



Reports of Cases

OPINION OF ADVOCATE GENERAL

BOT

delivered on 15 May 2012¹

Joined Cases C-581/10 and C-629/10

**Emeka Nelson,
Bill Chinazo Nelson,
Brian Cheimezie Nelson (C-581/10)**

v

Deutsche Lufthansa AG

(Reference for a preliminary ruling from the Amtsgericht Köln (Germany))

and

The Queen, on the application of

TUI Travel plc,

British Airways plc,

easyJet Airline Co. Ltd,

International Air Transport Association (C-629/10)

v

Civil Aviation Authority

(Reference for a preliminary ruling from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court))

(Transport — Common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights — Right to compensation in the event of delay of flights — Compatibility of that right with the Montreal Convention)

1. These cases concern the interpretation and validity of Articles 5, 6 and 7 of Regulation (EC) No 261/2004.²

2. By the questions which they ask the Court, the Amtsgericht Köln (Germany) and the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), wish to know, in actual fact, whether the Court confirms the interpretation which it gave of those provisions in its judgment of 19 November 2009 in *Sturgeon and Others*,³ according to which passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and may thus rely on the right to compensation laid down in Article 7 of Regulation No 261/2004 where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.⁴

1 — Original language: French.

2 — Regulation 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).

3 — Joined Cases C-402/07 and C-432/07 [2009] ECR I-10923.

4 — Paragraph 69.

3. In this opinion, I shall propose that the Court confirm that interpretation and rule that Articles 5, 6 and 7 of that regulation are compatible with the Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 9 December 1999,⁵ with the principle of proportionality and with the principle of legal certainty.

I – Legal framework

A – International legislation

4. The Montreal Convention was approved on behalf of the European Community by Decision 2001/539/EC⁶ and entered into force, so far as the European Union is concerned, on 28 June 2004.

5. Article 19 of the Montreal Convention provides for the air carrier to be liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

6. Article 29 of the Montreal Convention provides:

‘In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.’

B – European Union legislation

7. Recital 1 in the preamble to Regulation No 261/2004 states that action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers.

8. Recital 14 to that regulation states that obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes which affect the operation of an operating air carrier.

9. According to recital 15 in the preamble to that regulation, extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.

⁵ — ‘The Montreal Convention’.

⁶ — Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) (OJ 2001 L 194, p. 38).

10. Article 5 of Regulation No 261/2004 is worded as follows:

‘1. In case of cancellation of a flight, the passengers concerned shall:

...

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(c) have the right to compensation by the operating air carrier in accordance with Article 7 ...

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

...’

11. Article 6 of that regulation provides:

‘1. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:

(a) for two hours or more in the case of flights of 1 500 kilometres or less; or

(b) for three hours or more in the case of all intra-Community flights of more than 1 500 kilometres and of all other flights between 1 500 and 3 500 kilometres; or

(c) for four hours or more in the case of all flights not falling under (a) or (b),

passengers shall be offered by the operating air carrier:

(i) the assistance specified in Article 9(1)(a) and 9(2); and

(ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).

2. In any event, the assistance shall be offered within the time limits set out above with respect to each distance bracket.’

12. Article 7 of Regulation No 261/2004, entitled ‘Right to compensation’, provides, in paragraph 1, for a fixed amount of compensation according to the distance of the flight concerned. Thus, under that provision, passengers receive compensation amounting to EUR 250 for all flights of 1 500 kilometres or less, EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres, and EUR 600 for all flights not falling into the preceding categories.

II – The facts in the main proceedings

A – Case C-581/10

13. Mr Nelson booked seats, for his two sons and himself, on flight LH 565 from Lagos to Frankfurt am Main departing at 22.50 on 27 March 2008. At around 02.00 on 28 March, that flight was cancelled owing to a technical defect in the steering mechanism of the nose landing gear of the aircraft. Mr Nelson and his two sons were then accommodated in a hotel. At 16.00 on 28 March 2008 they were taken from the hotel to the airport, since the plane had been replaced by an aircraft from Frankfurt am Main (Germany). The Lagos to Frankfurt am Main flight finally departed at 01.00 on 29 March 2008. The referring court states that that flight had the same flight number, LH 565, and most of the same passengers as had booked on the flight of 27 March 2008. The plane landed in Frankfurt am Main at 07.10 on 29 March 2008, that is, more than 24 hours later than the original scheduled arrival time.

