



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

7 July 2022 *

(Reference for a preliminary ruling – Air transport – Regulation (EC) No 261/2004 – Compensation and assistance to passengers – Cancellation or long delay of flights – Article 5(3) – Exemption from the obligation to pay compensation – Extraordinary circumstances – Generalised failure of the aircraft refuelling system at the airport)

In Case C-308/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Judicial da Comarca dos Açores (Juízo Local Cível de Ponta Delgada – Juiz 4) (District Court, Azores – Civil Chamber, Ponta Delgada – Court No 4, Portugal), made by decision of 25 January 2021, received at the Court on 14 May 2021, in the proceedings

KU,

OP,

GC

v

SATA International – Azores Airlines SA,

THE COURT (Eighth Chamber),

composed of N. Jääskinen, President of the Chamber, K. Jürimäe (Rapporteur), President of the Third Chamber, and N. Piçarra, Judge,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Portuguese Government, by P. Barros da Costa, C. Chambel Alves, A. Luz and P. Pisco Santos, acting as Agents,

* Language of the case: Portuguese.

- the German Government, by J. Möller, J. Heitz and M. Hellmann, acting as Agents,
 - the European Commission, by L. Santiago de Albuquerque and K. Simonsson, acting as Agents,
- having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).
- 2 The request has been made in proceedings between KU, OP and GC and SATA International – Azores Airlines SA (‘Sata International’) concerning the right of passengers to compensation under that regulation, following a generalised failure of the refuelling system at an airport which led to flight delays of more than three hours or cancellation of flights.

Legal context

- 3 Recitals 1, 14 and 15 of 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.
- ...
- (14) As under the [Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999 and approved on behalf of the European Community by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38)], 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 that affect the operation of an operating air carrier.
- (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.’

4 Article 5 of that regulation, headed ‘Cancellation’, provides:

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

...

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

- (i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or
- (ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or
- (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.

...’

5 Article 7 of that regulation, headed ‘Right to compensation’, is worded as follows:

‘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.

...’

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

6 GC purchased a ticket for flight S4321, operated by SATA International on 10 May 2017, scheduled to depart from Lisbon (Portugal) at 12.50 and arrive at Ponta Delgada Airport (Azores, Portugal) at 14.15 (local time) on the same day. GC arrived at 19.30, that is, five hours and 15 minutes after the original scheduled arrival time.

- 7 On 10 May 2017, KU booked a connecting flight allowing him to travel from Lisbon to Santa Maria (Azores, Portugal) via Ponta Delgada. That connecting flight, which was the subject of a single booking, consisted of two flights operated by SATA International, namely flights S4321 and SP107, the latter of which was scheduled to depart at 18.45 (local time) on the same day. Owing to the delay in the arrival of flight S4321, KU was unable to board flight SP107 to Santa Maria.
- 8 OP purchased a ticket for flight S4142, operated by SATA International on 10 May 2017, scheduled to depart from Pico (Azores, Portugal) at 17.35 and arrive in Lisbon at 21.05 (local time). Since flight S4142 was cancelled, OP was re-routed, on 10 May 2017, on flight S4136 departing from Terceira (Azores, Portugal) at 21.25 bound for Lisbon.
- 9 The delay to flight S4321 and the cancellation of flight S4142 were caused by a sudden and unexpected failure of the refuelling system at Lisbon Airport, which occurred on 10 May 2017 from 13.19 onwards.
- 10 That failure, which led to the reorganisation of all air operations from that airport hub, required the use of fuel depots at airports in the vicinity.
- 11 GC, KU and OP each applied to SATA International, on the basis of Regulation No 261/2004, for compensation for the damage suffered by them as a result, in the case of the first two applicants, of a flight delay of more than three hours and, in the case of the third applicant, of the cancellation of the flight which also led to a delay of more than three hours on arrival. SATA International rejected those applications on the ground that those delays were not attributable to it, but resulted from a failure in the airport's refuelling system, which failure was, moreover, unforeseen and unexpected.
- 12 The applicants in the main proceedings then brought an action before the Tribunal Judicial da Comarca dos Açores (Juízo Local Cível de Ponta Delgada – Juiz 4) (District Court, Azores – Civil Chamber, Ponta Delgada – Court No 4, Portugal). That court asks whether that failure constitutes an 'extraordinary circumstance', within the meaning of Article 5(3) of Regulation No 261/2004, which would allow SATA International to be exempted from any liability. The referring court is uncertain, in particular, as to the interpretation of the concept of 'extraordinary circumstances', within the meaning of that provision, where, as in the present case, the delay of more than three hours to or cancellation of a flight is caused by a breakdown in the supply of fuel at the airport of origin of the flights or aircraft concerned and that airport is responsible for managing the refuelling system.
- 13 Recalling the case-law of the Court of Justice, the referring court wishes to ascertain whether a situation such as that described in the preceding paragraph falls within the scope of the concept of 'extraordinary circumstances' or must be regarded as inherent in the normal exercise of the activity of the air carrier concerned, with the result that that carrier is exempted from its obligation to pay compensation in such a situation.

