(5), second sentence, 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] where the Community carrier as the contractual carrier operated the first leg of a flight with a stopover at an airport in a non-Member State, from which, under a code sharing agreement, a carrier which is not a Community carrier operated the second leg of the flight and **[OR 2]** there was a delay of more than three hours in the arrival at the final destination airport which arose exclusively in the second leg of the flight?"

Grounds:

1 [National proceedings](Omissis)

2 The facts of the case are as follows: the defendant performed the first leg of the flight in respect of whose late arrival the applicants are seeking compensation from the defendant, inasmuch as its aircraft (Flight OK 350) departed from Prague airport in accordance with the flight plan on 16 January 2014 at 23h40 and arrived at Abu Dhabi airport on 17 January 2014 at 05h24. The scheduled flight arrival time was 06h05. The second leg of the flight after the stopover was operated by the company Etihad airways, in accordance with the flight plan and under a code sharing agreement (Flight OK 3172). The company Etihad Airways is not a Community carrier. There was a delay which arose in the second leg of the flight, after the stopover. Instead of departing from Abu Dhabi on 17 January at 10h40, the aircraft did not depart until 17 January at 19h19 and it arrived at Bangkok at 03h53 on 18 January. The 8 606 km flight from Prague to Bangkok was therefore delayed by 488 minutes.

3 In its legal assessment, the first-instance court concluded that the claims brought are claims under Regulation (EC) No 261/2004 [of the European Parliament and of the Council] ('the Regulation') which, pursuant to Article 288 of the Treaty on the Functioning of the European Union, is directly applicable. The applicability of the Regulation to the case at issue follows from Article 3(1)(a) and Article 2(h) thereof in conjunction with the judgment of the Court of Justice in Case C-11/11, inasmuch as the passengers departed from Prague airport, that is to say from an airport in an EU Member State. The court then concluded that the amount claimed was justified under Article 7(1)(c) of the Regulation read in conjunction with the judgment of the Court of Justice in Case C-402/07.

4 The main legal issue was the defendant's legal capacity to be sued. The defendant objected that it did not have capacity to be sued since in the flight leg from Abu Dhabi to Bangkok it was not the operating air carrier (Article 2(b) of the

Regulation). However, the first-instance court inferred the defendant's liability from Article 3(5), second sentence, of the Regulation, which provides that where an operating air carrier which has no contract with the passenger performs obligations under this Regulation, it is to be regarded as doing so on behalf of the person having a contract with that passenger. It therefore upheld the application in its entirety.

5 The referring court, as the first-instance appellate court, confirmed the judgment of the first-instance court by a judgment of 26 April 2016 …, it furthermore ruled as to the success of the application and as to the costs of the first-instance appeal proceedings. As of the time of the first-instance appeal proceedings, the defendant contended that the case should be referred to the Court of Justice of the European Union in particular with regard to the appraisal of the liability of the contractual carrier for the flight leg operated by another carrier. At that stage of the proceedings, the first-instance appellate court concluded that the solution to the legal questions for which the reference to the Court of Justice was requested could be clearly deduced from the abovementioned Regulation No 261/2004 in conjunction with the judgment of the Court of Justice in Case C-11/11. It did not take the view that the case-law of the Court of Justice was inconsistent, and therefore the cited judgment in Case C-173/07 did not have an impact on the present case in the first-instance appeal proceedings. The first-instance appellate court thus agreed that a flight from an airport in an EU Member State, to which the Treaty on the Functioning of the European Union applies, must be regarded as a single flight, even if the airport of final destination is reached after a stopover (judgment in Case C-11/11). Like the first-instance court, it relied on Article 3(5) of the Regulation, under which the operating air carrier acts on behalf of the person having a contract with the passenger concerned. It follows from Article 3(5) of the Regulation, as applied to the case in the main proceedings, that the defendant is directly liable to the applicants for the damage they suffered on account of the delay in the flight leg operated by the company Etihad Airways, since a constituent feature of the legal concept of 'agency' is **[OR 3]** that the principal is directly responsible for the acts of the agent. The first-instance appellate court considered that interpretation of the Regulation to be entirely pertinent to the situation and correct, inasmuch as the liability of the contractual carrier stems from the contract and the carrier cannot be exempted on the ground that the delayed flight leg was operated by another party and inasmuch as it assessed the situation as identical to any other form of subcontracting. In its legal assessment the first-instance appellate court also had regard to the fact that the legal finding set out above had also been adopted by other chambers of the Městský soud v Praze (Prague City Court), which had adjudicated on cases with similar facts…. It further held that where the amount claimed by each applicant individually is less than CZK 50 000, there is no appeal on a point of law allowed against its judgment to the Nejvyšší soud ČR (the Supreme Court, Czech Republic) and it advised the parties of this in the written version of its judgment.