14. Mr Nelson considers that that delay entitles him and his two sons to the compensation provided for in Article 7(1) of Regulation No 261/2004. He therefore brought an action before the Amtsgericht Köln seeking an order against the airline Deutsche Lufthansa AG to pay each of them EUR 600 on the basis of Article 5(1)(c) and Article 7(1) of that regulation.

15. Deutsche Lufthansa AG takes the view that, since the flight was operated, it cannot be regarded as ‘cancelled’ within the meaning of Regulation No 261/2004. It is therefore a question, in this case, of a delayed flight, for which the regulation does not provide compensation.

16. As a ruling was expected in *Sturgeon and Others*, the referring court stayed the proceedings. They were resumed following the judgment given on 19 November 2009. However, the referring court still entertains doubts with regard to the compatibility of Article 7 of Regulation No 261/2004, as interpreted by the Court in *Sturgeon and Others*, with the Montreal Convention. It therefore decided to stay the proceedings and to refer questions to the Court for a preliminary ruling.

B – Case C-629/10

17. The main proceedings have been brought by TUI Travel plc (‘TUI Travel’), British Airways plc, easyJet Airline Co. Ltd and the International Air Transport Association (‘the IATA’) against the Civil Aviation Authority (‘the CAA’).

18. TUI Travel owns seven airlines, based in several Member States. Those companies largely operate charter flights on behalf of TUI Travel, which is primarily a tour operator. The IATA is an international trade body representing some 230 airlines which themselves comprise 93% of scheduled international air traffic.

19. The dispute in the main proceedings arises out of a request made by the applicants to the CAA for confirmation that it would not interpret Regulation No 261/2004 as imposing an obligation on airlines to compensate passengers in the event of delay. The CAA refused to confirm that interpretation and stated that it was bound by the judgment in *Sturgeon and Others*. The applicants therefore brought proceedings before the High Court of Justice of England and Wales, Queen’s Bench Division (Administrative Court). The latter decided to stay proceedings and refer a series of questions to the Court for a preliminary ruling.

20. By order of the President of the Court of 30 November 2011, Cases C-581/10 and C-629/10 were joined for the purposes of the oral procedure and the judgment.

III – The questions referred for a preliminary ruling

A – Case C-581/10

21. The Amtsgericht Köln has referred the following questions to the Court:

- ‘1. Does the right to compensation provided for in Article 7 of Regulation No 261/2004 constitute a claim for non-compensatory damages within the meaning of the second sentence of Article 29 of the [Montreal Convention]?’
2. What is the relationship between, on the one hand, the right to compensation based on Article 7 of Regulation No 261/2004 which a passenger has, according to the judgment ... in [*Sturgeon and Others*], if he reaches his final destination three hours or more after the scheduled arrival time and, on the other hand, the right to compensation in respect of delay provided for in Article 19 of the Montreal Convention, regard being had to the exclusion under the second sentence of Article 29 of the Montreal Convention?
3. How may the interpretative criterion underlying the Court of Justice’s judgment in *Sturgeon and Others*, which allows the right to compensation under Article 7 of Regulation No 261/2004 to be extended to cover cases of delay, be reconciled with the interpretative criterion which the Court of Justice applied to that regulation in its judgment in Case C-344/04 *IATA and ELFAA* [2006] ECR I-403?’

B – Case C-629/10

22. The High Court has referred the following questions to the Court for a preliminary ruling:

- ‘1. Are Articles 5 to 7 of Regulation ... No 261/2004 to be interpreted as requiring the compensation provided for in Article 7 to be paid to passengers whose flights are subject to delay within the meaning of Article 6, and if so in what circumstances?’
2. If question 1 is answered in the negative, are Articles 5 to 7 of Regulation ... No 261/2004 invalid, in whole or in part, for breach of the principle of equal treatment?
3. If question 1 is answered in the affirmative, are Articles 5 to 7 of Regulation ... No 261/2004 invalid, in whole or in part, for (a) inconsistency with the Montreal Convention; (b) breach of the principle of proportionality; and/or (c) breach of the principle of legal certainty?
4. If question 1 is answered in the affirmative and question 3 in the negative, what if any limits are to be placed upon the temporal effects of the Court’s ruling in this case?
5. If question 1 is answered in the negative, what if any effect is to be given to the decision of *Sturgeon* [*and Others*] between 19 November 2009 and the date of the Court’s ruling in this case?

