

JUDGMENT OF THE COURT (Third Chamber)

12 May 2011*

In Case C-294/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Augstākās Tiesas Senāts (Latvia), made by decision of 9 June 2010, received at the Court on 15 June 2010, in the proceedings

Andrejs Eglītis,

Edvards Ratnieks

v

Latvijas Republikas Ekonomikas ministrija,

intervening party:

Air Baltic Corporation AS,

* Language of the case: Latvian.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász and J. Malenovský (Rapporteur), Judges,

Advocate General: E. Sharpston,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Latvijas Republikas Ekonomikas ministrija, by J. Pūce, acting as Agent,

— the Polish Government, by K. Rokicka, acting as Agent,

— the United Kingdom Government, by L. Seeboruth, acting as Agent,

— the European Commission, by A. Sauka 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 reference for a preliminary ruling concerns the interpretation of Articles 5(3) and 6(1) 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 has been made in the course of proceedings between Mr Eglitis and Mr Ratnieks, two passengers on a flight from Copenhagen to Riga, and the airline Air Baltic Corporation AS ('Air Baltic'), following Air Baltic's refusal to pay compensation to the passengers of flight BT 140, scheduled for 14 July 2006, which had been cancelled.

Legal context

3 Recitals 1 and 2 in the preamble to Regulation No 261/2004 are worded as follows:

‘(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.’

4 Recitals 13 to 15 of Regulation No 261/2004 state:

‘(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.

(14) As under the Montreal Convention, 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.'

5 Article 5 of Regulation No 261/2004, headed 'Cancellation,' provides at paragraph 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
- (b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and

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

⁶ Article 5(3) of Regulation No 261/2004 provides:

'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.'

7 Article 6 of Regulation No 261/2004, headed 'Delay', provides at paragraph 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).'

- 8 Article 7 of Regulation No 261/2004, headed 'Right to compensation', provides at paragraph 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 questions referred for a preliminary ruling

- 9 On 14 July 2006, Swedish air space in the Malmö region was closed from 20.30 as a result of failures in the power supply leading to a breakdown in radars and air navigation systems. On the same day, the departure of a Copenhagen-Riga flight, chartered by Air Baltic, was scheduled for 20.35.
- 10 The passengers boarded the aeroplane and remained there, awaiting departure, for a little over 2 hours, that is, until approximately 22.45. At 22.45, the passengers were informed that the flight was cancelled and were therefore asked to leave the aeroplane.
- 11 Considering that they were entitled, following the cancellation of their flight, to obtain compensation from Air Baltic, two passengers, Mr Eglītis and Mr Ratnieks, brought a claim before the Patērētāju tiesību aizsardzības centrs (Consumer Protection Office, 'the Office').
- 12 The Office refused their claim. That decision was confirmed by a decision of 22 March 2007 of the Latvijas Republikas Ekonomikas ministrija (Department of the Economy for the Republic of Latvia, 'the ministrija').
- 13 The appellants in the main proceedings brought an action against the decision of the ministrija, first before the Administratīvā rajona tiesa (District Administrative Court), then before the Administratīvā apgabaltiesa (Administrative Court of Appeal). As their action was dismissed, they appealed in cassation to the referring court.
- 14 The Office, the ministrija and the administrative courts of first instance and appeal concluded that Air Baltic was not obliged to pay compensation to the appellants under Article 5(3) of Regulation No 261/2004 since cancellation of the flight had to

be regarded as having occurred in extraordinary circumstances, beyond the airline's control.

- 15 The appellants in the main proceedings submit that the reason for the cancellation of the flight was not the closure of Swedish air space but rather the expiry of the permitted working hours for the crew of that flight. They do not dispute that the closure of Swedish air space, following failures in the power supply, qualifies as 'extraordinary circumstances' beyond the airline's control. In their opinion, that event explains only the initial flight delay, namely between 20.35 and 22.45. The decision to cancel the flight was made at 22.45 because the permitted working hours of the crew were insufficient to complete the flight in its entirety.
- 16 The national court considers that it is possible to take the view that, at 20.35, the time for which departure was scheduled, there were extraordinary circumstances, namely, in this instance, the closure of Malmö air space, which were circumstances that the operator could not avoid. However, it adds that air carriers do not, in general, usually cancel flights each time it is not possible to depart exactly on time. In its view, taking account of the specific features of air transport, resulting from the fact that passengers cannot easily find another means of transport or alternative routes and flights and that air carriers cannot easily reorganise their resources, particularly at foreign airports, both the carrier and the airport usually strive to ensure that, where possible, a programmed flight is operated.
- 17 Accordingly, the national court asks whether the fact that departure is impossible at exactly the scheduled time is an adequate reason for taking a decision to cancel a flight. In particular, it asks whether, where departure at the scheduled time is, owing

to extraordinary circumstances, impossible for a short time, those circumstances can be grounds for cancelling the flight.

