

JUDGMENT OF THE COURT (Third Chamber)

13 October 2011 (\*)

(Reference for a preliminary ruling – Air transport – Regulation (EC) No 261/2004 – Article 2(I) – Compensation for passengers in the event of cancellation of a flight – Meaning of ‘cancellation’ – Article 12 – Meaning of ‘further compensation’ – Compensation under national law)

In Case C-83/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil nº 1 de Pontevedra (Spain), made by decision of 1 February 2010, received at the Court on 11 February 2010, in the proceedings

**Aurora Sousa Rodríguez**

**Yago López Sousa**

**Rodrigo Manuel Puga Lueiro**

**Luis Ángel Rodríguez González**

**María del Mar Pato Barreiro**

**Manuel López Alonso**

**Yaiza Pato Rodríguez**

v

**Air France SA,**

THE COURT (Third Chamber),

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

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Ms Sousa Rodríguez, Mr López Sousa, Mr Puga Lueiro, Mr Rodríguez González, Ms Pato Barreiro, Mr López Alonso and Ms Pato Rodríguez, by J. Portela Leiros, Procurador de los Tribunales, assisted by J. González Pérez, abogado,
- the French Government, by G. de Bergues and M. Perrot, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Russo, avvocato dello Stato,
- the Polish Government, by M. Szpunar, acting as Agent,
- the United Kingdom Government, by S. Hathaway, acting as Agent, assisted by D. Beard, Barrister,

– the European Commission, by L. Lozano Palacios and K. Simonsson, acting as Agents,  
after hearing the Opinion of the Advocate General at the sitting on 28 June 2011,  
gives the following

## Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 2(1) and Article 12 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) ('Regulation No 261/2004').
- 2 The reference has been made in proceedings between seven passengers and Air France SA ('Air France') concerning compensation for damage that they consider that they suffered as a result of significant delays and inconveniences caused by technical problems encountered by that airline company's aeroplane on a flight from Paris (France) to Vigo (Spain).

### Legal context

#### *International law*

- 3 The European Union ('EU') took part in the International Diplomatic Conference on air law that was held in Montreal from 10 to 28 May 1999, which resulted, on 28 May 1999, in the adoption of the Convention for the unification of certain rules for international carriage by air ('the Montreal Convention'), and it signed that Convention on 9 December 1999.
- 4 On 5 April 2001 the Council of the European Union adopted Decision 2001/539/EC on the conclusion by the European Community of the Convention for the unification of certain rules for international carriage by air ('the Montreal Convention') (OJ 2001 L 194, p. 38). That Convention entered into force, in relation to the EU, on 28 June 2004.
- 5 Article 19 of the Montreal Convention, entitled 'Delay', appearing in Chapter III thereof, entitled 'Liability of the carrier and extent of compensation for damage', 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.'

- 6 Article 22(1) of the Montreal Convention, entitled 'Limits of liability in relation to delay, baggage and cargo', also falling within Chapter III, states:
- 'In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.'

- 7 Article 29 of the Montreal Convention, entitled 'Basis of claims', provides:

'In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention ...'

#### *EU law*

Regulation (EC) No 2027/97

- 8 Article 1 of Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air (OJ 1997 L 285, p. 1), as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ 2002 L 140, p. 2, 'Regulation

No 2027/97'), provides:

'This Regulation implements the relevant provisions of the [Montreal Convention] ...'

9 Article 3(1) of Regulation No 2027/97 states:

'The liability of a Community air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability.'

Regulation No 261/2004

10 Recitals 10 and 17 in the preamble to Regulation No 261/2004 state:

'(10) Passengers denied boarding against their will should be able either to cancel their flights, with reimbursement of their tickets, or to continue them under satisfactory conditions, and should be adequately cared for while awaiting a later flight.

...

(17) Passengers whose flights are delayed for a specified time should be adequately cared for and should be able to cancel their flights with reimbursement of their tickets or to continue them under satisfactory conditions.'

11 Article 1(1) of Regulation No 261/2004, entitled 'Subject', provides:

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

- (a) they are denied boarding against their will;
- (b) their flight is cancelled;
- (c) their flight is delayed.'

12 Article 2(1) of Regulation No 261/2004 provides, under the heading 'Definitions':

'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.'

13 Article 5(1) to (3) 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
- (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.

2. When passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport.

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.'

14 Article 6(1) of Regulation No 261/2004, entitled 'Delay', provides:

'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).'