IV – Analysis

A – Preliminary observations

23. Since some of the questions raised by the Amtsgericht Köln and by the High Court are related, I propose that the Court address them in the following manner.

24. First of all, the Amtsgericht Köln, by its third question, and the High Court, by its first question, are in fact asking the Court for confirmation of the interpretation it gave of Articles 5, 6 and 7 of Regulation No 261/2004 in its judgment in *Sturgeon and Others*.

25. Then, by its second question, the High Court wonders whether, if the Court reconsiders its decision in *Sturgeon and Others*, Articles 5, 6 and 7 of that regulation are invalid for breach of the principle of equal treatment.

26. Next, the first and second questions raised by the Amtsgericht Köln and the third question raised by the High Court concern, in essence, the compatibility of Articles 5, 6 and 7 of that regulation with the Montreal Convention, in so far as passengers on a delayed flight may claim compensation under Article 7 of Regulation No 261/2004, and with the principle of proportionality and the principle of legal certainty.

27. By its fourth question, the High Court also wishes to know, in essence, whether the judgment which the Court will be moved to give in these cases is to have limits placed on its temporal effects if the Court holds that Articles 5, 6 and 7 of that regulation are to be interpreted as meaning that the air carrier is required to pay compensation to a passenger whose flight has been delayed.

28. Finally, if the Court considers that those provisions are to be interpreted as meaning that the air carrier is not required to pay compensation to a passenger whose flight has been delayed, the High Court, by its fifth question, asks what effect is to be given to the judgment in *Sturgeon and Others*, between 19 November 2009, the date on which it was delivered, and the date of the ruling in the present cases?

B – *The questions referred for a preliminary ruling*

1. The right of an airline passenger to compensation in the event of a flight delay

29. The Court has already had the opportunity to consider whether an air carrier was required, under Articles 5, 6 and 7 of Regulation No 261/2004, to pay compensation to passengers whose flights had been delayed. In its judgment in *Sturgeon and Others*, it held that those articles must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.⁷

30. However, the disputes in the main proceedings show that air carriers refuse to apply that judgment and to compensate passengers finding themselves in such situations. Those carriers consider, in fact, that the interpretation given by the Court in *Sturgeon and Others* of Articles 5, 6 and 7 of that regulation is contrary to the approach taken in its judgment in *IATA and ELFAA* and that the Court overstepped its powers.

31. In that latter judgment, the Court was moved to rule on the validity of those provisions. In particular, the court which made the reference raised the question whether Articles 5 and 6 of Regulation No 261/2004 were invalid inasmuch as they were inconsistent with the principle of legal certainty.

⁷ — Paragraph 69 of that judgment.

32. In that regard, the Court held, *inter alia*, in paragraph 76 of that judgment, that ‘while the preamble to a Community measure may explain the latter’s content, ... it cannot be relied upon as a ground for derogating from the actual provisions of the measure in question’. It went on to explain that ‘the wording [of recitals 14 and 15 in the preamble to Regulation No 261/2004] indeed gives the impression that, generally, operating air carriers should be released from all their obligations in the event of extraordinary circumstances, and it accordingly gives rise to a certain ambiguity between the intention thus expressed by the Community legislature and the actual content of Articles 5 and 6 of [that regulation] ... which do not make this defence to liability so general in character. However, such an ambiguity does not extend so far as to render incoherent the system set up by those two articles, which are themselves entirely unambiguous’.

33. The United Kingdom Government infers from that paragraph that, according to the Court, Regulation No 261/2004 does not lay down any obligation to pay compensation to passengers whose flights have been delayed and that the Court did not consider that recital 15 thereto could be used to modify the meaning of the provisions of the regulation.⁸ In its view, the Court was therefore wrong to base its reasoning, in *Sturgeon and Others*, on that recital and to conclude that compensation may also be payable in the event of delay.

34. I do not consider that such an analysis may be inferred from paragraph 76 of the judgment in *IATA and ELFAA*, or that the interpretation given by the Court in *Sturgeon and Others* is in contradiction with the approach taken in the former judgment.