6 Ruling on a constitutional complaint brought by the defendant, the Ústavní soud ČR (Czech Constitutional Court) in its judgment of 31 October [2017] set aside

the judgment of the Městský soud v Praze (Prague City Court) of 26 April 2016 …. The Ústavní soud (Constitutional Court) concluded that the first-instance appellate court had infringed the right of the parties to a fair trial under Article 36(1) of the Czech Charter of Fundamental Rights and Freedoms (Listina základních práv a svobod), which forms part of the constitutional order of the Czech Republic …, inasmuch as it had incorrectly advised the parties that no appeal on a point of law was possible. The Ústavní soud (Constitutional Court) found that the claim brought is a claim on the basis of a consumer contract and that an appeal on a point of law to the Nejvyšší soud (Supreme Court) … against a decision by the first-instance appellate court on such a claim is admissible irrespective of the amount claimed in the proceedings. It also directed the first-instance appellate court to address the arguments contained in the decision of the German Federal Court of Justice (‘Bundesgerichtshof’) Xa ZR 132/08, to which the complainant had referred.

7 In the proceedings before the first-instance appellate court, the defendant subsequently relied, in support of its arguments, on the judgments of the Bundesgerichtshof Xa ZR 132/08, X ZR 14/12, X ZR 73/16 and X ZR 101/16. It also relied on the findings in the judgment of the Court of Justice in Case C-302/16. Judgment Xa ZR 132/08 of the Bundesgerichtshof specifically addresses a case similar to that in the main proceedings, in which a flight was delayed in the leg operated by a carrier other than the contractual carrier. The Bundesgerichtshof held in that case that the contractual carrier was not liable since it was not the operating air carrier. Subsequently, in its judgment X ZR 14/12, the Bundesgerichtshof also held in a similar case that the case concerned two separate flights. However, both those judgments were delivered prior to the judgment of the Court of Justice in Case C-11/11, which defined a flight with a stopover as a single flight. Although judgment X ZR 73/16 of the Bundesgerichtshof deals with special circumstances, in judgment X ZR 101/16 it was concluded, with reference to the judgment of the Court of Justice in Case C-302/16 (paragraph 27), that the Regulation could not be interpreted as ruling out the possibility for the contractually-bound operating air carrier to avoid its obligations under the Regulation by means of a connection operated by a carrier which is not covered under the Regulation (see paragraphs 16 and 18 of the judgment). The Městský soud v Praze (Prague City Court) infers from the above that the findings in the abovementioned judgments of the Bundesgerichtshof tend to support the defendant’s arguments, even if it cannot be overlooked that the reference to the judgment of the Court of Justice in Case C-302/16 is not entirely relevant, since that judgment dealt with a different situation. The ratio of the judgment of the Court of Justice Case C-302/16 was that where a flight is cancelled, the operating air carrier is required to pay compensation to passengers where it did not inform them directly of that cancellation, even if it informed the person which concluded the contract with them (the travel agent).

8 In addition to the provisions of the Regulation and the judgments of the Court of Justice relied on by the first and second-instance Czech courts, the applicants cited in support of their arguments the judgment of the Court of Justice in Case C-

559/16, in which the concept of the ‘flight distance’ is explained, since a flight with a stopover is treated in that judgment as a single flight, together with, in particular, the Opinion of Advocate General Michal Bobek of … in Joined Cases C-274/16, C-447/[16] and C-448/16. That Opinion primarily deals with the issue of jurisdiction, but it also expressly addresses the application of Article 3(5) and Article 13 of the Regulation and concludes that the contractual air carrier cannot escape the contractual obligations agreed with the passenger by subcontracting a part of the transport service to another air carrier. In this sense, the legal position of the operating air carrier is derived from the legal position of the contractual air carrier. The contractual air carrier is the principal in such a situation and the operating air carrier the agent (see in particular points 75 to 77 of the Opinion). **[OR 4]**

9 In the proceedings before the Městský soud v Praze (Prague City Court) after the referral back of the case, it was also definitively shown that the air carrier Etihad Airways is not a Community carrier within the meaning of Article 2(c) of the Regulation.

