



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

3 September 2020*

(Reference for a preliminary ruling – Air transport – Regulation (EC) No 261/2004 – Articles 5 and 9 – Obligation of the air carrier to offer hotel accommodation to passengers whose flights have been cancelled – Damage suffered by a passenger during her stay at the hotel providing the accommodation – Possibility of invoking the liability of the air carrier as a result of negligence on the part of employees of the hotel)

In Case C-530/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 17 June 2019, received at the Court on 11 July 2019, in the proceedings

NM, acting as liquidator of NIKI Luftfahrt GmbH,

v

ON,

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, A. Prechal (Rapporteur), President of the Third Chamber, and F. Biltgen, Judge,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- ON, by E. Sommeregger, Rechtsanwalt,
- the German Government, by J. Möller, M. Hellmann and E. Lanckenau, acting as Agents,
- the Netherlands Government, by M.K. Bulterman and C.S. Schillemans, acting as Agents,
- the European Commission, by N. Yerrell and G. Braun, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: German.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 9(1)(b) 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 (OJ 2004 L 46, p. 1).
- 2 The request has been made in proceedings between NM, acting as liquidator of NIKI Luftfahrt GmbH, an air transport company, and ON concerning a claim for damages brought by the latter seeking compensation for harm suffered by her on the premises of a hotel in which NIKI Luftfahrt had accommodated her following the cancellation of her flight.

Legal context

European Union law

- 3 Recitals 1, 2, 13 and 19 of Regulation No 261/2004 state:

‘(1) Action by the [European 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.

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

...

(13) Passengers whose flights are cancelled should be able either to obtain reimbursement of their tickets or to obtain re-routing under satisfactory conditions, and should be adequately cared for while awaiting a later flight.

...

(19) Operating air carriers should meet the special needs of persons with reduced mobility and any persons accompanying them.’

- 4 Article 1(1) of that regulation provides:

‘This Regulation establishes, under the conditions specified herein, minimum rights for passengers when:

...

(b) their flight is cancelled;

...’

5 Article 2 of that regulation provides:

‘For the purposes of this Regulation:

...

(i) “person with reduced mobility” means any person whose mobility is reduced when using transport because of any physical disability (sensory or locomotory, permanent or temporary), intellectual impairment, age or any other cause of disability, and whose situation needs special attention and adaptation to the person’s needs of the services made available to all passengers;

...’

6 Under Article 5(1) of Regulation No 261/2004:

‘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

...’

7 Article 9 of that regulation, entitled ‘Right to care’, states:

‘1. Where reference is made to this Article, passengers shall be offered free of charge:

...

(b) hotel accommodation in cases

– where a stay of one or more nights becomes necessary, or

...

2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.

3. In applying this Article, the operating air carrier shall pay particular attention to the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied children.’

8 Article 12 of that regulation, entitled ‘Further compensation’, provides, in paragraph 1 thereof:

‘This Regulation shall apply without prejudice to a passenger’s rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.’

Austrian law

- 9 Paragraph 1313a of the Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code) is worded as follows:

‘Any party obliged to provide another party with a service shall be liable thereto for any fault on the part of its legal representatives and persons whom it employs for the performance [of its obligation] to the same extent as for its own.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 10 In the context of a package travel contract, ON had a booking for a flight from Mallorca (Spain) to Vienna (Austria), which was to be operated by NIKI Luftfahrt. Following the cancellation of that flight, a rebooking was made, with the departure from Mallorca scheduled for the evening of the following day. As a result of that cancellation, ON was offered accommodation free of charge by NIKI Luftfahrt in a local hotel.
- 11 During her stay at that hotel, ON, who is confined to a wheelchair, fell and was seriously injured after the front wheels of her wheelchair got caught in a transverse gutter channel in a pathway.
- 12 ON brought an action before the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria) requesting that NM be ordered to pay damages by way of compensation for the harm suffered by her. In this respect, she submitted that the accident had occurred on the premises of the hotel and that the employees of the operator of that hotel had acted negligently in neither removing the transverse gutter channel nor rendering it safe.
- 13 By judgment of 21 November 2018, the Landesgericht Korneuburg (Regional Court, Korneuburg) dismissed the action on the ground that the air carrier was only required to provide accommodation and that no liability for consequential damage due to alleged negligence on the part of employees of the hotel in which accommodation is offered under Regulation No 261/2004 results from that regulation.
- 14 ON lodged an appeal against that judgment before the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), which, by order of 14 February 2019, set aside that judgment. According to that court, in accordance with national law, applicable alongside Regulation No 261/2004 under Article 12 of that regulation, the air carrier is liable for the negligent conduct of employees of the hotel appointed by that air carrier to fulfil its obligation to provide the services set out in Article 9(1)(b) of Regulation No 261/2004. Accordingly, the Oberlandesgericht Wien (Higher Regional Court, Vienna) remitted the case to the court of first instance for examination of the specific circumstances of the accident at issue in the main proceedings.
- 15 NM therefore brought an appeal on a point of law before the Oberster Gerichtshof (Supreme Court, Austria) seeking a declaration that NIKI Luftfahrt had fulfilled its obligation under Article 9(1)(b) of Regulation No 261/2004 by providing ON with accommodation free of charge, as, inter alia, the air carrier is not required, in order to eschew liability, also to check the facilities of the hotel offered by it.
- 16 According to the referring court, in the first place, it is clear from the case-law of the Court of Justice that the failure to fulfil that obligation to provide accommodation gives the passenger a right to compensation, based directly on Regulation No 261/2004, as regards the amounts which prove necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger (judgments of 13 October 2011, *Sousa Rodríguez and Others*, C-83/10, EU:C:2011:652, paragraph 44, and of 31 January 2013, *McDonagh*, C-12/11, EU:C:2013:43,