35. That paragraph must be placed in context. In *IATA and ELFAA*, the Court had to rule, we have seen, on the validity of Articles 5, 6 and 7 of Regulation No 261/2004. The applicants maintained that the regulation envisages, in an inconsistent manner in recitals 14 and 15 in its preamble, that extraordinary circumstances may limit or exclude an operating air carrier’s liability in the event of cancellation of, or long delays to, flights, whereas Articles 5 and 6 of the regulation, which govern its obligations in such a case, do not accept such a defence to liability except with regard to the obligation to pay compensation.⁹

36. Those applicants were surprised, in fact, that there was no exemption, in the body of the text of Regulation No 261/2004, from the obligation to assist and care for passengers in the event of a flight delay owing to extraordinary circumstances. They maintained that recitals 14 and 15 in the preamble to that regulation state that the air carrier is to be exempted from any obligation whatsoever in the event of extraordinary circumstances in the case not only of cancellation but also of delay. They therefore considered that those recitals, read in conjunction with Article 6 of the regulation, relating to flight delay, give rise to a certain ambiguity and that the principle of legal certainty is thereby infringed.¹⁰

37. It was on this aspect that the Court held, in paragraph 76 of *IATA and ELFAA*, that such an ambiguity does not extend so far as to render incoherent the system set up by Articles 5 and 6 of Regulation No 261/2004, which are themselves entirely unambiguous. In other words, the Court considered, in my view, that the ambiguity which may arise on a reading of recitals 14 and 15 to that regulation takes nothing away from the fact that it is clear, in the body of the text, that the defence of extraordinary circumstances is not general in nature but applies only to the obligation to pay compensation.

8 — Paragraphs 35 to 38 of its observations in Case C-581/10.

9 — See paragraph 75 of that judgment.

10 — See, *inter alia*, paragraph 31 of the observations of the European Low Fares Airline Association and paragraphs 132 to 135 of the observations of the IATA in *IATA and ELFAA*.

38. Therefore, I do not think that it is possible to draw from that analysis the conclusion that the interpretation of Articles 5, 6 and 7 of Regulation No 261/2004 given by the Court in *Sturgeon and Others* is in conflict with the approach taken by the Court in *IATA and ELFAA*.

39. As to the actual principle of compensation of air passengers whose flight has been delayed by at least three hours, since nothing new which might call into question the interpretation that the Court gave of those provisions in *Sturgeon and Others* has been presented by the parties to the disputes in the main proceedings, I do not see why the Court should reconsider that interpretation.

40. In that judgment, the Court applied the teleological method of interpreting Regulation No 261/2004.¹¹ The interpretation of Articles 5, 6 and 7 of that regulation is suggested by recital 15 in the preamble and is based on the very objective of the legislation which is, it is to be recalled, to ensure a high level of protection for air passengers regardless of whether they are denied boarding or whether their flight is cancelled or delayed, since they are all caused similar serious trouble and inconvenience connected with air transport.¹²

41. The Court in fact gave an interpretation *a contrario* of recital 15 to Regulation No 261/2004. Recital 15 in fact states that '[e]xtraordinary circumstances [and, therefore, exemption from the obligation to pay compensation] ... exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft'. Therefore, the Court inferred, in paragraph 43 of *Sturgeon and Others*, that the notion of long delay is also linked to the right to compensation.

42. Moreover, as the Court stated, in paragraph 47 in *Sturgeon and Others*, according to a general principle of interpretation, a Community act must be interpreted, as far as possible, in such a way as not to affect its validity. Similarly, where a provision of European Union law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness.

43. The approach taken by the Court in that judgment seeks specifically not to affect the validity of Articles 5, 6 and 7 of Regulation No 261/2004 by choosing the interpretation which ensures that those provisions retain their effectiveness. The Court stated, in paragraph 52 of that judgment, that that regulation has the objective of repairing, inter alia, damage consisting, for the passengers concerned, in a loss of time which, given that it is irreversible, can be redressed only by compensation. It concluded that passengers whose flights have been cancelled and passengers affected by a flight delay suffer similar damage, consisting in a loss of time, and thus find themselves in comparable situations for the purposes of the application of the right to compensation laid down in Article 7 of that regulation.¹³

44. Therefore, it would be contrary to the principle of equal treatment if those passengers were treated differently, even though they are in comparable situations. That is why the Court held, in paragraph 61 of *Sturgeon and Others*, that passengers whose flights have been delayed may rely on the right to compensation laid down in Article 7 of Regulation No 261/2004.

