

Case C-20/24 [Cymdek]ⁱ**Request for a preliminary ruling****Date lodged:**

12 January 2024

Referring court:Sąd Rejonowy dla miasta stołecznego Warszawy w Warszawie
(Poland)**Date of the decision to refer:**

24 November 2023

Applicants:

M1.R.

M2.R.

Defendants:

AAA sp. z o.o.

Ref. I C 1222/22

ORDER

24 November 2023

The Sąd Rejonowy dla miasta stołecznego Warszawy w Warszawie w I Wydziale Cywilnym (District Court for the Capital City of Warsaw, Warsaw – 1st Division, dealing with Civil Matters) [...]

[...] following the hearing in closed session on 24 November 2023 in Warsaw

of the case brought by **M1.R.** and **M2.R.**

against the limited liability company **AAA sp. z o.o. with its registered office in W.**

ⁱ The present case has been given a fictitious name which does not correspond to the real names of any of the parties to the proceedings.

for payment

decides

I. to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Must Article 2(g) 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, be interpreted as meaning that a passenger's boarding pass may constitute other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator?
2. Must Article 3(2)(a) of [Regulation No 261/2004] be interpreted as meaning that passengers who have a boarding pass for a particular flight, where no special abnormal circumstance is demonstrated, should be considered to have a confirmed reservation on the flight concerned?
3. Must Article 3(3) of [Regulation No 261/2004] be interpreted as meaning that the passenger bears the burden of proving that the flight was paid for, or alternatively that the carrier, in order to be released from liability, has to prove that the passenger travelled free of charge or at a reduced fare?
4. Must Article 3(3) of [Regulation No 261/2004] be interpreted as meaning that where a passenger has purchased a package tour from a tour operator and the latter has paid the fare for the flight to the carrier, the flight has been paid for?
5. Must Article 3(3) of [Regulation No 261/2004] be interpreted as meaning that where a third party purchases a package tour on behalf of passengers, in connection with which the tour operator pays an arm's-length remuneration to the charter carrier, this is not a case of 'passengers travelling at a reduced fare', irrespective of the terms of settlement between that third party and the passengers?

II. [...] to stay the proceedings pending the response of the Court of Justice of the European Union to the questions referred.

Request for a preliminary ruling**1. Designation of the court and the parties**

1. Referring court: Sąd Rejonowy dla miasta stołecznego Warszawy w Warszawie, I Wydział Cywilny [...]
2. Applicants: M1.R. [...], M2.R. [...]
3. [...]
4. Defendant: the limited liability company[AAA] [...]
5. [...]

2. Subject matter of the proceedings and relevant facts

1. The limited liability company [AAA] with its registered office in W. ('the Carrier') is a charter air carrier.
2. The limited liability company [BBB] with its registered office in W. ('the Tour Operator') is a tour operator which provides package holiday and travel services to consumers.
3. The Carrier presented an offer and subsequently entered into a contract with the Tour Operator, under which the Carrier operated specific flights on specific dates for the tour operator, for which flights the Tour Operator then sold tickets to passengers. The Tour Operator paid the Carrier for the flights.
4. The applicants M1.R. and M2.R. participated in a package tour, which included a flight from Tenerife (Spain) to Warsaw (Poland) on 20 May 2021 on Flight No ENT 7346 operated by the Carrier.
5. The contract concerning the package tour was entered into by [CCC] sp. z o.o. (on behalf of, inter alia, the applicants and other participants) and the Tour Operator as a contract between those two companies.
6. The arrival of the flight at issue (operated by the Carrier) was delayed by more than 22 hours.
7. As evidence of their standing to bring an action for compensation for flight delay, the applicants submitted, inter alia, copies of boarding passes for the aforementioned flight, which made reference to the Carrier.

8. The Carrier refused to compensate the applicants for the delayed flight, arguing that they had failed to demonstrate that they had a confirmed and 'paid for' reservation for the flight in question.
9. In several previous cases, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) has ruled in favour of the Carrier, finding that although a boarding pass constitutes proof of presenting for check-in, it does not constitute proof of possessing a confirmed and 'paid for' reservation.
10. The passengers, however, take the position that, by submitting the boarding passes issued to them, they demonstrated that they had a confirmed reservation, because otherwise they would not have been issued with those boarding passes. At the same time, the passengers claim that the onus is not on them to prove that they 'paid' for the reservation, but rather it is the Carrier which must prove that they travelled free of charge.
11. Notwithstanding the above, the applicants argue that if the Carrier received payment from the Tour Operator for the flight, and the Tour Operator received from [CCC] sp. z o.o., which paid for the applicants' package tour, payment for that package tour which included, inter alia, the flight operated by the Carrier, then the applicants did not travel free of charge. It is irrelevant from the point of view of Article 3(3) of Regulation No 261/2004 whether the flight was paid for by the passengers or by a third party (unless it was the Carrier).
12. The Carrier, on the other hand, contends that since the applicants participated in a tour arranged for them on preferential terms by [CCC] sp. z o.o., they travelled 'free of charge or at a reduced fare' for the purposes of Article 3(3) of Regulation No 261/2004, and therefore they are not entitled to compensation.

