



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

23 October 2012*

(Air transport — Regulation (EC) No 261/2004 — Articles 5 to 7 — Montreal Convention — Articles 19 and 29 — Right to compensation in the event of delay of flights — Compatibility)

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

REFERENCES for a preliminary ruling under Article 267 TFEU from the Amtsgericht Köln (Germany) and the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) (United Kingdom), made by decisions of 3 November and 10 August 2010 respectively, received at the Court on 13 and 24 December 2010, in the proceedings

Emeka Nelson,

Bill Chinazo Nelson,

Brian Cheimezie Nelson

v

Deutsche Lufthansa AG (C-581/10),

and

The Queen, on the application of:

TUI Travel plc,

British Airways plc,

easyJet Airline Company Ltd,

International Air Transport Association

v

Civil Aviation Authority (C-629/10),

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, G. Arestis, J. Malenovský (Rapporteur), M. Berger, Presidents of Chambers, E. Juhász, A. Borg Barthet, J.-C. Bonichot, D. Šváby and A. Prechal, Judges,

* Languages of the case: German and English.

Advocate General: Y. Bot,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 20 March 2012,

after considering the observations submitted on behalf of:

- Deutsche Lufthansa AG, by C. Giesecke, Rechtsanwalt,
- TUI Travel plc, British Airways plc, easyJet Airline Company Ltd and the International Air Transport Association, by L. Van den Hende, Solicitor, and by D. Anderson QC,
- the Civil Aviation Authority, by A. Shah QC,
- the German Government, by T. Henze and J. Kemper, acting as Agents,
- the United Kingdom Government, by S. Ossowski, acting as Agent, and by D. Beard QC,
- the French Government, by G. de Bergues and M. Perrot, acting as Agents,
- the Polish Government, by M. Szpunar, K. Bożekowska-Zawisza and M. Kamejsza, acting as Agents,
- the European Parliament, by L.G. Knudsen and A. Troupiotis, acting as Agents,
- the Council of the European Union, by E. Karlsson and A. De Elera, acting as Agents,
- the European Commission, by K. Simonsson, K.-P. Wojcik and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2012,

gives the following

Judgment

- 1 These references for a preliminary ruling concern the interpretation and validity of Articles 5 to 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 (OJ 2004 L 46, p. 1).
- 2 The reference in Case C-581/10 has been made in proceedings between, on the one hand, Mr Nelson and his family (together ‘the Nelsons’) and, on the other, the airline Deutsche Lufthansa AG (‘Lufthansa’) concerning Lufthansa’s refusal to compensate those passengers, whose arrival at the airport of destination was delayed by 24 hours in relation to the arrival time originally scheduled.
- 3 The reference in Case C-629/10 has been made in proceedings between, on the one hand, TUI Travel plc, British Airways plc, easyJet Airline Company Ltd and the International Air Transport Association (collectively ‘TUI Travel and Others’) and, on the other, the Civil Aviation Authority concerning that latter’s refusal to guarantee to them that it would not interpret Regulation No 261/2004 as imposing an obligation on airlines to compensate passengers in the event of delay to their flights.

Legal context

International law

- 4 The Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38; ‘the Montreal Convention’).
- 5 Articles 17 to 37 of the Montreal Convention comprise Chapter III thereof, entitled ‘Liability of the carrier and extent of compensation for damage’.
- 6 Article 19 of that convention, entitled ‘Delay’, provides:

‘The carrier is 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.’
- 7 Article 22(1) of the Montreal Convention limits the liability of the carrier in the case of damage caused by delay in the carriage of persons to 4 150 Special Drawing Rights (SDRs) for each passenger. Article 22(5) essentially provides that this limit is not to apply if the damage results from an act or omission of the carrier, its servants or agents in the course of their duties, done with intent to cause damage or recklessly and with knowledge that damage would probably result.
- 8 Article 29 of that convention, entitled ‘Basis of claims’, is worded as follows:

‘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.’

European Union (‘EU’) law

- 9 Recitals 1 to 4 and 15 in the preamble to Regulation No 261/2004 state:
 - ‘(1) Action by the Community 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.
 - (3) While Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport [(OJ 1991 L 36, p. 5)] created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays.

- (4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.

...