45. Moreover, the Court considered that a delay must be regarded as long, and confer entitlement to such compensation, where the passengers reach their final destination three hours or more after the arrival time initially scheduled by the air carrier. That interpretation of the concept of 'long delay', referred to in recital 15 to Regulation No 261/2004, has also been criticised by, inter alia, air carriers and academic lawyers who consider that the fixing of such a duration is arbitrary and that no justification for it is to be found in that regulation.

11 — See paragraphs 41 and 42 of the judgment.

12 — See *Sturgeon and Others*, paragraph 44.

13 — Ibid., paragraph 54.

46. I do not share that view. First of all, it should be pointed out that the principle of legal certainty, which is a fundamental principle of European Union law, requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly.¹⁴ When applied to the situations of air passengers whose flights have been delayed and to air carriers, that means that the former must be able to know from when they may claim payment of compensation and that the latter must be able to know from what point they will be required to pay that compensation. The introduction of a time-limit serves to prevent national courts from making different assessments of what constitutes a long delay, which may give rise to legal uncertainty.¹⁵ Passengers who have been delayed for four hours might be granted compensation in some Member States but not in others, since some national courts would hold that that delay is a long delay for the purposes of Regulation No 261/2004, whereas others would consider that not to be the case. That would have the effect of creating, as well as legal uncertainty, inequalities between air passengers whose situations are nevertheless identical.

47. Secondly, in order to determine the loss of time beyond which the passengers on a delayed flight may claim payment of compensation, it should be pointed out that the Court based its argument on the situation of passengers whose flights are cancelled, who are re-routed in accordance with Article 5(1)(c)(iii) of Regulation No 261/2004, since their situation is similar to that of passengers whose flight has been delayed and both categories of passengers are informed, as a rule, at the same time of the incident which will make their journey by air more difficult.¹⁶ Moreover, both categories of passengers reach their final destination after the time originally scheduled and, as a consequence, they suffer a similar loss of time.¹⁷ The Court then pointed out that passengers who are re-routed under Article 5(1)(c)(iii) of Regulation No 261/2004 are afforded the right to compensation laid down in Article 7 of that regulation where the carrier fails to re-route them on a flight which departs no more than one hour before the scheduled time of departure and reaches their final destination less than two hours after the scheduled time of arrival. Those passengers thus acquire a right to compensation when they suffer a loss of time equal to or in excess of three hours in relation to the duration originally planned by the air carrier.¹⁸

48. The Court thus concluded that passengers whose flights are delayed may rely on the right to compensation laid down in Article 7 of Regulation No 261/2004 where they suffer, on account of such flights, a loss of time equal to or in excess of three hours, that is to say, when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.¹⁹

49. Consequently, in the light of all these considerations, I take the view that Articles 5, 6 and 7 of that regulation are to be interpreted as meaning that passengers whose flights are delayed may rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a delayed flight, a loss of time equal to or in excess of three hours, that is to say, when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.

50. There is therefore no need to reply to the second question referred by the High Court.

14 — See *IATA and ELFAA*, paragraph 68 and the case-law cited.

15 — See, in that regard, points 88 to 90 of the Opinion of Advocate General Sharpston in *Sturgeon and Others*.

16 — *Sturgeon and Others*, paragraphs 55 and 56.

17 — *Ibid.*, paragraph 56.

18 — *Ibid.*, paragraph 57.

19 — *Ibid.*, paragraph 61.

2. The compatibility of Articles 5, 6 and 7 of Regulation No 261/2004 with the Montreal Convention, the principle of proportionality and the principle of legal certainty

51. The Amtsgericht Köln asks, in essence, how the right to ‘compensation’ laid down in Article 7 of Regulation No 261/2004 relates to Articles 19 and 29 of the Montreal Convention, inasmuch as these latter provisions exclude non-compensatory damages for loss occasioned by delay in the carriage of air passengers.

52. The High Court also enquires, in actual fact, whether, if the Court holds that passengers on delayed flights may claim the compensation laid down in Article 7 of that regulation, Article 7 is invalid, in whole or in part, for incompatibility with the Montreal Convention, infringement of the principle of proportionality and/or infringement of the principle of legal certainty.