3. Tenor of any national provisions applicable in the case

Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code) (consolidated text: Journal of Laws (Dziennik Ustaw) of 2023, item 1610):

Article 6:

The burden of proof rests on the person seeking to rely on the evidence in question.

Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the Code of Civil Procedure) (consolidated text: Journal of Laws (Dziennik Ustaw) of 2023, item 1550)

Article 231:

The court may consider as established facts which are of vital importance for the adjudication of a case, if such conclusion may be drawn from other established facts (presumption of fact).

4. Provisions of European Union law that are the subject of the questions referred for a preliminary ruling

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):

Recitals 1 and 5 of Regulation No 261/2004:

- (1) ‘Action by the [Union] in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general’
- (5) ‘Since the distinction between scheduled and non-scheduled air services is weakening, such protection should apply to passengers not only on scheduled but also on non-scheduled flights, including those forming part of package tours’.

Article 2(g):

‘For the purposes of this Regulation ... “reservation” means the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator’.

Article 3(2)(a):

‘This Regulation shall apply ... on the condition that passengers ... have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in, ... as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent, or, if no time is indicated, ... not later than 45 minutes before the published departure time’.

Article 3(3):

‘This Regulation shall not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public. However, it shall apply to passengers having tickets issued under a frequent flyer programme or other commercial programme by an air carrier or tour operator’.

4. Case-law of the Court of Justice of the European Union relevant to the questions referred for a preliminary ruling

1 Judgment of 21 December 2021, [YYY] v [ZZZ], C-146/20, EU:C:2021:1038

Article 3(2)(a) of [Regulation No 261/2004] must be interpreted as meaning that the passenger has a ‘confirmed reservation’, within the meaning of that provision, where the tour operator submits to that passenger, with whom it has a contract, ‘other proof’, within the meaning of Article 2(g) of that regulation, by which he or she is assured transport on a particular flight, individualised by points of departure and destination, times of departure and arrival, and the flight number, even in cases where that tour operator has not received confirmation from the air carrier concerned as to the times of departure and arrival of that flight.

1 Judgment of 26 March 2020, [KKK] v [LLL], C-215/18, EU:C:2020:235

[Regulation No 261/2004] must be interpreted as meaning that a passenger on a flight which has been delayed for three hours or more may bring an action for compensation under Articles 6 and 7 of that regulation against the operating air carrier, even if that passenger and that air carrier have not entered into a contract between them and the flight in question forms part of a package tour covered by [Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59)].

2 Order of 11 October 2021, [MMM] v [NNN], C-686/20], not published, EU:C:2021:859]

Article 2(f) of Regulation No 261/2004 defines the term ‘ticket’ as ‘a valid document giving entitlement to transport, or something equivalent in paperless form, including electronic form, issued or authorised by the air carrier or its authorised agent’. Article 2(g) of Regulation No 261/2004 also stipulates that the possession of a ticket by a passenger may constitute proof that the reservation has been accepted and registered by the air carrier. It follows that a ‘ticket’, which is an autonomous concept in Union law, is defined broadly in Regulation No 261/2004 and includes any tangible or intangible item that grants a passenger the right to transportation. It should be added that a restrictive interpretation of that concept would result in a substantial reduction in the protection of passengers under Regulation No 261/2004 and would therefore be contrary to the aim of that regulation – referred to in recital 1 thereof – of ensuring a high level of protection for

passengers (see, by analogy, judgment of 4 October 2012, *Finnair*, C-22/11, EU:C:2012:604, paragraph 23).

3 Order of 24 October 2019, [OOO] v [PPP], C-756/18, EU:C:2019:902:

[Regulation No 261/2004] and, in particular, Article 3(2)(a) thereof, must be interpreted as meaning that passengers on a flight with a delay of 3 hours or more on arrival who have a confirmed reservation on that flight cannot be denied compensation under that regulation solely on the ground that, upon claiming compensation, they failed to prove that they were present for check-in for that flight, in particular by means of a boarding card, unless it can be established that those passengers were not transported on the delayed flight at issue, which is [a] matter for the national court to determine.

5. Connection between the case and European Union law

The applicants are claiming compensation for the delayed flight pursuant to Article 5(1)(c) and Article 7(1) of Regulation No 261/2004. The assessment of the applicants' claim depends on the interpretation of European Union law.