15 Article 7(1) of Regulation No 261/2004, 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;

...'

16 Article 8 of Regulation No 261/2004, entitled 'Right to reimbursement or re-routing', provides:

'1. 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.

...

3. When, in the case where a town, city or region is served by several airports, an operating air carrier offers a passenger a flight to an airport alternative to that for which the booking was made, the operating air carrier shall bear the cost of transferring the passenger from that alternative airport either to that for

which the booking was made, or to another close-by destination agreed with the passenger.'

17 Article 9(1) and 9(2) of Regulation No 261/2004, entitled 'Right to care', provides:

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

(a) meals and refreshments in a reasonable relation to the waiting time;

(b) hotel accommodation in cases

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

– where a stay additional to that intended by the passenger becomes necessary;

(c) transport between the airport and place of accommodation (hotel or other).

2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or emails.'

18 Article 12(1) of Regulation No 261/2004, entitled 'Further compensation', states:

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

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

19 The applicants in the main proceedings entered into an air transport contract with Air France to carry them from Paris (France) to Vigo (Spain) on that company's Flight 5578. That flight was scheduled for 25 September 2008, with a departure time from Paris (Charles de Gaulle) of 19.40.

20 A few minutes after the flight took off as planned, the pilot decided to return to the departure point, Paris Charles de Gaulle airport, because of a technical failure of the aeroplane. After the return to the airport of departure, there is nothing in the file to indicate that the plane then took off again and belatedly reached its destination.

21 Three passengers of the flight in question were invited to take a flight leaving the next day, 26 September 2008, at 07.05, from Paris Orly airport to Porto (Portugal), from where they travelled to Vigo by taxi. Another traveller was offered a seat, the same day, on a flight from Paris to Vigo, via Bilbao. As for the other passengers, Air France put them on a flight from Paris to Vigo, also departing on 26 September 2008, at the same time as the one that had broken down (19.40). With the exception of one of them, none of the passengers of the flight from the day before was provided with accommodation at Air France's cost or received any assistance from that airline.

22 Seven passengers on Flight 5578, that is to say the applicants in the main proceedings, brought an action against Air France for damages before the Juzgado de lo Mercantil No 1 de Pontevedra (Commercial Court No 1 of Pontevedra) for breach of contracts of carriage by air.

23 The applicants in the main proceedings seek the compensation referred to in Article 7 of Regulation No 261/2004 in the fixed amount of EUR 250 each, as prescribed by that article. One of the applicants claims, furthermore, repayment of the costs that he incurred for his transfer by taxi from Porto airport to Vigo. Another applicant claims the repayment of his meal costs at the Paris airport, as well as those in respect of his dog's being kept in boarding kennels for a day longer than initially expected. All the applicants claim, finally, that Air France should be ordered to pay them an additional sum in respect of the non-material damage that they consider they have suffered.

24 It is in those circumstances that the Juzgado de lo Mercantil no 1 de Pontevedra decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is the term "cancellation", defined in Article 2(l) of [Regulation No 261/2004], to be interpreted as meaning only the failure of the flight to depart as planned or is it also to be interpreted as meaning any circumstance as a result of which the flight on which places are reserved takes off but fails to reach its destination, including the case in which the flight is forced to return to the airport of

departure for technical reasons?

2. Is the term “further compensation”, used in Article 12 of [Regulation No 261/2004], to be interpreted as meaning that, in the event of a cancellation, the national court may award compensation for damage, including non-material damage, for breach of a contract of carriage by air in accordance with rules established in national legislation and case-law on breach of contract or, on the contrary, must such compensation relate solely to appropriately substantiated expenses incurred by passengers and not adequately indemnified by the carrier in accordance with the requirements of Articles 8 and 9 of [Regulation No 261/2004], even if such provisions have not been relied upon or, lastly, are the two aforementioned notions of further compensation compatible one with another?’