paragraph 51). However, it cannot be excluded that the Court may equate poor performance of that obligation with non-performance and, in this case too, allow a right to compensation directly on the basis of Regulation No 261/2004, even though, according to the referring court, in the case of poor performance of that obligation, this would involve compensating for the harm done through the payment of damages in an amount exceeding the cost of the accommodation and which could therefore come within the scope of Article 12 of Regulation No 261/2004 according to the scheme thereof.

- 17 In the second place, the referring court points out that the air carrier could also be held liable for the conduct of employees of the hotel that provides the accommodation on the basis of Paragraph 1313a of the General Civil Code, provided however that those employees acted in the context of performing an obligation incumbent on that carrier. For that purpose, it is of key importance to determine the nature of that carrier's obligation under Article 9(1)(b) of Regulation No 261/2004. If that obligation were to be understood as meaning that the air carrier is only required to offer hotel accommodation and to cover the costs thereof, the air carrier would therefore be liable only for the selection of the hotel and not for the conduct of employees of that hotel.
- 18 However, a broader interpretation of that provision whereby the air carrier is liable for the accommodation as such is also possible. In those circumstances, under Austrian law, the air carrier would be liable for negligence on the part of employees of the hotel providing the accommodation, with the air carrier therefore having to prove that there is no fault on its part in the event of objective fault on the part of employees on the premises of that hotel.
- 19 According to the referring court, although it is true that the wording of Article 9(1)(b) of Regulation No 261/2004 requires only that hotel accommodation be 'offered', the objective of ensuring a high level of protection for passengers, referred to in recital 1 of that regulation, supports a broader interpretation of the obligation to provide accommodation, in particular in that the passenger would then have the possibility of bringing legal proceedings against the air carrier in order to obtain compensation for the damage suffered on the premises of that hotel. That carrier would not, in that case, be disproportionately burdened as it could seek redress from the operator of the hotel in accordance with its contract with that operator. As the obligation to accommodate a passenger in a hotel must be performed only in the event of a shortcoming on the part of the air carrier, it would be logical for the air carrier and not the passenger to bear the risk of legal proceedings brought before a court of a Member State other than that in which that carrier has its seat.
- 20 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
 - '(1) Is an air carrier which, under Article 5(1)(b) of [Regulation No 261/2004], is required to offer assistance under Article 9(1)(b) of that regulation liable on the basis of that regulation for damage resulting from an injury incurred by the passenger as a result of the negligent conduct of employees of the hotel provided by the air carrier?
 - (2) If Question 1 is answered in the negative:

Is the air carrier's obligation under Article 9(1)(b) of [Regulation No 261/2004] limited to providing the passenger with a hotel and covering the costs of the accommodation, or is the air carrier liable for the accommodation as such?

Consideration of the questions referred

- 21 As a preliminary point, it should be noted that the first question concerns, in essence, the consequences that Regulation No 261/2004 could attach to poor performance of the air carrier's obligation to provide care under Article 9(1)(b) of that regulation, whereas the aim of the second question is to determine the content of that obligation, so that it is necessary to examine, in the first place, the second question.