- (15) 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.'

10 Article 2 of that regulation, entitled 'Definitions', provides:

'For the purposes of this Regulation:

...

- (1) "cancellation" means the non-operation of a flight which was previously planned and on which at least one place was reserved.'

11 Article 5 of Regulation No 261/2004, entitled 'Cancellation', states:

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

- (a) be offered assistance by the operating air carrier in accordance with Article 8; and

...

- (c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

...

- (iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

...

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.

...'

12 Article 6 of Regulation No 261/2004, entitled 'Delay', is worded as follows:

'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.'

13 Article 7 of that regulation, entitled 'Right to compensation', provides:

'1. Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1 500 kilometres or less;

(b) 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;

(c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.

2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked:

(a) by two hours, in respect of all flights of 1 500 kilometres or less; or

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

(c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air carrier may reduce the compensation provided for in paragraph 1 by 50%.

...'

14 Article 8(1) of Regulation No 261/2004 provides:

‘Where reference is made to this Article, passengers shall be offered the choice between:

(a)

- reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger’s original travel plan, together with, when relevant,
- a return flight to the first point of departure, at the earliest opportunity;

(b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or

(c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger’s convenience, subject to availability of seats.’

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

Case C-581/10

- 15 The Nelsons booked a flight for themselves with Lufthansa from Frankfurt am Main (Germany) to Lagos (Nigeria), departing on 27 July 2007 and returning from Lagos to Frankfurt am Main on 27 March 2008 on flight No LH 565. The scheduled departure time for that return flight was 22.50. On 27 March 2008, the Nelsons arrived in good time at Lagos airport. However, the return flight did not depart at the scheduled time and they were accommodated in a hotel. At 16.00 on 28 March 2008 they were collected from their hotel and taken to the airport. Flight LH 565 finally departed at 01.00 on 29 March 2008 by means of a replacement aircraft which Lufthansa had brought in from Frankfurt am Main, which had the same flight number and most of the same passengers. The plane landed in Frankfurt am Main at 07.10, that is, more than 24 hours later than the arrival time originally scheduled.
- 16 Following that flight, the Nelsons brought an action before the referring court. They requested, *inter alia*, that Lufthansa be ordered to pay each of them EUR 600 plus interest for the delay on the basis of Articles 5(1)(c) and 7 of Regulation No 261/2004.
- 17 In that regard, Lufthansa contends that, since the flight was operated, it cannot be a question of a ‘cancellation’ within the meaning of Article 2(l) of Regulation No 261/2004, but rather one of delay for which that regulation does not provide a right to compensation.
- 18 The referring court stayed the proceedings as a ruling from the Court was expected in Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923. They were resumed following delivery of the judgment in that case.
- 19 In the light of *Sturgeon and Others*, Lufthansa contended, first, that the right to compensation which the Court of Justice has accepted in favour of passengers whose flights are delayed cannot be reconciled with the rules on claims for damages under the Montreal Convention. Second, it argued that, in *Sturgeon and Others*, the Court of Justice exceeded its jurisdiction.

20 In those circumstances the Amtsgericht Köln (Local Court, Cologne) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘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 [of non-compensatory damages] 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?’

Case C-629/10

- 21 TUI Travel plc is an international leisure group which owns seven airlines, including Thomson Airways based in the United Kingdom. British Airways plc and easyJet Airlines Company Ltd are airlines operating international scheduled passenger flights.
- 22 The International Air Transport Association is an international trade body representing some 230 airlines which themselves comprise 93% of scheduled international air traffic.
- 23 The Civil Aviation Authority is the United Kingdom’s independent aviation regulator. Its activities include economic regulation, airspace policy, safety regulation and consumer protection. It is responsible for enforcing aviation regulation in the United Kingdom.
- 24 TUI Travel and Others requested confirmation from the Civil Aviation Authority that it would not interpret Regulation No 261/2004 as imposing an obligation on airlines to compensate their passengers in the event of delay. The Civil Aviation Authority refused that request, stating that it was bound to give effect to the ruling in *Sturgeon and Others*.
- 25 Consequently, TUI Travel and Others brought proceedings before the referring court in order to challenge the position of the Civil Aviation Authority.
- 26 Satisfied that the arguments of TUI Travel and Others were not without substance, the High Court of Justice of England and Wales, Queen’s Bench Division (Administrative Court), decided to stay the proceedings and to refer the following questions to the Court of Justice 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 [of that regulation] to be paid to passengers whose flights are subject to delay within the meaning of Article 6 [of that regulation], 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 [, the date of its delivery,] and the date of the Court's ruling in this case?
- 27 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 of the judgment.