## **Consideration of the questions referred**

### *The first question*

- 25 For the purpose of compensating the passengers on the basis of the combined provisions of Article 5 and Article 7 of Regulation No 261/2004, the national court, called on to determine whether the flight in question can be classified as ‘cancelled’ within the meaning of Article 2(1) of Regulation No 261/2004, asks, in essence, whether the meaning of ‘cancellation’ refers only to the situation in which the aeroplane in question fails to take off at all, or whether it also covers the case in which that aeroplane, although having taken off, must return to the airport of departure following a technical failure of the aircraft.
- 26 It must be noted at the outset that Article 2(1) of Regulation No 261/2004 defines ‘cancellation’ as ‘the non-operation of a flight which was previously planned and on which at least one place was reserved’. Before being able to determine the meaning of ‘cancellation’, the meaning of ‘flight’ for the purpose of Article 2(1) must therefore firstly be specified.
- 27 In that regard, the Court has already held that a flight consists, in essence, of an air transport operation, being as it were a ‘unit’ of such transport, performed by an air carrier which fixes its itinerary (Case C-173/07 *Emirates Airlines* [2008] ECR I-5237, paragraph 40). Moreover, it has specified that the itinerary is an essential element of the flight, as the flight is operated in accordance with the carrier’s pre-arranged planning (Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, paragraph 30).
- 28 As the term ‘itinerary’ means the journey to be made by aeroplane from the airport of departure to the airport of arrival according to a fixed schedule, it follows that, for a flight to be considered to have been operated, it is not enough that the aeroplane left in accordance with the scheduled itinerary, but it must also have reached its destination as appearing in the said itinerary. The fact that take-off occurred but that the aeroplane then returned to the airport of departure without having reached the destination appearing in the itinerary means that the flight, as initially scheduled, cannot be considered as having been operated.
- 29 Next, it in no way follows from the definition in Article 2(1) of Regulation No 261/2004 that, in addition to the fact that the initially scheduled flight was not operated, the ‘cancellation’ of that flight, within the meaning of Article 2(1), requires the adoption of an express decision cancelling it.
- 30 In that regard, the Court has held that it is possible, as a rule, to conclude that there is a cancellation where the delayed flight for which the booking was made is ‘rolled over’ onto another flight, that is to say, where the planning for the original flight is abandoned and the passengers from that flight join passengers on a flight which was also planned but independently of the flight for which the passengers so transferred had made their bookings (*Sturgeon and Others*, paragraph 36).
- 31 In such a situation, it is not at all necessary that all the passengers who had booked a place on the originally scheduled flight be transported on another flight. All that matters in that regard is the individual situation of each passenger so transported, that is to say, the fact that, in relation to the passenger in question, the original planning of the flight has been abandoned.
- 32 In that regard, it must be noted that both Article 1(1)(b) and recitals 10 and 17 of Regulation No 261/2004, in the various language versions of Regulation No 261/2004, refer to the cancellation of ‘their’ flight.
- 33 It is undisputed that all the applicants to the main proceedings were transferred to other flights, scheduled for the day after the scheduled departure date, allowing them to reach their final destination, Vigo, subject to a transfer for certain of them. ‘Their’ originally scheduled flight must, consequently, be classified as ‘cancelled’.

34 Finally, it must be noted that the reason why the aeroplane was forced to return to the airport of departure and did not, therefore, reach its destination, is irrelevant to the classification of 'cancellation' within the abovementioned definition in Article 2(1) of Regulation No 261/2004. That reason is relevant only to determine, in the context of compensation for damage suffered by passengers due to the cancellation of their flight, whether, depending on the circumstances, that cancellation is 'caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken' within the meaning of Article 5(3) of Regulation No 261/2004, in which case no compensation is payable.

35 In light of the foregoing, the answer to the first question is that 'cancellation', as defined in Article 2(1) of Regulation No 261/2004, must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, it does not refer only to the situation in which the aeroplane in question fails to take off at all, but also covers the case in which that aeroplane took off but, for whatever reason, was subsequently forced to return to the airport of departure where the passengers of that aeroplane were transferred onto other flights.

*The second question*

36 By its second question, the national court asks, in essence, whether, in respect of the further compensation provided for by Article 12 of Regulation No 261/2004, the national court may order the air carrier to pay for all types of damage, including non-material damage, arising from breach of a contract of carriage by air, in accordance with national rules. It asks, in particular, whether such further compensation may cover expenses incurred by passengers due to the failure of the air carrier to fulfil its obligations to assist and provide care under Articles 8 and 9 of Regulation No 261/2004.

37 At the outset, it must be noted that Article 1 of Regulation No 261/2004 notes the minimum nature of the rights that it establishes for air passengers in the event of being denied boarding against their will, or of cancellation or delay of their flight. Moreover, Article 12 of Regulation No 261/2004, entitled 'Further compensation', provides that Regulation No 261/2004 applies without prejudice to a passenger's right to further compensation. It is also made clear that compensation granted under Regulation No 261/2004 may be deducted from such compensation.