- 18 The national court therefore asks whether, when it provides that air carriers are released from the obligation to pay compensation to travellers provided that all reasonable measures have been taken to avoid any extraordinary circumstances, Article 5(3) of Regulation No 261/2004 includes among those measures an obligation for those carriers to organise their resources, including their crew, in such a way that flights can be operated over a certain period of time should such circumstances occur.
- 19 In relation to the definition of that ‘period of time’, the appellants in the main proceedings submit that sufficient resources must be set aside to ensure that a flight can be operated at least during a two-hour period following the time originally scheduled for its departure. In this respect, their submission before the national court is based upon the provisions of Regulation No 261/2004 which lay down the obligations of air carriers in the event of delay. According to Article 6(1)(a) of Regulation No 261/2004, when an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure for two hours or more, in the case of flights of 1 500 kilometres or less, passengers are to be offered the assistance provided for in that regulation. They conclude that a two-hour delay, in the present case, is ‘normal’, that is to say, that the fact that it is impossible to operate a flight during a two-hour period is not, in itself, a circumstance that justifies cancellation of that flight.
- 20 The national court considers that the primary objective of Article 6(1) of Regulation No 261/2004 is not to regulate those issues in the way in which the appellants in the main proceedings propose but that it cannot be excluded that that provision may have a role to play in the systemic interpretation of Article 5(3) of the regulation.

21 It was in those circumstances that the Augstākās Tiesas Senāts (Supreme Court) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Is Article 5(3) of [Regulation No 261/2004] to be interpreted as meaning that an air carrier is required, in order to be found to have taken all reasonable measures to avoid extraordinary circumstances, to organise its resources in good time so that it is possible to operate a programmed flight once the unforeseen extraordinary circumstances have ceased to obtain, that is to say, during a certain period following the scheduled departure time?
- (2) If the first question is to be answered in the affirmative, does Article 6(1) of Regulation [No 261/2004] apply for the purpose of determining the minimum “reserve time” which the air carrier, when organising its resources at the appropriate time, must provide for as a possible foreseeable delay in the event that extraordinary circumstances arise?’

Consideration of the questions referred

22 By its two questions, which it is appropriate to consider together, the national court asks, in essence, whether Article 5(3) of Regulation No 261/2004 must be interpreted in such a way that an air carrier has an obligation, in respect of the reasonable measures that it is required to implement in order to guard against extraordinary circumstances, to organise its resources in good time in order to provide a certain minimum ‘reserve time’ after the scheduled departure time, so as to be able, if possible, to operate the flight after the extraordinary circumstances have come to an end.

It asks, in particular, whether that 'reserve time' may be determined with reference to Article 6(1) of Regulation No 261/2004.

- 23 As a preliminary point, it should be noted that, under Article 5(1) of Regulation No 261/2004, in the event of cancellation of a flight, the passengers concerned are to be offered by the air carrier, on the conditions laid down in that paragraph, firstly, assistance in accordance with Article 8 of that regulation, that is, the right to reimbursement or re-routing, secondly, free of charge, meals, accommodation and telephone calls as provided for in Article 9 of the regulation and, thirdly, flat-rate compensation in accordance with the rules laid down in Article 7 of the regulation, unless they have been informed in good time that the flight has been cancelled.
- 24 However, under Article 5(3) of Regulation No 261/2004, by way of exception to the provisions of Article 5(1), the air carrier is released from one of its obligations, that is, the one requiring that passengers be paid 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.
- 25 In that regard, at paragraph 40 of Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, the Court held that, since not all extraordinary circumstances confer exemption, the onus is on the party seeking to rely on them to establish, in addition, that they could not on any view have been avoided by measures appropriate to the situation, that is to say, by measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned. Indeed, that air carrier must, as the Court specified at paragraph 41 of that judgment, establish that, even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able, unless it had made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time, to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight.

- 26 It should be noted at the outset that, very often, the occurrence of extraordinary circumstances makes it difficult, if not impossible, to operate a flight at the scheduled time. Thus, the risk of delay to a flight, which may ultimately result in its cancellation, is the usual — and therefore foreseeable — detrimental consequence for passengers when extraordinary circumstances arise.
- 27 It follows that the air carrier, since it is obliged, under Article 5(3) of Regulation No 261/2004, to implement all reasonable measures to avoid extraordinary circumstances, must reasonably, at the stage of organising the flight, take account of the risk of delay connected to the possible occurrence of extraordinary circumstances.
- 28 More particularly, to prevent any delay, even insignificant, to which extraordinary circumstances have given rise inevitably leading to cancellation of the flight, the reasonable air carrier must organise its resources in good time to provide for some reserve time, so as to be able, if possible, to operate that flight once the extraordinary circumstances have come to an end. If, in such a situation, an air carrier does not, however, have any reserve time, it cannot be concluded that it has taken all reasonable measures as provided for in Article 5(3) of Regulation No 261/2004.
- 29 With regard, firstly, to the determination, generally, of a minimum reserve time to which the national court refers, it should be noted that, at paragraph 42 of *Wallentin-Hermann*, the Court held, in that connection, that it was necessary to ascertain whether the air carrier concerned had taken measures appropriate to the particular situation, that is to say, measures which, at the time of the occurrence of the extraordinary circumstances whose existence the air carrier is to establish, met, inter alia, conditions which were technically and economically viable for that carrier.