The second question

- 22 By its second question, the referring court seeks, in essence, to ascertain whether Article 9(1)(b) of Regulation No 261/2004 is to be interpreted as meaning that the obligation of the air carrier under that provision to offer hotel accommodation free of charge to the passengers referred to therein means that that carrier is required not only to find a hotel room for those passengers and to cover the costs thereof, but also to take care of the accommodation arrangements as such.
- 23 In accordance with settled case-law, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 18 January 2017, *NEW WAVE CZ*, C-427/15, EU:C:2017:18, paragraph 19 and the case-law cited).
- 24 As regards the wording of the provision in question, it should be noted that Article 9 of Regulation No 261/2004, entitled 'Right to care', provides, in paragraph 1(b) thereof, that the passengers concerned, including those referred to in Article 5 of that regulation, relating to the cancellation of a flight, are to be offered hotel accommodation free of charge where, inter alia, a stay of one or more nights becomes necessary. Thus, the wording 'shall be offered free of charge ... hotel accommodation' reflects the desire of the EU legislature to prevent passengers who are obliged, following the cancellation of their flight, to spend the night in a hotel while waiting for the departure of a new flight from having to bear the burden of finding a hotel room and of paying the costs thereof themselves, as those passengers must be cared for by the air carrier, which must make the necessary arrangements for that purpose. However, it does not expressly follow from the wording of that provision that the EU legislature wished to impose on air carriers, beyond that provision of care for passengers, the obligation also to take care of the accommodation arrangements as such, either directly or by relying on hotels appointed by them.
- 25 The context of Article 9(1)(b) of Regulation No 261/2004 supports an interpretation whereby air carriers are not required to organise the actual implementation of the accommodation arrangements themselves. Article 9(2) of that regulation provides that air carriers are required, in the context of the right to care of the passengers concerned, to offer them free of charge, inter alia, two telephone calls or emails. However, although it follows from that provision that the air carrier must in fact make the means of making those calls or of sending those emails available to passengers free of charge, it cannot be inferred from that fact that that carrier is thus required to organise, on its own responsibility, the implementation of the telecommunications operations necessary for that purpose.
- 26 That interpretation is, moreover, supported by the objective pursued by Regulation No 261/2004, which, in accordance with recitals 1 and 13 thereof, is aimed at ensuring a high level of protection for passengers, in particular by ensuring that passengers whose flights are cancelled are adequately cared for while awaiting a later flight. To that end, Regulation No 261/2004 grants those passengers standardised and immediate compensatory measures such as, where appropriate, the offer of hotel accommodation free of charge provided for in Article 9(1)(b) of that regulation, with those measures being designed to cater for passengers' immediate needs on the spot, whatever the cause of the cancellation of the flight in question (see, to that effect, judgment of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 86).

- 27 In the light of that objective, an interpretation of Article 9(1)(b) of Regulation No 261/2004 whereby the air carrier must, on its responsibility, take care of the accommodation arrangements of the passengers concerned itself cannot be accepted, as the operations necessary to fulfil such an obligation go beyond the scope of the scheme for standardised and immediate on-the-spot assistance that the EU legislature intended to establish for the benefit of passengers.
- 28 It must be added that the interpretation whereby the air carrier is not required to take care of the accommodation arrangements itself is, first of all, not invalidated by the fact, considered unacceptable by ON, that such an interpretation could mean that the passenger becomes the contractual partner of the operator of the hotel that provides the accommodation. In that regard, it is sufficient to note that Article 9(1)(b) of Regulation No 261/2004 merely lays down an obligation on the part of the air carrier to offer hotel accommodation free of charge to the passengers concerned without establishing detailed rules governing the contractual relationships that may arise from the implementation of that obligation.
- 29 Next, contrary to what is submitted, in essence, by ON, that interpretation does not render meaningless the air carrier's obligation, under Article 9(3) of Regulation No 261/2004, to pay particular attention, in applying that article, to the needs, inter alia, of persons with reduced mobility. Even though the air carrier is not required to take care of the hotel accommodation arrangements of passengers whose flights have been cancelled itself, the fact remains that that air carrier must adequately care for them, as specified in recital 13 of that regulation, which means that the air carrier must select the hotel carefully, having ascertained that that hotel is capable of meeting reasonable expectations in terms of quality and safety and, as regards persons with reduced mobility like ON, that that hotel is adapted in such a way as to be capable of accommodating them under good conditions, notifying, where appropriate, that hotel of the reduced mobility of the passengers concerned.
- 30 Lastly, although, as the referring court points out, consideration could be given, in the light of the objective of protecting passengers, to a broader interpretation of the obligation of air carriers to provide care whereby those air carriers would be required to take care of their passengers' hotel accommodation arrangements themselves, in that those passengers could have the possibility, on the basis of the conditions and rules governing tortious liability under national law, of bringing legal proceedings against their air carrier in a situation such as that at issue in the main proceedings, it must be stated that Regulation No 261/2004 has implemented that protection in a more limited manner by establishing a scheme for standardised and immediate assistance, as noted in paragraph 26 above.
- 31 In light of the foregoing, the answer to the second question is that Article 9(1)(b) of Regulation No 261/2004 must be interpreted as meaning that the obligation of the air carrier under that provision to offer hotel accommodation free of charge to the passengers referred to therein does not mean that that carrier is required to take care of the accommodation arrangements as such.