Consideration of the questions referred

Question 1 in Case C-629/10: the existence of the right to compensation under Regulation No 261/2004 in the event of a flight delay and the conditions under which that compensation is payable

- 28 By question 1 in Case C-629/10, the referring court asks, in essence, whether, and if so under what conditions, passengers whose flights are delayed enjoy the right to compensation under Regulation No 261/2004.
- 29 In that connection, it should be noted that neither Article 7 of Regulation No 261/2004 nor any other provision of that regulation expressly provides such a right.
- 30 Nevertheless, it is apparent from Article 5(1)(c)(iii) of Regulation No 261/2004 that passengers are entitled to fixed compensation – under the conditions specified in that provision – where their flights are cancelled without their being notified beforehand or where they are informed of the cancellation less than seven days before the scheduled time of departure, and where the air carrier is not able to offer 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 (see *Sturgeon and Others*, paragraph 57).
- 31 Accordingly, Article 5(1)(c)(iii) of that regulation provides an air carrier with some leeway in order to offer to re-route a passenger whose flight is cancelled at the very last moment, without having to pay compensation to him. Under that provision, an air carrier is entitled to offer the passenger a re-routing whose duration is greater than that of the cancelled flight. However, even if the carrier makes full use of the two possibilities which that provision grants to it – that enabling the passenger's departure to be brought forward one hour and that enabling his arrival to be deferred by up to two hours – the total duration of the re-routing offered must not, in any event, be equal to or in excess of three hours in relation to the planned duration of the cancelled flight. Where the re-routing is longer, the passenger concerned will necessarily be compensated.

- 32 On the other hand, no provision of Regulation No 261/2004 specifically grants fixed compensation to passengers who learn at the very last moment before their flight, or even during that flight, that there will be a long delay, and that they will reach their final destination three hours or more after the arrival time originally scheduled.
- 33 In that regard, it should be noted that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (*Sturgeon and Others*, paragraph 48 and the case-law cited).
- 34 Passengers whose flights are delayed and those whose flights are cancelled must be considered as being in comparable situations, for the purposes of compensation under Regulation No 261/2004, because those passengers suffer similar inconvenience, namely, a loss of time equal to or in excess of three hours in relation to the original planning of that flight (see *Sturgeon and Others*, paragraph 54).
- 35 In addition, passengers in either group are in practice denied the opportunity to reorganise their travel arrangements freely, since they are faced either with a serious incident in the operation of their flight which is about to depart or already underway, or with the cancellation of their flight giving rise, as the case may be, to an offer to re-route. Consequently, if, for one reason or another, they are absolutely required to reach their final destination at a particular time, they cannot avoid the loss of time inherent in the new situation, having no leeway in that regard.
- 36 Those considerations are moreover supported by the final part of recital 3 in the preamble to Regulation No 261/2004 which – by referring, inter alia, to the fact that the number of passengers affected by cancellations without prior warning and by long delays is too high – implicitly emphasises that the inconvenience suffered by those two groups of passengers is equivalent.
- 37 In those circumstances, and in view of the fact that the aim pursued by Regulation No 261/2004 is to increase protection for all air passengers, passengers whose flights are delayed by three hours or more cannot be treated differently from those receiving compensation under Article 5(1)(c)(iii) of that regulation, since such unequal treatment as between those two groups is not duly justified in the light of the aims pursued by the regulation (see *Sturgeon and Others*, paragraphs 59 and 60).
- 38 In order to alleviate such unequal treatment, Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are the subject of long delay may receive the same compensation, namely that laid down in Article 5(1)(c)(iii) of that regulation, as passengers whose flights are cancelled (see *Sturgeon and Others*, paragraph 61).
- 39 That said, it should be added that, with the adoption of Regulation No 261/2004, the legislature was also seeking to strike a balance between the interests of air passengers and those of air carriers. Having laid down certain rights for those passengers, it provided at the same time, in recital 15 and Article 5(3) of that regulation, that 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 (*Sturgeon and Others*, paragraph 67).
- 40 In the light of the foregoing the answer to question 1 in Case C-629/10 is that Articles 5 to 7 of Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are delayed are entitled to compensation under that regulation where they suffer, on account of such flights, 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. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.

