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Provisional text

JUDGMENT OF THE COURT (Third Chamber)

4 April 2019 (*)

(Reference for a preliminary ruling — Air transport — Regulation (EC) No 261/2004 — Article 5(3) — Compensation to passengers in the event of denied boarding and of cancellation or long delay of flights — Scope — Exemption from the obligation to pay compensation — Notion of ‘extraordinary circumstances’ — Damage to an aircraft tyre caused by a foreign object lying on an airport runway)

In Case C-501/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Köln (Regional Court, Cologne, Germany), made by decision of 25 July 2017, received at the Court on 18 August 2017, in the proceedings

Germanwings GmbH

v

Wolfgang Pauels,

THE COURT (Third Chamber),

composed of M. Vilaras, President of the Fourth Chamber, acting as President of the Third Chamber, J. Malenovský, L. Bay Larsen, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 17 September 2018,

after considering the observations submitted on behalf of:

– Germanwings GmbH, by W. Bloch and Y. Pochyla, Rechtsanwälte,

- W. Pauels, by E. Stamer and M. Hofmann, Rechtsanwälte,
- the German Government, by T. Henze, J. Möller, M. Hellmann, M. Kall, J. Techert and A. Berg, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by K. Simonsson, B. Bertelmann and K.-Ph. Wojcik, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2018,

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 Mr Wolfgang Pauels and Germanwings GmbH, an air carrier, concerning the latter's refusal to compensate that passenger for a long delay to his flight.

Legal context

3 Recitals 14 and 15 of Regulation No 261/2004 state:

‘(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.’

4 Under the heading ‘Cancellation’, Article 5(1) and (3) of that regulation 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 Under the heading 'Right to compensation', Article 7(1)(a) of the regulation provides:

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

(a) EUR 250 for all flights of 1500 kilometres or less;

...'

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

6 Mr Pauels booked a flight from Dublin (Ireland) to Düsseldorf (Germany) with Germanwings.

7 That flight took place on 28 August 2015 with a delay in arrival of 3 hours and 28 minutes.

8 Germanwings refused to pay compensation to Mr Pauels on the ground that the delay in the flight in question was due to 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 thereby discharging it from its obligation to pay compensation under Article 5(1) of that regulation.

9 In that regard, Germanwings contends that the delay was caused by a screw found, during the preparations for take-off of the flight at issue, in a tyre of the aircraft operating that flight, which meant that the tyre in question needed to be changed.

10 Following an action brought by Mr Pauels, the Amtsgericht Köln (Local Court, Cologne, Germany) ordered Germanwings to pay Mr Pauels EUR 250 together with interest on the ground that the damage caused to an aircraft tyre by a screw lying on the runway of an airport constitutes a circumstance which is inherent in the normal exercise of the activity of an air carrier and effectively controllable by it. In support of that decision, the Amtsgericht Köln (Local Court, Cologne) added that its assessment is also in line with the will of the legislature, as evidenced by the statutory rules on airfield supervision.

11 Germanwings brought an appeal against that decision before the Landgericht Köln (Regional Court, Cologne). It considers that the Amtsgericht Köln (Local Court, Cologne) overestimated what is within its control. In that regard, it claims that the use of an airport runway is to be attributed to general air traffic and not to the specific tasks of an air carrier. It considers that the cleaning of a runway also does not form part of the duties of an air carrier and is not within its control.

12 The Landgericht Köln (Regional Court, Cologne) considers that the outcome of the case depends on whether or not, on the basis of Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, damage to a tyre caused by a screw lying on the runway falls within the normal exercise of the activity of the air carrier in question and, owing to its nature or origin, is beyond its control.

13 It stated that it has held in several prior sets of proceedings that damage to an aircraft tyre caused by nails or similar objects on the runway amounts to ‘extraordinary circumstances’ in so far as foreign objects on runways constitute a risk beyond the control of air carriers and, unlike the premature malfunction of specific aircraft components, notwithstanding regular maintenance, constitute a supervening extraneous event.

