

Case C-399/24

Request for a preliminary ruling

Date lodged:

7 June 2024

Referring court:

Landesgericht Korneuburg (Austria)

Date of the decision to refer:

16 April 2024

Applicant and appellant:

AirHelp Germany GmbH

Defendant and respondent:

Austrian Airlines AG

REPUBLIC OF AUSTRIA

LANDESGERICHT KORNEUBURG

(REGIONAL COURT, KORNEUBURG, AUSTRIA)

ORDER

In the case brought by the applicant **AirHelp Germany GmbH**, [...] D-10245 Berlin, [...] against the defendant **Austrian Airlines AG**, [...] A-1300 Vienna Airport, [...] in respect of **EUR 400** [...], on the appeal lodged by the applicant against the judgment of the Bezirksgericht Schwechat (District Court, Schwechat, Austria) of 30 October 2023, 27 C 366/22h-13, the Regional Court, Korneuburg, as appellate court, through the judges [...] meeting in closed session, has ordered as follows:

[I] The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

‘Is Article 5(3) 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 (the Air Passengers Rights Regulation) to be interpreted as meaning that an ‘extraordinary circumstance’ exists where the aircraft with which the flight was to be operated was struck by lightning on its immediately preceding flight, leading to a mandatory aircraft safety check by certified technicians as a result of which the aircraft was cleared for service again only approximately five hours after the scheduled departure?’

[II] The proceedings are stayed pending the preliminary ruling from the Court of Justice of the European Union.

GROUND:

The passenger had a confirmed single booking for flights OS 646 from Iași (IAS) to Vienna (VIE) and OS 455 from Vienna to (London) Heathrow (LHR), which were to be operated by the defendant on 8 March 2022. The distance between the departure airport and the destination airport is more than 1 500 kilometres, but not more than 3 500 kilometres.

Flight OS 646 was scheduled to take off from Iași at 14.05 and land in Vienna at 15.50 on 8 March 2022 (all times UTC; London LT = UTC; Vienna LT = UTC + 1h; Iași LT = UTC + 2h). In fact, the flight – ultimately using a replacement aircraft – did not go off-block until 22.25, was in the air at 22.42, landed at 22.53 and reached the parking position in Vienna at 23.59. This delay was caused by events on the immediately preceding flight OS 645 (scheduled flight times 11.45 to 13.15). Flight OS 645 initially went off-block in Vienna with a delay of 15 minutes due to technical problems. At the time of landing there were snow showers and storm clouds in the Iași area. Shortly before landing, the flight OS 645 aircraft was struck by lightning. After lightning strikes a technical safety check of the aircraft must be carried out by technicians certified for the aircraft in question. The length of this inspection cannot be precisely predicted in advance, but an initial damage assessment is available after a first walkaround approximately 45 minutes after landing. After flight OS 645 had landed in Iași at 13.47 (delay of 32 minutes), the crew – following standard procedure – reported the lightning strike, after a first walkaround, to the defendant’s technical department in Vienna, which then arranged for the aircraft to be inspected by local contract technicians. On a first walkaround by the technicians, visible damage to an instrument relevant to flight safety, the pilot-static system, was also found. This is an area on the outside of the aircraft which is responsible for operations such as measuring air pressure or calculating speed; if there is visible damage to this area, a thorough inspection must always be carried out and further repair work can be expected. The predicted completion of the check was logged in the system as 19.45, but the result was not foreseeable. The defendant therefore began

examining alternative transportation options for the passengers on flight OS 646 while the inspection work was still ongoing; in addition to rebooking options, it looked into the delayed operation of flight OS 646 with a replacement aircraft to be transferred from Vienna. It examined possible alternative flight connections within its ticket sales system, which contains all flight connections, including indirect services, for all airlines which use that sales system. Flights by low-cost airlines such as Wizz Air or Blue Air are not shown there, however. Consequently, they were not examined by the defendant during the rebooking process. The defendant's system did not indicate any direct or indirect alternative flight connection which could have taken the passenger from Iași to London Heathrow (LHR) that same evening. The defendant also did not examine a possible connection to London Luton airport (LTN) within its sales system.