Questions 1 and 2 in Case C-581/10 and question 3(a) in Case C-629/10: whether Articles 5 to 7 of Regulation No 261/2004 are valid in the light of the Montreal Convention

- 41 By questions 1 and 2 in Case C-581/10 and question 3(a) in Case C-629/10, the referring courts ask, in essence, whether Articles 5 to 7 of Regulation No 261/2004 are valid in the light of the second sentence of Article 29 of the Montreal Convention, if they are interpreted as meaning that passengers whose flights are delayed and who reach their final destination three hours or more after the arrival time originally scheduled by the air carrier are entitled to compensation under that regulation.
- 42 Lufthansa, TUI Travel and Others, and the German and United Kingdom Governments contend that if that regulation were to confer a right to compensation on passengers whose flights are delayed, it would conflict with the very wording of the second sentence of Article 29 of the Montreal Convention, which provides for an action for damages, *inter alia*, in the event of damage resulting from delays in air transport, and makes the principle of the compensation of those passengers subject to precise conditions and limits which the relevant provisions of Regulation No 261/2004 do not satisfy.
- 43 On the other hand, Lufthansa, TUI Travel and Others and the German and United Kingdom Governments do not in any way deny that the right to compensation under Regulation No 261/2004 is compatible with the second sentence of Article 29 of the Montreal Convention so far as passengers whose flights are cancelled or who are denied boarding are concerned.
- 44 However, it is apparent in that regard from a combined reading, in particular, of Articles 8(1)(b) and 7(2) of Regulation No 261/2004 that denied boarding with re-routing or cancellation with re-routing is likely to result, first, in a delay in the carriage of passengers by air and, second, in compensation of the passengers affected by such delay.
- 45 Consequently, by their arguments, Lufthansa, TUI Travel and Others and the German and United Kingdom Governments indirectly call in question the very right to compensation provided for by Regulation No 261/2004, and, ultimately, the compatibility of Articles 5 to 7 of that regulation with the Montreal Convention.
- 46 In paragraph 45 of *IATA and ELFAA*, the Court held that it does not follow from Articles 19, 22 and 29 of the Montreal Convention, or from any other provision thereof, that the authors of that convention intended to shield air carriers from any form of intervention other than those laid down by those provisions, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts.
- 47 Even though the scope of the questions referred for a preliminary ruling concerning compatibility with the Montreal Convention was limited to the standardised and immediate measures of assistance and care laid down in Article 6 of Regulation No 261/2004, the Court did not rule out that other measures, such as that of compensation laid down in Article 7 of that regulation, may fall outside the scope of the Montreal Convention.
- 48 That last measure was specifically examined in *Sturgeon and Others*, in which the Court stated, first, that loss of time constitutes an inconvenience covered by Regulation No 261/2004, like the other inconveniences which the measures laid down by that regulation must redress. Second, it found that that inconvenience must be redressed by means of compensating the passengers concerned pursuant to that regulation (see, to that effect, *Sturgeon and Others*, paragraphs 52 and 61).