6. Legal uncertainties of the national court and their relevance to the resolution of the case before it

1. The national court has doubts as regards:
 - a. whether, in the established facts of the case, a passenger's submission of a boarding pass constitutes other proof, which indicates that the reservation was accepted and registered by the air carrier or tour operator;
 - b. whether a passenger's standing is conditional upon that passenger demonstrating that he or she paid for the travel and did not travel at a reduced fare;
 - c. whether the flight at issue, which was paid for by the Tour Operator (there is no evidence that the applicants personally paid the fee or in what amount), was either free of charge or subject to a reduced fare not available to the public for the purposes of Regulation No 261/2004.
2. The [national] court has taken note of the judgment of the Court of Justice of 21 December 2021 [in Case C-146/20 (EU:C:2021:1038)]. Although that judgment concerned similar issues, it does not address the [national] court's doubts as to whether, in the situation described by that court, EU law allows for the submission of other proof that a passenger had a confirmed reservation for a particular flight where the

boarding pass submitted does not contain all the elements referred to in that judgment, such as the time of arrival of the flight at issue.

3. It is apparent from the wording of Article 3(2)(a) of Regulation No 261/2004 that that regulation applies only if, first, passengers have a confirmed reservation on the flight concerned, and, second, they present themselves for check-in within the time limits laid down in that provision.
4. The facts of the case show that the passengers received boarding passes, presented themselves for check-in on time, and took in the flight in question. This has been admitted by the Carrier, but the passengers did not submit a document amounting to a confirmed flight reservation.
5. The Carrier takes the view that the conditions laid down in Regulation No 261/2004 must be interpreted narrowly and argues that, in light of the Court's case-law (the judgment in [Case] C-756/18), while a passenger's presenting him- or herself for check-in may be presumed by virtue of the fact that he or she has a confirmed reservation on a particular flight, it cannot be presumed that that passenger had a confirmed reservation for the flight by virtue of the fact that he or she presented him- or herself for that flight (as evidenced by the boarding pass). This position, while rejected in the case-law of the referring court, is nevertheless shared by some appellate court panels.
6. However, the [national] court wishes to point out that a boarding pass is issued to a passenger with a confirmed reservation for a particular flight (and not to any random person) after check-in, and in the case of online check-in, it is necessary to provide either the ticket number or the reservation number, and therefore, in the view of the national court, it appears that the boarding pass also constitutes other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator. Indeed, it is impossible to explain in any other rational way (leaving aside situations that are abnormal and difficult to imagine, and whose occurrence should in any case be demonstrated by the carrier rather than by the passenger) how a particular passenger would have a boarding pass if he or she did not have a reservation. It is much more probable that a passenger with a reservation might not present him- or herself for the flight, yet in this situation the Court has allowed the presumption that a passenger has presented him- or herself for check-in on the basis of the fact that that passenger had a reservation.
7. In addition, the defendant (along with some appellate court panels) relies on the fact that the passenger failed to demonstrate that he or she had a confirmed reservation to argue that it is impossible to verify

whether the flight was paid for by the passenger, arguing that Regulation No 261/2004 does not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public (Article 3(3) of that regulation).

8. Nevertheless, it would appear that the onus is on the defendant, who derives favourable legal consequences from the assertion that the flight was free of charge, to demonstrate that fact, while the passengers are obliged to demonstrate that they had a 'confirmed reservation' rather than a 'paid' and confirmed reservation, as the defendant suggests (that position being shared by some appellate court panels).
9. It should also be noted that, in the case of package tours, it is the tour operator that is bound by the contract of carriage with the air carrier, and it is the tour operator which pays for the flight. Passengers, on the other hand, pay for the tour rather than for the flight. Thus, if a tour that was paid for (whether directly by the passengers or by another party on behalf of the passengers) includes a flight (for which the tour operator paid the carrier), a case of 'passengers travelling free of charge' does not arise.
10. The national court also has doubts as to the meaning of the concept of 'travelling at a reduced fare not available directly or indirectly to the public' used in Article 3(3) of Regulation No 261/2004, that is to say, whether it refers to a discount offered to the passenger by the carrier (and this is the position the [national] court is inclined to take), or whether that provision also applies in a situation in which the carrier receives an arm's-length remuneration from the tour operator, but that tour operator, or another party, enables passengers to participate in the package tour on preferential terms. The latter position appears contrary to the purpose of the regulation and difficult to apply in practice due to the lack of criteria for determining what constitutes preferential terms of participation in a package tour.
11. The national court is of the view that the interpretation proposed by the Carrier and certain appellate court panels is inconsistent with the purpose and content of [Regulation No 261/2004], recital 5 of which clearly indicates that passengers on non-scheduled flights, including those forming part of package tours, who have limited ability to prove that the flight was paid for by a third party, are also protected.
12. [...]
13. The Court's response to the questions referred and its clarification of the doubts indicated above will allow the referring court to determine whether the defendant carrier is liable for compensation for the delay

of the flight at issue, and consequently will determine the validity of the claim.

WORKING DOCUMENT