14 Nevertheless, it refers to the decisions of other courts which have held to the contrary, in particular following the order of 14 November 2014, *Siewert* (C-394/14, EU:C:2014:2377), that damage to an aircraft tyre caused by foreign objects on the runway cannot be compared to the collision with boarding stairs considered in that order and should, on the other hand, be compared to the collision with a bird considered in the judgment of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342). In that regard, it observes that clearing the runway is a matter for airport safety and not the duty of an air carrier.

15 It therefore considers it necessary to refer the matter to the Court, whilst specifying that, were the facts of the present case ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004, it would need to take further evidence.

16 In those circumstances, the Landgericht Köln (Regional Court, Cologne) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is the damage to an aircraft tyre caused by a screw lying on the take-off or landing runway (foreign object damage/FOD) an extraordinary circumstance within the meaning of Article 5(3) of [Regulation No 261/2004]?’

Consideration of the question referred

17 By its question, the referring court asks, in essence, whether Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that damage to an aircraft tyre caused by a foreign object, such as loose debris, lying on an airport runway falls within the notion of ‘extraordinary circumstances’ within the meaning of that provision.

18 It must be borne in mind that the EU legislature has laid down the obligations of air carriers in the event of cancellation or long delay of flights (that is, a delay equal to or in excess of three hours) in Article 5(1) of Regulation No 261/2004 (see judgment of 4 May 2017, *Pešková and Peška*, C-315/15, EU:C:2017:342, paragraph 19 and the case-law cited).

19 Recitals 14 and 15 and Article 5(3) of that regulation, as interpreted by the Court, state that an air carrier is to be released from its obligation to pay passengers compensation under Article 7 of

Regulation No 261/2004 if the carrier can prove that the cancellation or delay of three hours or more is caused by ‘extraordinary circumstances’ which could not have been avoided even if all reasonable measures had been taken (see judgment of 4 May 2017, *Pešková and Peška*, C-315/15, EU:C:2017:342, paragraph 20 and the case-law cited) and, where such circumstances do arise, 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 avoid that situation from resulting in the cancellation or long delay of the flight in question, without the air carrier being required to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time (see, to that effect, judgment of 4 May 2017, *Pešková and Peška*, C-315/15, EU:C:2017:342, paragraphs 29 and 34).

20 According to settled case-law, events may be classified as ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004 if, by their nature or origin, they are not inherent in the normal exercise of the activity of the air carrier concerned and are outside that carrier’s actual control (see, to that effect, judgments of 22 December 2008, *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 23, and of 4 May 2017, *Pešková and Peška*, C-315/15, EU:C:2017:342, paragraph 22), since both conditions are cumulative (judgment of 17 April 2018, *Krüsemann and Others*, C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:258, paragraph 34).

21 As to whether damage to aircraft tyres, which are essential to the operation of aircraft, may be regarded as ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004, it must, first of all, be noted that the premature, or even unexpected, malfunction of certain components of a particular aircraft constitutes, in principle, an unexpected event intrinsically linked to the operating system of that aircraft (see, to that effect, judgments of 17 September 2015, *van der Lans*, C-257/14, EU:C:2015:618, paragraphs 41 and 42, and of 4 May 2017, *Pešková and Peška*, C-315/15, EU:C:2017:342, paragraph 23).

22 Air carriers are regularly faced with such malfunctioning in the light of the specific conditions in which carriage by air takes place and the degree of technological sophistication of aircraft (see, to that effect, judgment of 22 December 2008, *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 24; order of 14 November 2014, *Siewert*, C-394/14, EU:C:2014:2377, paragraph 19 and judgment of 17 September 2015, *van der Lans*, C-257/14, EU:C:2015:618, paragraphs 37 and 42).

23 In that regard, it is common ground that aircraft tyres are components which are, on landing and take-off, subject to very great stress and are therefore subject to a permanent risk of damage, justifying particularly strict regular safety checks, which form part of an air carrier’s everyday operating conditions.

24 However, where the malfunctioning in question is the sole result of the impact of a foreign object, which must be proven by the air carrier, such malfunctioning cannot be regarded as intrinsically linked to the operating system of that aircraft.