38 It follows from those provisions that the compensation granted to air passengers on the basis of Article 12 of Regulation No 261/2004 is intended to supplement the application of measures provided for by Regulation No 261/2004, 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.

39 In that regard, it must be recalled that the Court has already held that standardised and immediate measures taken pursuant to Regulation No 261/2004 do not themselves prevent the passengers concerned, should the same failure of the air carrier to fulfil its contractual obligations also cause them damage conferring entitlement to compensation, from being able to bring, in addition, actions to redress that damage under the conditions laid down by the Montreal Convention (see, to that effect, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 47).

40 In particular, the provisions of Articles 19, 22 and 29 of the Montreal Convention, applicable, pursuant to Article 3(1) of Regulation No 2027/97, to the liability of an air carrier established within the territory of a Member State, specify the conditions in which, following the delay or cancellation of a flight, the passengers in question may bring actions to obtain, by way of redress on an individual basis, damages from the carriers liable for damage arising from breach of a contract of carriage by air.

41 In that regard, it should be recalled that, in its judgment in Case C-63/09 *Walz* [2010] ECR I-0000, paragraph 29, the Court held that the term 'damage', referred to in Chapter III of the Montreal Convention, must be construed as including both material and non-material damage. It follows that damage for which compensation may be payable pursuant to Article 12 of Regulation No 261/2004 may be not only material damage, but also non-material damage.

42 On the other hand, in respect of further compensation, on the basis of Article 12 of Regulation No 261/2004, the national court may not order an air carrier to reimburse to passengers whose flight has been delayed or cancelled the expenses the latter have had to incur because of the failure of the carrier to fulfil its obligations to assist (reimbursement of ticket or re-routing to the final destination, taking into account the cost of transfer between the airport of arrival and the originally scheduled airport) and provide care (meal, accommodation and communication costs) under Article 8 and Article 9 of Regulation No 261/2004.

- 43 The air passengers' claims based on the rights conferred on them by Regulation No 261/2004, such as those set out in Article 8 and Article 9, cannot be considered as falling within 'further' compensation in the sense in which it has been defined in paragraph 38 herein.
- 44 However, when a carrier fails to fulfil its obligations under Article 8 and Article 9 of Regulation No 261/2004, air passengers are justified in claiming a right to compensation on the basis of the factors set out in those articles.
- 45 Finally, as the national court has raised the question whether the rights of air passengers established in Article 8 and Article 9 of Regulation No 261/2004 are conditional on being claimed by those passengers, it must be stated that, as the Advocate General noted in point 61 of her Opinion, there is nothing in Regulation No 261/2004 that precludes the award of compensation in respect of a failure to fulfil the obligations provided for by Article 8 and Article 9 therein, if those provisions are not invoked by the air passengers.
- 46 In light of the foregoing, the answer to the second question is that the meaning of 'further compensation', used in Article 12 of Regulation No 261/2004, allows the national court to award compensation, under the conditions provided for by the Montreal Convention or national law, for damage, including non-material damage, arising from breach of a contract of carriage by air. On the other hand, that meaning of 'further compensation' may not be the legal basis for the national court to order an air carrier to reimburse to passengers whose flight has been delayed or cancelled the expenses the latter have had to incur because of the failure of that carrier to fulfil its obligations to assist and provide care under Article 8 and Article 9 of Regulation No 261/2004.

### **Costs**

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

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

- 1. 'Cancellation', as defined in Article 2(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, must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, it does not refer only to the situation in which the aeroplane in question fails to take off at all, but also covers the case in which that aeroplane took off but, for whatever reason, was subsequently forced to return to the airport of departure where the passengers of the said aeroplane were transferred to other flights.**
- 2. The meaning of 'further compensation', used in Article 12 of Regulation No 261/2004, must be interpreted to the effect that it allows the national court to award compensation, under the conditions provided for by the Convention for the unification of certain rules for international carriage by air or national law, for damage, including non-material damage, arising from breach of a contract of carriage by air. On the other hand, that meaning of 'further compensation' may not be the legal basis for the national court to order an air carrier to reimburse to passengers whose flight has been delayed or cancelled the expenses the latter have had to incur because of the failure of that carrier to fulfil its obligations to assist and provide care under Article 8 and Article 9 of Regulation No 261/2004.**

[Signatures]