The first question

- 32 By its first question, the referring court asks, in essence, whether Regulation No 261/2004 is to be interpreted as meaning that an air carrier which, under Article 9(1)(b) of that regulation, has offered hotel accommodation to a passenger whose flight has been cancelled may be required, on the basis of that regulation alone, to compensate that passenger for damage caused by fault on the part of employees of that hotel.
- 33 In that regard, the referring court takes the view that it is clear from the case-law cited in paragraph 16 above that the failure to fulfil the obligation to provide accommodation gives the passenger a right to compensation, based directly on Regulation No 261/2004, as regards the amounts which prove

necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger. According to that court, it could follow that a right to compensation would also apply to poor performance of that obligation by the air carrier.

- 34 As a preliminary point, it should be noted that the assumption of fault on the part of the air carrier, on which the first question is based, rests on the premiss that that carrier's obligation to provide care under Article 9(1)(b) of Regulation No 261/2004 would extend to taking care of the accommodation arrangements of the passengers concerned, so that any fault on the part of the hotel appointed by that carrier in that context could reflect poor performance of that obligation on the part of that carrier, giving rise to its liability.
- 35 However, in the light of the answer given to the second question, that premiss must be regarded as erroneous.
- 36 In any event, it must be pointed out, as the referring court does, that passengers' right to compensation where the air carrier has failed to fulfil its obligation to provide care laid down in Article 9 of Regulation No 261/2004 applies only to the reimbursement of amounts which, in the light of the specific circumstances of each case, prove necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in providing that care.
- 37 Accordingly, the right to reimbursement of those amounts is fully consistent with the scheme for standardised and immediate compensatory measures established by that regulation for the benefit of passengers, as those amounts are intended to make good the expenditure incurred by those passengers to obtain the same standardised and immediate services as those which the air carrier should have offered them, without it being necessary for that purpose to carry out a case-by-case assessment of the specific circumstances of each passenger.
- 38 However, compensation for individual damage as a result of fault on the part of employees of the hotel selected by the air carrier for the purpose of providing the accommodation referred to in Article 9 of Regulation No 261/2004 would necessarily require a case-by-case assessment of the extent of that damage and would go beyond the scope of the standardised and immediate compensatory measures provided for by Regulation No 261/2004.
- 39 In that regard, the Court has already held that Regulation No 261/2004 does not provide for the compensation of individual damage, redress for which requires a case-by-case assessment of the extent of the damage caused (see, to that effect, judgment of 29 July 2019, *Rusu*, C-354/18, EU:C:2019:637, paragraph 31).
- 40 In light of the foregoing, the answer to the first question is that Regulation No 261/2004 must be interpreted as meaning that an air carrier which, under Article 9(1)(b) of that regulation, has offered hotel accommodation to a passenger whose flight has been cancelled cannot be required, on the basis of that regulation alone, to compensate that passenger for damage caused by fault on the part of employees of that hotel.

Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

- 1. Article 9(1)(b) 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 as meaning that the obligation of the air carrier under that provision to offer hotel accommodation free of charge to the passengers referred to therein does not mean that that carrier is required to take care of the accommodation arrangements as such.**
- 2. Regulation No 261/2004 must be interpreted as meaning that an air carrier which, under Article 9(1)(b) of that regulation, has offered hotel accommodation to a passenger whose flight has been cancelled cannot be required, on the basis of that regulation alone, to compensate that passenger for damage caused by fault on the part of employees of that hotel.**

[Signatures]