- 49 In that connection, it should be made clear that, like the inconveniences referred to in *IATA and ELFAA*, a loss of time cannot be categorised as ‘damage occasioned by delay’ within the meaning of Article 19 of the Montreal Convention, and, for that reason, it falls outside the scope of Article 29 of that convention.
- 50 Article 19 of the Montreal Convention implies, in particular, that the damage arises as a result of a delay, that there is a causal link between the delay and the damage and that the damage is individual to passengers depending on the various losses sustained by them.
- 51 First of all, a loss of time is not damage arising as a result of a delay, but is an inconvenience, like other inconveniences inherent in cases of denied boarding, flight cancellation and long delay and encountered in them, such as lack of comfort or the fact of being temporarily denied means of communication normally available.
- 52 Next, a loss of time is suffered identically by all passengers whose flights are delayed and, consequently, it is possible to redress that loss by means of a standardised measure, without having to carry out any assessment of the individual situation of each passenger concerned. Consequently, such a measure may be applied immediately.
- 53 Lastly, there is not necessarily a causal link between, on the one hand, the actual delay and, on the other, the loss of time considered relevant for the purpose of giving rise to a right to compensation under Regulation No 261/2004 or calculating the amount of that compensation.
- 54 The specific obligation to pay compensation, imposed by Regulation No 261/2004, does not arise from each actual delay, but only from a delay which entails a loss of time equal to or in excess of three hours in relation to the time of arrival originally scheduled. In addition, whereas the extent of the delay is normally a factor increasing the likelihood of greater damage, the fixed compensation awarded under that regulation remains unchanged in that regard, since the duration of the actual delay in excess of three hours is not taken into account in calculating the amount of compensation payable under Article 7 of Regulation No 261/2004.
- 55 In those circumstances, the loss of time inherent in a flight delay, which constitutes an inconvenience within the meaning of Regulation No 261/2004 and cannot be categorised as ‘damage occasioned by delay’ within the meaning of Article 19 of the Montreal Convention, cannot come within the scope of Article 29 of that convention.
- 56 Consequently, the obligation under Regulation No 261/2004 intended to compensate passengers whose flights are subject to a long delay is compatible with Article 29 of the Montreal Convention.
- 57 Furthermore, it should be stated that the obligation to pay compensation which stems from Regulation No 261/2004 is additional to Article 29 of the Montreal Convention, inasmuch as it operates at an earlier stage than the system laid down in that Article (see, to that effect, *IATA and ELFAA*, paragraph 46).
- 58 It follows that that obligation to pay compensation does not itself prevent the passengers concerned, should the same delay also cause them individual damage conferring entitlement to compensation, from being able to bring in addition actions to obtain, by way of redress on an individual basis, damages under the conditions laid down by the Montreal Convention (see, to that effect, *IATA and ELFAA*, paragraphs 44 and 47).
- 59 In that connection, the Court has held, when interpreting Article 12 of Regulation No 261/2004, entitled ‘Further compensation’, that that article is intended to supplement the application of measures provided for by that regulation, so that passengers are compensated for the entirety of the damage that they have suffered due to the failure of the air carrier to fulfil its contractual obligations.

That provision thus allows the national court to order the air carrier to compensate damage arising, for passengers, from breach of the contract of carriage by air on a legal basis other than Regulation No 261/2004, that is to say, in particular, in the conditions provided for by the Montreal Convention and national law (Case C-83/10 *Sousa Rodríguez and Others* [2011] ECR I-9469, paragraph 38).

60 In the light of the foregoing, consideration of questions 1 and 2 in Case C-581/10 and of question 3(a) in Case C-629/10 has disclosed no factor of such a kind as to affect the validity of Articles 5 to 7 of Regulation No 261/2004.

Question 3 in Case C-581/10 and question 3(c) in Case C-629/10: whether Articles 5 to 7 of Regulation No 261/2004 are valid in the light of the principle of legal certainty

61 By question 3 in Case C-581/10 and question 3(c) in Case C-629/10, the referring courts ask, in essence, whether Articles 5 to 7 of Regulation No 261/2004, as interpreted by *Sturgeon and Others*, are valid in the light of the principle of legal certainty.

62 TUI Travel and Others and the United Kingdom Government submit that interpreting Regulation No 261/2004 as imposing an obligation to compensate passengers whose flights are delayed would contravene that principle. That interpretation is incompatible, first, with *IATA and ELFAA*, according to which there is no obligation to pay compensation in such cases. Second, it disregards the intentions of the EU legislature and also the clear wording of that regulation, according to which compensation must be paid only in the event of denied boarding or flight cancellation.

63 That line of argument must be rejected in the light of the findings set out above.

64 In particular, as regards, first of all, the relationship between the judgments in *IATA and ELFAA* and *Sturgeon and Others*, it is apparent from paragraphs 46 to 48 above that there is no tension between those two judgments, the second judgment applying the principles laid down by the first.