- 30 The Court therefore established an individualised and flexible concept of reasonable measures, leaving to the national court the task of assessing whether, in the circumstances of the particular case, the air carrier could be regarded as having taken measures appropriate to the situation.
- 31 It follows that Article 5(3) of Regulation No 261/2004 cannot be interpreted as requiring, as a ‘reasonable measure’, provision to be made, generally and without distinction, for a minimum reserve time applicable in the same way to all air carriers in all situations when extraordinary circumstances arise.
- 32 With regard, secondly, to the assessment of the reasonable nature of the measures taken to provide for a reserve time so as to prevent, if possible, the delay resulting from extraordinary circumstances leading to cancellation of the flight, it should be stated at the outset that that assessment must be carried out not, as the national court seems to suggest, with regard to the delay in relation to the aeroplane’s scheduled departure time, but taking account of the delay that may exist at the end of the flight operated in the new conditions to which the extraordinary circumstances have given rise.
- 33 In the context of such an assessment, the only issue to matter is the ability of the air carrier to operate the programmed flight in its entirety — the flight being regarded as a ‘unit’ of transport performed by an air carrier which fixes its itinerary (see, to that effect, Case C-173/07 *Emirates Airlines* [2008] ECR I-5237, paragraph 40) — despite the fact that extraordinary circumstances have given rise to some delay. A delay as initially noted, at the time when those extraordinary circumstances come to an end or in relation to the time scheduled for departure, may increase thereafter, on account of a series of various secondary complications connected to the fact that the flight at issue could not be properly operated, in accordance with the scheduled timetable, such as difficulties related to the reallocation of air corridors or accessibility conditions at the destination airport, including the possible total or partial closure of that airport

for part of the night. The result could be that, by the end of the flight, the delay will ultimately be appreciably longer than the delay as initially noted.

- 34 The assessment of the reasonable nature of measures taken by the air carrier when organising its flight must, consequently, also take account of those secondary risks, insofar as their constituent elements are foreseeable and calculable.
- 35 As to the ability of the air carrier to operate the programmed flight in its entirety in those conditions, it must be assessed in light of the criteria formulated by the Court in *Wallentin-Hermann*. Such an assessment must be carried out in such a way as to ensure that the length of the required reserve time does not result in the air carrier being led to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time.
- 36 Furthermore, when assessing the reasonable nature of the measures implemented in order to provide that reserve time, Article 6(1) of Regulation No 261/2004 is not applicable. That provision relates to various categories of ‘delay’ attributable to the air carrier and not connected with the occurrence of extraordinary circumstances that could not have been avoided even if all reasonable measures had been taken.
- 37 In view of the foregoing, the answer to the questions is that Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that an air carrier, since it is obliged to implement all reasonable measures to avoid extraordinary circumstances, must reasonably, at the stage of organising the flight, take account of the risk of delay connected to the possible occurrence of such circumstances. It must, consequently, provide for a certain reserve time to allow it, if possible, to operate the flight in its

entirety once the extraordinary circumstances have come to an end. However, that provision cannot be interpreted as requiring, as a 'reasonable measure,' provision to be made, generally and without distinction, for a minimum reserve time applicable in the same way to all air carriers in all situations when extraordinary circumstances arise. The assessment of the ability of the air carrier to operate the programmed flight in its entirety in the new conditions resulting from the occurrence of those circumstances must be carried out in such a way as to ensure that the length of the required reserve time does not result in the air carrier being led to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time. Article 6(1) of that regulation is not applicable in the context of such an assessment.

Costs

- ³⁸ 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 (Third 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 an air carrier, since it is obliged to implement all

reasonable measures to avoid extraordinary circumstances, must reasonably, at the stage of organising the flight, take account of the risk of delay connected to the possible occurrence of such circumstances. It must, consequently, provide for a certain reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end. However, that provision cannot be interpreted as requiring, as a 'reasonable measure', provision to be made, generally and without distinction, for a minimum reserve time applicable in the same way to all air carriers in all situations when extraordinary circumstances arise. The assessment of the ability of the air carrier to operate the programmed flight in its entirety in the new conditions resulting from the occurrence of those circumstances must be carried out in such a way as to ensure that the length of the required reserve time does not result in the air carrier being led to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time. Article 6(1) of that regulation is not applicable in the context of such an assessment.

[Signatures]