25 That is, inter alia, true of damage to an aircraft caused by its collision with a bird (judgment of 4 May 2017, *Pešková and Peška*, C-315/15, EU:C:2017:342, paragraph 24) and, as in the case in the main proceedings, of damage to a tyre caused by a foreign object, such as loose debris, lying on the airport runway.

26 Therefore, if the malfunctioning of a tyre is the sole result of impact with a foreign object lying on the airport runway, it cannot be regarded as inherent, by its nature or origin, in the normal exercise of the activity of the air carrier concerned. In addition, in view of the particular constraints to which the air carrier is subject during take-off and landing operations, related inter alia to the speed at which those operations are conducted and the need to ensure passenger safety aboard, and of the fact that the air carrier is not responsible for clearing the runway, such circumstances are outside that carrier's actual control.

27 Consequently, such malfunctioning must be regarded as 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004.

28 As appears from point 78 of the Advocate General's Opinion, such a finding satisfies the objective of ensuring the high level of protection for air passengers pursued by Regulation No 261/2004, which, as is specified in recital 1 thereof, means not encouraging air carriers to refrain from taking the necessary measures by prioritising the operation and timeliness of their flights over the objective of flight safety.

29 Furthermore, that finding cannot be called into question by the rule applied in the order of 14 November 2014, *Siewert* (C-394/14, EU:C:2014:2377), where the Court held that the collision of an airport's set of mobile boarding stairs with an aircraft cannot be regarded as 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004.

30 Such equipment is indispensable to air passenger transport, enabling passengers to enter or leave the aircraft (order of 14 November 2014, *Siewert*, C-394/14, EU:C:2014:2377, paragraph 19) and the use of such equipment ordinarily takes place in collaboration with the crew of the aircraft concerned. Such circumstances cannot therefore be regarded as not inherent in the normal exercise of the activity of the air carrier concerned or outside that carrier's actual control.

31 Nevertheless, as set out in paragraph 19 above, in the event of 'extraordinary circumstances', an air carrier is to be released from its obligation to pay passengers compensation under Article 7 of Regulation No 261/2004 only if the carrier can prove 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 avoid that situation from resulting in the cancellation or long delay of the flight in question, without the air carrier being required to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time.

32 In that regard, it emerged from the hearing that aircraft tyres are subject to regular checks and changed according to standard procedures under which air carriers are able to have at their disposal, in the airports from which they operate, including those which are not their principal hubs, contracts with air maintenance companies for changing their tyres under which they are afforded priority treatment for changing tyres.

33 Therefore, in a situation such as that at issue in the main proceedings, it is for the air carrier concerned to prove that it deployed all its resources in terms of staff or equipment and the financial means at its disposal in order to avoid the changing of the tyre damaged by a foreign object lying on an airport runway from leading to long delay of the flight in question, which is for the referring court to ascertain.

34 Accordingly, the answer to the question referred is that Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that damage to

an aircraft tyre caused by a foreign object, such as loose debris, lying on an airport runway falls within the notion of ‘extraordinary circumstances’ within the meaning of that provision.

However, in order to be released from its obligation to pay passengers compensation under Article 7 of Regulation No 261/2004, an air carrier whose flight has been subject to long delay due to such ‘extraordinary circumstances’ must prove that it deployed all its resources in terms of staff or equipment and the financial means at its disposal in order to avoid the changing of a tyre damaged by a foreign object, such as loose debris, lying on the airport runway from leading to long delay of the flight in question.

Costs

35 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, read in the light of recital 14 thereof, must be interpreted as meaning that damage to an aircraft tyre caused by a foreign object, such as loose debris, lying on an airport runway falls within the notion of ‘extraordinary circumstances’ within the meaning of that provision.

However, in order to be released from its obligation to pay passengers compensation under Article 7 of Regulation No 261/2004, an air carrier whose flight has been subject to long delay due to such ‘extraordinary circumstances’ must prove that it deployed all its resources in terms of staff or equipment and the financial means at its disposal in order to avoid the changing of a tyre damaged by a foreign object, such as loose debris, lying on the airport runway from leading to long delay of the flight in question.

[Signatures]

* Language of the case: German.