65 Next, it follows from paragraphs 30 to 39 above that the interpretation of Regulation No 261/2004 imposing an obligation to pay compensation for long delays to flights does not disregard the EU legislature's intentions.

66 Lastly, as regards the clarity of the obligations imposed on air carriers, it should be borne in mind that the principle of legal certainty requires that individuals should be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (see Case 169/80 *Gondrand and Garancini* [1981] ECR 1931, paragraph 17; Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, paragraph 27; and Case C-110/03 *Belgium v Commission* [2005] ECR I-2801, paragraph 30).

67 However, having regard to the requirements arising from the principle of equal treatment, air carriers cannot rely on the principle of legal certainty and claim that the obligation imposed on them by Regulation No 261/2004 to compensate passengers, in the event of delay to a flight, up to the amounts laid down therein infringes the latter principle.

68 In addition, as the Advocate General observed in point 46 of his Opinion, once the judgment in *Sturgeon and Others* was delivered, both air passengers whose flights were delayed and air carriers were able to know unequivocally the point from which those passengers may claim payment of compensation and the carriers will be required to pay that compensation, respectively, since the introduction of a clear time-limit also serves to prevent national courts from making different assessments of what constitutes a long delay which would, in some cases, give rise to legal uncertainty.

- 69 Consequently, consideration of question 3 in Case C-581/10 and of question 3(c) of Case C-629/10 has disclosed no factor of such a kind as to affect the validity of Articles 5 to 7 of Regulation No 261/2004.

Question 3(b) in Case C-629/10: the principle of proportionality

- 70 By its question 3(b) in Case C-629/10, the referring court asks, in essence, whether Articles 5 to 7 of Regulation No 261/2004 are valid in the light of the principle of proportionality, if they are interpreted as meaning that passengers whose flights have been delayed are entitled to compensation under that regulation.
- 71 The principle of proportionality, which is one of the general principles of EU law, requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 62, and Case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, paragraph 35).
- 72 In the present case, it must be borne in mind that Regulation No 261/2004 seeks to ensure a high level of protection for air passengers regardless of whether they are denied boarding or whether their flight is cancelled or subject to long delay, since they all suffer similar serious trouble and inconvenience connected with air transport (see *Sturgeon and Others*, paragraph 44).
- 73 TUI Travel and Others and the United Kingdom Government contend that if Regulation No 261/2004 is interpreted as requiring delayed passengers to be compensated, such an interpretation would be disproportionate to the aims of that regulation, because it imposes an excessive financial burden on air carriers. In addition, it would also have a disproportionate impact on passengers, since air carriers would be likely to pass on the financial costs of that obligation through their fares and reduce the number of flights from local airports and services to outlying destinations.
- 74 However, it should be observed at the outset in that regard that the fixed compensation provided for in Article 7 of Regulation No 261/2004 enables a loss of time suffered by passengers to be redressed without their having to prove that they have sustained individual damage. That measure therefore ensures a high level of protection for air passengers, as sought by that regulation.
- 75 Given that the loss of time suffered is irreversible, objective and easily quantifiable (see, in particular, *Sturgeon and Others*, paragraph 52), the measure granting all the passengers affected by that inconvenience immediate fixed pecuniary compensation is particularly appropriate.
- 76 Admittedly, it is true that that compensation entails certain financial consequences for air carriers. None the less, those consequences cannot be considered disproportionate to the aim of ensuring a high level of protection for air passengers.
- 77 First of all, the obligation to pay compensation which stems from Article 7 of Regulation No 261/2004 does not concern every delay, but only long delays.
- 78 Next, the amount of compensation, fixed at EUR 250, 400 and 600 depending on the distance of the flights concerned may still be reduced by 50% in accordance with Article 7(2)(c) of Regulation No 261/2004, where the delay is – in the case of a flight not falling under subparagraphs (a) or (b) of Article 7(2) – less than four hours (*Sturgeon and Others*, paragraph 63).