- 14 In those circumstances, the Tribunal Judicial da Comarca dos Açores (Juízo Local Cível de Ponta Delgada – Juiz 4) (District Court, Azores – Civil Chamber, Ponta Delgada – Court No 4, Portugal) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does a delay of more than three hours to, or the cancellation of, a flight as a result of a breakdown in the supply of fuel at the airport of origin, in the case where that airport is responsible for the management of the refuelling system, constitute an “extraordinary circumstance” within the meaning and for the purposes of Article 5(3) of [Regulation No 261/2004]?’

Consideration of the question referred

- 15 By its question, the referring court is asking, in essence, whether Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that, where the airport of origin of the flights or aircraft concerned is responsible for managing the aircraft refuelling system, a generalised breakdown in the supply of fuel may be regarded as an ‘extraordinary circumstance’ within the meaning of that provision.
- 16 As a preliminary point, it should be recalled that, where a flight is cancelled, Article 5(1)(c) of Regulation No 261/2004 provides that the passengers concerned have the right to compensation from the operating air carrier, in accordance with Article 7(1) of the regulation, unless they have been informed of the cancellation beforehand within the deadlines laid down in Article 5(1)(c)(i) to (iii).
- 17 However, Article 5(3) of Regulation No 261/2004, read in the light of recitals 14 and 15 of that regulation, releases the operating air carrier from that obligation to pay compensation 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.
- 18 Where such circumstances do arise, the Court has held that it is incumbent on the operating air carrier to demonstrate that it adopted measures appropriate to the situation, deploying all its resources in terms of staff or equipment and the financial means at its disposal, in order to prevent that situation from resulting in the cancellation of the flight in question. It cannot, however, be required to make sacrifices that are intolerable in the light of the capacities of its undertaking at the relevant time (judgment of 23 March 2021, *Airhelp*, C-28/20, EU:C:2021:226, paragraph 22 and the case-law cited).
- 19 Furthermore, the Court has also held that where, on arrival, passengers suffer considerable delay to their flight, that is to say, equal to or in excess of three hours, they have a right to compensation under Article 7 of Regulation No 261/2004 (see, to that effect, judgments of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraphs 60 and 61, and of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraphs 34 and 40). Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken (judgments of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 69, and of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraph 40).