53. As regards the compatibility of the right to compensation laid down in Article 7 of that regulation with Articles 19 and 29 of the Montreal Convention, it should be recalled that the Court has held that any delay in the carriage of passengers by air may, generally speaking, cause two types of damage, namely (i) damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned, and (ii) individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis.²⁰

54. The Montreal Convention is designed to govern the conditions for compensation for this second type of damage.²¹ Since the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute standardised and immediate compensatory measures, they are not among those whose institution is regulated by the Convention.²²

55. Like assistance and care, compensation under Article 7 of that regulation constitutes a standardised and immediate measure intended to repair damage consisting, for air passengers whose flights have inter alia been delayed, in a loss of time which is irreversible.²³ That is confirmed by the flat-rate nature of that compensation, the amount of which varies according not to the individual damage suffered, but to the flight distance covered or to be covered, and by its general nature since it is applicable without distinction to all passengers fulfilling the conditions for entitlement.

56. Consequently, Article 7 of Regulation No 261/2004 is, in my view, compatible with Articles 19 and 29 of the Montreal Convention.

57. As regards observance of the principle of proportionality, the Court has already had the opportunity to rule on the compatibility of Article 7 of Regulation No 261/2004 with that principle.²⁴ It has held, in that regard, that the measures prescribed by Articles 5 and 6 of that regulation²⁵ are in themselves capable of immediately redressing some of the damage suffered by air passengers in the event of cancellation of, or a long delay to, a flight and therefore enable a high level of passenger protection, sought by Regulation No 261/2004, to be ensured.²⁶

20 — *IATA and ELFAA*, paragraph 43. See also *Sturgeon and Others*, paragraph 51.

21 — *IATA and ELFAA*, paragraph 44.

22 — *Ibid.*, paragraph 46.

23 — See, to that effect, *Sturgeon and Others*, paragraph 52.

24 — See *IATA and ELFAA*, paragraph 81.

25 — Those measures are passenger assistance and care, as provided for in Articles 8 and 9 of Regulation No 261/2004, and compensation, as provided for in Article 7 thereof.

26 — *IATA and ELFAA*, paragraph 84.

58. Moreover, the Court has stated that it is not disputed that the extent of the various measures chosen by the European Union legislature varies according to the significance of the damage suffered by the passengers, its significance being assessed by reference either to the length of the delay and the wait for the next flight or to the time taken to inform them of the flight's cancellation. The criteria thus adopted for determining the passengers' entitlement to those measures do not therefore appear in any way unrelated to the requirement for proportionality.²⁷

59. Some parties to the disputes in the main proceedings also put forward the argument that compensating passengers whose flights have been delayed results in the imposition of an arbitrary and unduly severe financial burden on air carriers. That compensation is, it is claimed, disproportionate to the objective pursued by Regulation No 261/2004.

60. In that regard, according to the figures brought to the attention of the European Commission by the European Organisation for the Safety of Air Navigation (Eurocontrol), less than 1.2% of flights potentially fall under the scope of the regulation's provisions on delayed flights. Moreover, less than 0.5% of delayed flights are delayed by three hours or more, whether or not the delay is due to extraordinary circumstances. The proportion of flights for which delay confers entitlement to the compensation provided for in Article 7 of the regulation is less than 0.15%.²⁸

61. The frequency of delays of more than three hours conferring entitlement to that compensation thus appears limited. The effects of the compensation payable in the event of delay of more than three hours do not therefore seem to me to be disproportionate having regard to the objective of Regulation No 261/2004 which is, we recall, to ensure a high level of protection for air passengers.

62. That is particularly so, as the Court stated in *Sturgeon and Others*, because air carriers are not obliged to pay compensation if they can prove that the cancellation or long delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances which are beyond the air carrier's actual control.²⁹ Furthermore, the discharge of obligations pursuant to Regulation No 261/2004 is without prejudice to air carriers' rights to seek compensation from any person who caused a delay, including third parties, as Article 13 of the regulation provides.³⁰ Finally, the Court also held that the compensation payable to a passenger whose flight is delayed, who reaches his final destination three hours or more after the arrival time originally scheduled, may be reduced by 50%, in accordance with Article 7(2)(c) of that regulation, where the delay is – in the case of a flight not falling under Article 7(2)(a) or (b) – less than four hours.³¹ The financial burden imposed on air carriers in the case of a flight delay of more than three hours may therefore be non-existent or considerably reduced.