- 79 In addition, 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, that is, circumstances which are beyond the air carrier's actual control (see *Sturgeon and Others*, paragraph 67).
- 80 Moreover, 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 the delay, including third parties, as Article 13 of that regulation provides. Such compensation may accordingly reduce or even remove the financial burden borne by carriers in consequence of those obligations. Nor does it appear unreasonable for those obligations initially to be borne, subject to the abovementioned right to compensation, by the air carriers with which the passengers concerned have a contract of carriage that entitles them to a flight that should be neither cancelled nor delayed (*IATA and ELFAA*, paragraph 90, and *Sturgeon and Others*, paragraph 68).
- 81 Indeed, the case-law shows that the importance of the objective of consumer protection, which includes the protection of air passengers, may justify even substantial negative economic consequences for certain economic operators (see, to that effect, Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paragraphs 53 and 69).
- 82 Furthermore, as the Advocate General observed in point 60 of his Opinion, according to data provided to the Court on the frequency of long delays and the costs of the compensation in question for airlines, the proportion of flights for which delay confers entitlement to the compensation provided for under Regulation No 261/2004 is less than 0.15%.
- 83 Lastly, no specific evidence has been submitted to the Court which could lead to the conclusion that the payment of compensation in the event of long delays to flights would give rise to an increase in fares or a reduction in the number of flights from local airports and services to outlying destinations.
- 84 Consequently, consideration of question 3(b) in Case C-629/10 has disclosed no factor of such a kind as to affect the validity of Articles 5 to 7 of Regulation No 261/2004.

Questions 2 and 5 in Case C-629/10

- 85 Since the referring court asks those questions only in the event of a negative answer to question 1 in Case C-629/10, it is not necessary to reply to them.

Question 4 in Case C-629/10 concerning the temporal effects of the present judgment

- 86 By question 4 in Case C-629/10, the referring court wishes to ascertain the temporal effects of the present judgment with regard to the right to compensation of passengers whose flights are delayed for three hours or more in relation to the arrival time originally scheduled.
- 87 TUI Travel and Others submit that if question 1 is answered in the affirmative and question 3 in the negative, the Court should limit the temporal effect of its ruling such that Articles 5 to 7 of Regulation No 261/2004 cannot be relied upon as the basis for claims by passengers for compensation in respect of flights which have been the subject of delay prior to the date of the present judgment, except as regards passengers who had already brought court proceedings for such compensation as of the date of the judgment. They submit that despite the judgment in *Sturgeon and Others*, airlines and other relevant actors may, to date, reasonably conclude that Article 7 of Regulation No 261/2004 does not apply to passengers whose flights are delayed, because that judgment is contrary to both the plain wording of that regulation and the judgment in *IATA and ELFAA*.

- 88 In that connection, regard must be had to the settled case-law to the effect that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU 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 (see, *inter alia*, Case C-347/00 *Barreira Pérez* [2002] ECR I-8191, paragraph 44 and Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraph 41).
- 89 It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the right to rely upon a provision which it has interpreted with a view to calling in question legal relationships established in good faith (see, *inter alia*, Case C-104/98 *Buchner and Others* [2000] ECR I-3625, paragraph 39 and *Linneweber and Akritidis*, paragraph 42).
- 90 In that context, it is, however, for the Court to determine a single point from which the interpretation which it has given to a provision of EU law is to take effect.
- 91 In that connection, the Court has already held that restricting the temporal effects of such an interpretation may be allowed only in the actual judgment ruling upon the interpretation requested. That principle guarantees the equal treatment of the Member States and of other persons subject to EU law, under that law, fulfilling, at the same time, the requirements arising from the principle of legal certainty (Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraph 37).
- 92 The interpretation requested by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) in Case C-629/10 concerns the right to compensation under Regulation No 261/2004 payable to air passengers where they suffer, as a result of a delay to their flight, 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. In that regard, it is clear from paragraph 61 of *Sturgeon and Others* that air passengers enjoy such a right.
- 93 It must be stated that, in that judgment, the Court did not limit the temporal effects of the interpretation of Regulation No 261/2004 concerning the right to compensation referred to in paragraph 92 above.
- 94 Accordingly, there is no need to limit the temporal effects of the present judgment.

Costs

- 95 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Grand Chamber) hereby rules:

- Articles 5 to 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 as meaning that passengers whose flights are delayed are entitled to compensation under that regulation where they suffer, on account of such flights, 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. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.

- 2. Consideration of the questions referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of Articles 5 to 7 of Regulation No 261/2004.**

[Signatures]