10 In the case before it, the Městský soud v Praze (Prague City Court) has taken its decision on the basis that the dispute between the parties is to be settled exclusively on the basis of the Regulation which, under Article 288 TFEU, is binding and directly applicable. Moreover, the claim brought cannot succeed under national law either. Its nature is that of a claim for compensation in respect of non-material harm and the obligation to provide such compensation in the case of unlawful conduct does not as a general rule exist under Czech law but, pursuant to Paragraph 2894 of Law No 89/2012 (the new Civil Code) (Zákon č. 89/2012 Sb. (… nový občanský zákoník)), only if that obligation is expressly agreed or if it is specifically provided for by law. The Civil Code thus provides for an obligation to pay compensation for non-material harm only in the event of an unlawful interference with the natural rights of an individual (Paragraph 2956), wilful or malicious damage to property (Paragraph 2969(2)), or further in the case of persons who legitimately perceive the harm (which may include harm other than to themselves) as a personal misfortune (Paragraph 2971), or in connection with package tours (damages in respect of disruption of the holiday – Paragraph 2543) or in the event of the serious infringement of the fundamental membership rights of a member of an association (Paragraph 261). It must be added in this connection that the provision for payment of damages in respect of the disruption of a holiday under Paragraph 2543 of the Civil Code is in general applicable against the tour organisers and liability is incurred in particular where the tour was frustrated or substantially reduced. That legislation comes closest to applying to the case in the main proceedings, but it regulates the obligations of the travel agent, not those of the carrier. There is also an obligation to pay damages for non-material harm under Paragraph 3(2) of the Law on Business Corporations (Zákon o obchodních korporacích). It appears that such an obligation applies to situations where the illegality is based on the infringement of rules laid down by the Law on Business Corporations, in particular on the internal functioning of those corporations. Paragraph 31a of Law No 82/1998 (Zákon.č. 82/1998 Sb), which

provides for the obligation to pay compensation for non-material harm in the event of an unlawful decision or maladministration on the part of a public authority, is not applicable to the case either …. There is a lack of relevant case-law from the Nejvyšší soud ČR (the Czech Supreme Court) applicable to the case before the referring court, which can be explained in part by the short period since the new Civil Code entered into force.

11 Having regard to the above, the Městský soud v Praze (Prague City Court) concludes that the present claim under the Regulation for compensation in respect of non-material harm may be successful only if it is found that under the second sentence of Article 3(5) of the Regulation, in respect of a flight including a stopover, the contractual carrier (the defendant) is liable even for a delay which occurred in the flight leg operated not by that carrier but by a different carrier which is not a Community carrier. That court bases its reasoning on the fact that there may be several operating air carriers in the case of a flight including a stopover, each of which is the operating air carrier only for the leg of the flight which it actually performs (Article 2(b) of the Regulation). The objective of the Regulation, namely to ensure a high level of protection for passengers, supports a finding in favour of the liability of the contractual carrier, since if the air carrier operating a flight leg from an airport outside the EU is not a Community carrier, as in the present case, it is impossible to provide compensation under the Regulation (Article 3(1)(b) of the Regulation). Furthermore, the provision of compensation by the contractual air carrier naturally does not exclude the possibility of that carrier seeking redress from the operating air carrier (see Article 13 of the Regulation). A finding against liability is supported by the fact that the Regulation, with the exception of the second sentence of Article 3(5) thereof, is based on the premise that it is the operating air carrier that bears any liability for damages. That is borne out by the case-law of the Bundesgerichtshof of the Federal Republic of Germany, according to which it is clear that, even by application of the second sentence of Article 3(5) of the Regulation, it is not possible to find the contractual carrier liable to pay damages. The differing case-law of the Czech and German courts provides an argument in favour of unifying the case-law of the Court of Justice by means of a judgment. In these circumstances, the referring court thus, under Paragraph 109(1)(d) and Paragraph 211 of the Czech Code of Civil Procedure (Občanský soudní řád) has stayed the proceedings before it and, under the second sentence of Article 267(b) TFEU, has referred the question set out in part II of the operative part of the present order to the Court of Justice of the European Union for a preliminary ruling.

(Omissis) [Procedural aspect, guidance on the possibility of appeal] (Omissis) **[OR 5]** (Omissis)