In fact, on 8 March 2022 Wizz Air operated flight W6 3653 from Iași to London Luton airport with scheduled times of 14.45 to 18.15. It cannot be ascertained whether there would have been sufficient time to rebook the passenger on that flight. Wizz Air also operated a flight from Iași to London Luton airport at 03.55 on 9 March 2022 with a scheduled arrival at 07.25 (actual arrival at 07.11). Because, in the defendant's view, there were no suitable alternative transportation options for the passengers on flight OS 646 from Iași to Vienna or London Heathrow (LHR) and hotel availability in Iași was low on account of the Ukraine crisis, it decided to transfer a replacement aircraft from Vienna in order to be still able to operate OS 646 on 8 March 2022, albeit with a delay. After the replacement aircraft and the replacement crew, which was available in Vienna by 15.45, had been organised and all the necessary clearances had been obtained, the replacement flight could be scheduled with an earliest possible departure at 19.30 and an expected arrival at 21.00. In fact, the transfer flight departed from Vienna at 19.41 and arrived in Iași at 21.22. The actual flight time from Vienna to Iași is approximately one hour and 30 minutes. The minimum turnaround time in Iași is 60 minutes. The rescheduled departure time of flight OS 646 with the transferred replacement aircraft was then fixed at 22.25. Ultimately, 190 passengers were transported on flight OS 646. The passenger ... was also transported to Vienna on the delayed flight OS 646 and arrived there at 23.59 (on-block). The aircraft which had been struck by lightning had actually already been cleared to fly again by the technicians at around 19.00, but with the restriction that it could only make a flight to Vienna in order to undergo a thorough inspection there. Since all the clearances and flight plans for operating flight OS 646 with the replacement aircraft had already been obtained at this point, the defendant decided, partly in order to avoid further uncertainties (such as problems arising with the lightning-damaged aircraft, organisational effort resulting from new flight planning and slot allocation), not to reschedule the flight again on the original aircraft. The passenger's originally booked connecting flight, OS 455 (VIE-LHR), was scheduled from 16.30 to 18.55 and actually went off-block at 16.28 and on-block in London (LHR) at 18.39. The passenger missed that flight ... and did not arrive in Vienna until 23.59 on flight OS 646. At 18.14 on 8 March 2022, the defendant rebooked him on the earliest possible replacement connecting flight OS 451 from Vienna to London Heathrow (LHR) the following day with a scheduled arrival at

08.15. The passenger thus actually reached his destination in London (LHR) at 08.02.

The passenger assigned the contested claim to the applicant, which accepted the assignment.

The **applicant** applied for the award of EUR 400, on the basis of Regulation (EC) No 261/2004 (the Air Passengers Rights Regulation), and asserted in support of the claim, in essence, that there was not an extraordinary circumstance; in particular, a lightning strike did not constitute an extraordinary circumstance.

The defendant had also failed to take all reasonable measures to transport the passenger as quickly as possible to his destination. In particular, the following connections would have resulted in an earlier arrival in London, it being disputed that the defendant examined these or offered them to the passenger:

- W6 3653 from IAS to LTN on 8 March 2022, 16.45 to 18.15;
- OB 6831 from IAS to LHR on 8 March 2022, 18.20 to 19.35;
- W6 3651 from IAS to LTN on 9 March 2022, 05.55 to 07.25.

It is evident that the defendant does not routinely check London Luton airport as an alternative airport for flights to London Heathrow, even though it is an airport in the same region (without making specific factual submissions in this regard). The passenger would have arrived in London earlier on flight OB 8631. That flight would also not have caused any further inconvenience; it was a direct flight. Furthermore, the passenger lives in London and it would therefore be immaterial to him where in London he landed. The passenger was deprived of the option of also being able to choose a replacement flight, if necessary, because this was not offered by the defendant.

The **defendant** disputed the claim, applied for the action to be dismissed and objected that the necessary technical safety check or damage caused by lightning strike was unusual and could be neither planned for nor controlled to that extent, with the result that there were extraordinary circumstances within the meaning of the Air Passengers Rights Regulation. The aircraft damaged by the lightning strike could be used again for regular service only after the inspection and maintenance work had been completed on 11 March 2022. Because of the low number of services using IAS airport, there was only one conceivable alternative connection, namely flight RO 708 (IAS-OTP) and then a flight from OTP to VIE (?). However, there had been no onward connection from ‘VIE’ on the same day and, consequently, the aircraft organised by it for the (delayed) operation of flight OS 646 and the connection by flight OS 451 (VIE-LHR) on 9 March 2022 was the quickest possible transportation, despite the delay. Flight W6 3653 would not have flown to LHR and, moreover, departed so early that rebooking would not even have been possible. Flight OB 6831 did not take place. Flight W6 365 would have caused further inconvenience in connection with an overnight stay in Iași,

where no hotel capacities were available; furthermore, a transfer from LTN to LHR would have led to the passenger's delayed arrival at his final destination. It had thus taken all reasonable measures. It disputed (again without stating any reasons) that LHR and LTN served the same region; the journey time between the two airports according to *Google Maps* was one hour 10 minutes.