63. Consequently, in the light of the foregoing, I take the view that Article 7 of Regulation No 261/2004 is compatible with the principle of proportionality.

64. Finally, the referring court in Case C-629/10 enquires, in essence, whether the interpretation of that provision given by the Court in its judgment in *Sturgeon and Others* is compatible with the principle of legal certainty.

27 — Ibid., paragraph 85.

28 — See the Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and the Council of 11 April 2011 on the operation and the results of Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (SEC(2011) 428 final).

29 — See paragraph 67 of that judgment.

30 — Paragraph 68 of that judgment.

31 — *Sturgeon and Others*, paragraph 63.

65. According to the applicants in the main proceedings in Case C-629/10, that interpretation infringes the principle of legal certainty since it conflicts with the clear and unambiguous wording of Regulation No 261/2004, with the European Union legislature's intention and with the judgement in *IATA and ELFAA*.

66. For the reasons set out in points 31 to 48 of this Opinion, I consider that interpretation not to be contrary to the principle of legal certainty.

67. In the light of the foregoing, I take the view that Articles 5, 6 and 7 of Regulation No 261/2004 are compatible with the Montreal Convention, with the principle of proportionality and with the principle of legal certainty.

3. The temporal effects of the judgment to be given

68. The applicants in the main proceedings in Case C-629/10 request that the Court limit the temporal effects of the judgment to be given, in the event that an affirmative reply and a negative reply are given, respectively, to the first and third questions referred by the High Court in this case. They submit that Articles 5, 6 and 7 of Regulation No 261/2004 should not be relied upon as the basis for claims by passengers for compensation in respect of flights which have been the subject of delay before the date of the judgment to be given in these cases, except as regards passengers who had already brought court proceedings for such compensation as at that date.

69. In that regard, it should be recalled that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of European Union law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the competent courts are satisfied.³²

70. The Court may, exceptionally, taking into account the serious difficulties which its judgment may create as regards the past, be moved to restrict for any person concerned the opportunity of relying on the interpretation which it gives to a provision of European Union law in response to a request for a preliminary ruling.³³

71. Moreover, the Court has stated that there must necessarily be a single occasion when a decision is made on the temporal effects of the requested interpretation, which the Court gives of a provision of European Union law. In that regard, the principle that a restriction may be allowed only in the actual judgment ruling upon the interpretation requested guarantees the equal treatment of the Member States and of other persons subject to European Union law, under that law, and thereby fulfils the requirements arising from the principle of legal certainty.³⁴

72. In the present cases, the provisions of European Union law subject to interpretation are Articles 5, 6 and 7 of Regulation No 261/2004. The Court is asked, in essence, whether those provisions are to be interpreted as meaning that the air carrier is required to pay compensation to passengers whose flights have been delayed. The Court has already had the opportunity to rule on that question in *Sturgeon and Others*³⁵ and the present questions referred for a preliminary ruling in fact seek only to ascertain whether the Court confirms the interpretation which it gave of those provisions in that judgment.

32 — See, inter alia, Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraph 34 and the case-law cited.

33 — See, in particular, Case C-577/08 *Brouwer* [2010] ECR I-7489, paragraph 33. See also *Meilicke and Others*, paragraph 35.

34 — *Meilicke and Others*, paragraph 37.

35 — See paragraph 69 of that judgment.

73. The Court did not, in that judgment, limit the temporal effects of the judgment.

74. Consequently, there is no need, in my view, to limit the temporal effects of the judgment to be given in the present cases.

75. Since I propose that the Court reply in the affirmative to the first question referred by the High Court in Case C-629/10, it is not necessary to reply to that court's fifth question.

V – Conclusion

76. On the basis of the foregoing considerations, I propose that the Court should reply as follows to the questions referred by the Amtsgericht Köln and by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court):

Articles 5, 6 and 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, and repealing Regulation (EEC) No 295/91, must be interpreted to the effect that:

- passengers whose flights are delayed may rely on the right to compensation laid down in Article 7 of Regulation No 261/2004 where they suffer, on account of a delayed flight, a loss of time equal to or in excess of three hours, that is to say, when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier;
- they are compatible with the Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 9 December 1999, with the principle of proportionality and with the principle of legal certainty.