

Case C-156/22

Request for a preliminary ruling

Date lodged:

17 February 2022

Referring court:

Landgericht Stuttgart (Germany)

Date of the decision to refer:

3 February 2022

Appellant:

TAP Portugal

Respondent:

flightright GmbH

[...]

Landgericht Stuttgart (Regional Court, Stuttgart, Germany)

Order:

In the case of

Flightright GmbH, [...]

– applicant and respondent –

[...]

v

TAP Portugal, [...]

– defendant and appellant –

[...]

concerning compensation (flight TP597/TP1944 on 17 July 2019)

- 1 the Regional Court, Stuttgart – 5th Civil Chamber – [...] ordered as follows on 3 February 2022:
- 2 I. The appeal proceedings are stayed.

II. The following question on the interpretation of EU law is referred to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union:
- 3 Is Article 5(3) of Regulation (EC) No 261/2004 to be interpreted as meaning that an extraordinary circumstance within the meaning of that provision exists where a flight departing from an airport outside the base of the operating air carrier is cancelled because a crew member deployed on that flight (*in casu* the co-pilot), who has passed the prescribed regular medical examinations without restriction, dies suddenly and in a way that the air carrier is unable to foresee shortly before the flight or falls so seriously ill that he or she cannot perform the flight?

Grounds:

Factual circumstances

- 4 The applicant in the main proceedings seeks compensation from the defendant air carrier under an assigned right pursuant to 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 ('the Air Passenger Rights Regulation').
- 5 The defendant was the operating air carrier for flight TP597 on 17 July 2019 from Stuttgart to Lisbon, scheduled to depart at 6.05 local time. The flight was cancelled. The defendant relies on extraordinary circumstances within the meaning of Article 5(3) of the Air Passenger Rights Regulation. The co-pilot, who should have performed the flight at issue, was found dead in his bed in a hotel room in the early morning of 17 July 2019 at 4.15 local time, when he was due to be picked up at the hotel and taken to the airport. As a result, the entire crew reported themselves unfit to fly. The sudden death of this father in his early 40s came as a severe shock to everyone and was completely unforeseeable. Such an external event could not be controlled by the air carrier. Replacement personnel were not available outside the defendant's base. A replacement crew was flown in from Lisbon to Stuttgart on the first flight of the day at 11.25 and arrived there at 15.20. The passengers were then transported as quickly as possible to Lisbon on the replacement flight TP593 at 16.40.

Decisions at first instance

- 6 The local court ordered the defendant to pay the amount of the compensation sought. The local court justified its decision by stating that the defendant could not rely on the existence of extraordinary circumstances, because – just like the sudden serious illness of a crew member – a sudden and unforeseeable death also fell solely within the operational scope of the air carrier. It was not an external event affecting the undertaking, but a risk experienced by all employers which should be expected in the normal course of business.
- 7 The defendant appealed against the decision to the Regional Court, Stuttgart. Two other cases concerning the same flight – 5 S 30/21 and 5 S 32/21 – are pending before the Chamber. The Chamber refers all three cases to the Court of Justice with the suggestion that they be joined. Since the applicants in the main proceedings are not identical in all cases, it is not expedient for the Chamber to hear and determine the proceedings together in the present case.

The importance of the question referred for a preliminary ruling for the resolution of the dispute and the provisional legal position of the Chamber

- 8 [...]
- 9 The decision on the appeal depends on how the Court of Justice of the European Union answers the question referred for a preliminary ruling in the operative part of the present order.
- 10 As regards the assessment of whether each of the applicants is entitled to claims for compensation on the part of the passengers affected by the cancellation, reference should be made to the Court's interpretation of Article 5(3) of the Air Passenger Rights Regulation. According to the research carried out by the Chamber into German case-law, it has been held in some cases that there is no extraordinary circumstance within the meaning of an externally influencing event since such a circumstance falls within the scope of the operational risks assumed by the air carrier – a view also shared by the Amtsgericht Nürtingen (Local Court, Nürtingen) at first instance (Landgericht Darmstadt (Regional Court, Darmstadt), 6 April 2011 – 7 S 122/10 [...]; Regional Court, Darmstadt, 23 May 2012 – 7 S 250/11 [...]; Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main), 20 May 2011 – 31 C 245/11 [...]). However, in so far as the Chamber is in a position to judge, there has been a change in the case-law on this subject in the Netherlands, to the effect that the sudden illness of a crew member is now regarded as an external event that cannot be controlled by the air carrier (Rechtbank Noord-Holland (District Court, North Holland), 28 October 2020 – ECLI:NL:RBNHO:2020:8758 as distinct from District Court, North Holland of 11 March 2020 – ECLI:NL:RBNHO:2020:2920, also referring to the scope of the risks assumed by an organisation).

- 11 A search of the French database Légifrance revealed a judgment of the Cour de cassation (Court of Cassation, France) of 5 February 2020, 19-12.294, ECLI:FR:CCASS:2020:C100113, which also denied the existence of extraordinary circumstances in the case of the pilot being ill or indisposed on the grounds that it was not an extraordinary event (paragraph 5).
- 12 The Chamber tends to take the view that the air carrier is in principle responsible for the fitness to fly and the availability of its employees and is therefore in principle also required to keep a certain number of replacement personnel available. However, since the issue is disputed in European case-law and in the commentary in the legal literature and has not yet been resolved either at the highest judicial level in Germany by the Bundesgerichtshof (Federal Court of Justice, Germany) or by the Court of Justice of the European Union, the Chamber is referring the dispute to the latter for a preliminary ruling.

[...]