By the **judgment under appeal**, the **court of first instance** dismissed the claim and ordered the applicant to bear the costs. It made, in essence, the findings reproduced at the beginning and drew the legal inference that a lightning strike was to be regarded as an extraordinary circumstance within the meaning of Article 5(3) of the Air Passengers Rights Regulation. Since this had occurred on the immediately preceding flight, there could also be considered to be a sufficient causal link to the delay that ultimately arose. By proactively organising a replacement aircraft, the defendant was able to avoid a cancellation of flight OS 646 and to ensure that the flight could still be operated on 8 March 2022, albeit with a significant delay. A spontaneous switch back to the aircraft damaged by the lightning strike, which had been actually cleared again by 19.00, did not appear to be reasonable, taking into account the high organisational effort already made and the uncertainties associated with rescheduling in terms of the clearances and slot allocations to be obtained, and in the interest of the stability and reliability of the flight plan. In view of the significantly delayed operation of flight OS 646, a rebooking for the passenger should also have been examined. However, the only options for alternative transportation would be flights which departed from the same place of departure as the cancelled flight and landed at the same place of arrival. In this case, a direct or connecting flight from Iași to London LHR was not available on 8 March 2022. The offer of a flight connection from an airport other than the originally booked destination airport, London LHR, specifically London LTN, was not a reasonable measure. It is irrelevant whether those airports might serve the same region. The Court of Justice had applied this distinguishing criterion in clarifying a different legal question. Since, ultimately, no onward transportation had been available from Vienna to London LHR earlier than replacement flight OS 451, which was actually offered and taken, the defendant had also taken all reasonable measures in this respect and, consequently, the conditions laid down in Article 5(3) of the Air Passengers Rights Regulation were met and the claim had to be dismissed.

The applicant's **appeal** is directed against that judgment, raising the ground of appeal of incorrect legal assessment and claiming that the judgment under appeal should be altered such that the claim is granted; in the alternative, it claims that the judgment should be set aside.

The defendant contends that the appeal should be dismissed.

The Regional Court, Korneuburg is called on, as the **appellate court**, to rule on the applicant's claim at second and last instance.

The question referred for a preliminary ruling:

Clarifying the question whether a lightning strike could, in principle, constitute an extraordinary circumstance is a necessary pre-condition for the appellate court to resolve the case at issue because if the question is answered in the negative, the judgment under appeal should be altered without further consideration such that the action is upheld. If it is answered in the affirmative, it would have to be examined additionally whether the defendant air carrier took all reasonable measures, which the appellate court does not absolutely rule out on the basis of the facts established, with the result that it would not be possible to uphold the action immediately, irrespective of whether there was actually an extraordinary circumstance.

The referring court assumes, in principle, that a lightning strike constitutes an extraordinary circumstance within the meaning of Article 5(3) of the Air Passengers Rights Regulation (Regional Court, Korneuburg, 24 October 2019, 21 R 222/19y; most recently 21 July 2020, 22 R 209/20i). However, the question is answered otherwise by other Austrian courts (for example, Bezirksgericht für Handelssachen Vienna (District Court for Commercial Matters, Vienna, Austria), 31 March 2017, 11 C 227/16m = RRa 2018, 289).

On the basis of the following reasoning, the appellate court is considering, if necessary, departing from its previous settled case-law:

Civil aviation has always transported passengers using aerodynamic lift; in short, it uses the air flows around the wings. This could suggest that atmospheric conditions are inherent in the normal exercise of aviation. Unstable atmospheric conditions – and therefore also lightning – could therefore be attributable to the air carrier; damage caused to the aircraft by lightning would, by its nature or origin, be inherent in the normal exercise of the activity of the air carrier, and therefore differs from a bird strike (see judgment of Court of Justice of 4 May 2017 in Case C-315/15 *Pešková and Peška*, paragraph 24).

In view of the fact that scientific evidence may possibly be required, which the appellate court would have to instruct the court of first instance to obtain after setting aside the judgment under appeal, there is a need for clarification by the Court of Justice whether a lightning strike may, in principle, give rise to an extraordinary circumstance within the meaning of Article 5(3) of the Air Passengers Rights Regulation.

[...] [procedural details]

District Court, Korneuburg, Division 22

Korneuburg, 16 April 2024

[...] **Judge**