- 20 According to the settled case-law of the Court, the concept of ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004 refers to events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond that carrier’s actual control; those two conditions are cumulative and their fulfilment must be assessed on a case-by-case basis (judgment of 23 March 2021, *Airhelp*, C-28/20, EU:C:2021:226, paragraph 23 and the case-law cited).
- 21 In the first place, it is therefore necessary to determine, in the present case, whether a generalised breakdown in the supply of fuel is capable, by its nature or origin, of constituting an event which is not inherent in the normal exercise of the activity of the air carrier concerned where the airport of origin of the flights or aircraft concerned is responsible for the management of the refuelling system.
- 22 Since fuel is essential to the carriage of passengers by air, refuelling operations fall, in principle, within the scope of the normal exercise of an air carrier’s activity. Thus a technical issue which arises during a refuelling operation performed in collaboration with the staff of the air carrier concerned can constitute an event inherent in the normal exercise of that activity (see, by analogy, judgment of 4 April 2019, *Germanwings*, C-501/17, EU:C:2019:288, paragraph 30).
- 23 On the other hand, where that refuelling issue is the result of a general failure in the refuelling system managed by the airport, a distinction must be made between that and the situation referred to in the preceding paragraph, since such an event cannot be treated in the same way as a technical problem, which by its nature is confined to a single aircraft. That refuelling issue cannot, therefore, be regarded as intrinsically linked to the operation of the aircraft which should have completed the cancelled flight or which completed the delayed flight (see, by analogy, judgment of 26 June 2019, *Moens*, C-159/18, EU:C:2019:535, paragraph 18). Accordingly, that event is not capable of constituting, by its nature or origin, an event which is inherent in the normal exercise of the activity of the air carrier concerned.
- 24 Nevertheless, since the two conditions which constitute the concept of ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004 are cumulative, it is necessary, in the second place, to determine whether that event is entirely beyond the actual control of the air carrier concerned.
- 25 In that connection, it is apparent from the case-law of the Court relating to the concept of ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004 that events whose origin is ‘internal’ must be distinguished from those whose origin is ‘external’ to the operating air carrier (judgment of 23 March 2021, *Airhelp*, C-28/20, EU:C:2021:226, paragraph 39). That concept thus encompasses, by way of the occurrence of such ‘external’ events, those which result from the activity of the air carrier and from external circumstances which are more or less frequent in practice but which the air carrier does not control because they arise from a natural event or an act of a third party, such as another air carrier or a public or private operator interfering with flight or airport activity (see, to that effect, judgment of 23 March 2021, *Airhelp*, C-28/20, EU:C:2021:226, paragraphs 40 and 41).
- 26 Thus, where the refuelling system at an airport is managed by that airport or by a third party, the generalised breakdown in the supply of fuel must be regarded as an event the origin of which is external to the air carrier and is, therefore, beyond its actual control.

- 27 Nevertheless, as follows from paragraphs 17 to 19 of the present judgment, in so far as, in order to be exempted from its obligation to pay compensation, the air carrier whose flight was subject to long delays or was cancelled owing to extraordinary circumstances, within the meaning of Article 5(3) of Regulation No 261/2004, read in the light of recitals 14 and 15 of that regulation, is required to demonstrate that those circumstances could not have been avoided even if all reasonable measures had been taken, and that it adopted the measures appropriate to the situation to avoid the consequences thereof, it is for the referring court to assess, having regard to all of the circumstances of the dispute in the main proceedings and the evidence adduced by the air carrier concerned, whether the latter did indeed adopt such measures, inter alia, by deploying all the resources at its disposal to ensure a reasonable, satisfactory and timely re-routing of passengers affected by a long delay to or cancellation of a flight, in accordance, in particular, with the objective of guaranteeing a high level of protection for passengers, referred to in recital 1 of that regulation, provided that this does not amount to an intolerable sacrifice in the light of the capacities of the air carrier's undertaking at the relevant time (see, to that effect, order of 30 March 2022, *Orbest*, C-659/21, not published, EU:C:2022:254, paragraph 26).
- 28 In the light of all the foregoing considerations, the answer to the question referred is that Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that where the airport of origin of the flights or aircraft concerned is responsible for the aircraft refuelling system, a generalised breakdown in the supply of fuel can be regarded as an 'extraordinary circumstance' within the meaning of that provision.

Costs

- 29 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 (Eighth Chamber) hereby rules:

Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, must be interpreted as meaning that where the airport of origin of the flights or aircraft concerned is responsible for the aircraft refuelling system, a generalised breakdown in the supply of fuel can be regarded as an 'extraordinary circumstance' within the meaning of that provision.

[Signatures]