

# DEFER NO TIME, DELAYS HAVE DANGEROUS ENDS<sup>1</sup>

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October has seen three judgments issued by the Court of Justice of the European Union to further clarify the scope and application of Regulation (EC) 261/2004 ('the Regulation'). These judgments are all likely to make for pleasant reading for those acting for consumers, but are unlikely to have the airline industry and their lawyers raising a glass to the judges in Luxembourg.

## The affirmation of *Sturgeon*

Most travel law specialists have been waiting for sometime now for the ECJ to deliver its judgment in the joined cases of *Nelson and Others v Deutsche Lufthansa AG* (C-581/10) and *TUI Travel and Others v Civil Aviation Authority* (C-629/10), which has resulted in so many cases being stayed in England and Wales over the last couple of years.

In these cases the courts of Germany and England and Wales sought clarification concerning the scope of the ECJ's judgment in the joined cases of *Christopher Sturgeon and Others v Condor Flugdienst GmbH* (C-402/07) and *Stefan Bock and Cornelia Lepuschitz v Air France SA* (C-432/07).

In its judgment in the *Nelson* and *TUI* cases, the Court has confirmed its previous ruling in

*Sturgeon* that passengers who had been delayed from reaching their destination for three hours or more would be entitled to the same level of fixed compensation (between €50 and €600) under the Regulation as those whose flights are cancelled, unless a defence of 'extraordinary circumstances' can be proved by the airline.

The Court's reasoning appears to be based heavily on what it refers to as 'the principle of equal treatment'. It explains that passengers whose flights are delayed and those whose flights are cancelled without notice must be regarded as being in comparable situations – both circumstances resulting in the passengers suffering

similar inconvenience, namely a loss of time. It goes on to hold that as those passengers whose flights are cancelled are entitled to compensation where their loss of time is equal to or in excess of three hours, passengers who experience a similar loss of time

through delays of three hours or more should be similarly compensated.

The Court stressed that the defence of extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier, would be available for delays of three hours or more, just as it operates for cancellations.

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<sup>1</sup> Shakespeare, *Henry VI*, Part 1

The Court dismissed the argument that compensation, under the Regulations, for passengers whose flights are delayed was incompatible with the Montreal Convention. It explained that the loss of time inherent in a flight delay constitutes an inconvenience which is not governed by the Montreal Convention (the Convention). It states that consequently the obligation under the Regulation to compensate passengers whose flights are delayed falls outside the scope of the Convention, but remains additional to the system of damages laid down by it. This would suggest that compensation for delays under the Regulations should be in addition to, rather than instead of, specific damages incurred from the very same delay which are covered by the Convention.

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**Its decision was consistent  
with the principle of  
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It also appears that the Court's judgment was influenced by what it describes as 'the principle of legal certainty' under which passengers and air carriers must know precisely the respective scope of their rights and obligations.

The Court also held that as the obligation to pay compensation does not arise in every delay, but only long delays where it cannot prove that the long delay is caused by extraordinary circumstances, its decision was consistent with the principle of proportionality, whereby measures adopted by EU institutions must not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, and the disadvantages caused must not be disproportionate to the aim pursued.

Finally, the Court dismissed the airlines' submission that claims for compensation in respect of flights which have been the subject of delay prior to the date of the delivery of the present judgment, 23 October 2012, should only be allowed where passengers had already brought court proceedings for such compensation as of the date of the judgment.

One question that doesn't appear to have been answered by this judgment though is how far back claims for compensation under the Regulations for long delays can relate to?

Whilst there will no doubt be vigorous debate about the rights or wrongs of the Court's judgment and reasoning, the floodgates have at last been reopened for the vast number of delayed passengers who have waited patiently to claim compensation under the Regulation, that has once again been confirmed to be their legal entitlement.

Two further cases delivered recently by the ECJ, which are unlikely to grab the headlines in the same way, are also

worthy of note.

## ***Finnair Oyj v Timy Lassooy Case*** **C-22/11**

### ***The facts***

On 28 July 2006, a strike by staff at Barcelona Airport meant that Finnair was unable to operate its 11.40 flight from Barcelona to Helsinki. To accommodate those booked on the 28 July flight, Finnair moved some of the passenger onto the 11.40 flight the next day and it also arranged a new flight for 21.40 to accommodate the remaining passenger. This meant that passengers due to depart on the 11.40 flight on 29 July and 30 July were told their bookings had had to be changed to the next day. Mr Lassooy had a booking for the 11.40 flight on 30 July 2006, but when he duly presented himself for boarding he was told he would be travelling on the newly arranged 21.40 flight that same day.

When Finnair refused to pay Mr Lassooy compensation under Article 7(1)(b) of Regulation (EC) 261/2004, he brought proceedings via the Finnish Courts. At first instance the Helsinki District Court held that the strike amounted to extraordi-

nary circumstances and the airline had taken all measures that could be required of it. The Helsinki Court of Appeal disagreed and ordered Finnair to pay Mr Lassooy 400 Euros under Article 7 of the Regulation. The Supreme Court stayed proceedings and sought clarification from the ECJ on three points:

- a) Is the Regulation, especially Article 4, to be interpreted as meaning that its application is limited only to cases where boarding is denied because of overbooking by an air carrier for economic reasons, or is the Regulation applicable also to situations in which boarding is denied for other reasons, such as operational reasons?
- b) Is Article 7(j) to be interpreted as meaning that the reasonable grounds laid down therein are limited only to factors relating to passengers, or may a denial of boarding be reasonable on other grounds? If so, is it to be interpreted as meaning that such a denial may also be reasonable on the grounds of the rescheduling of flights as a result of extraordinary circumstances, such as a strike?
- c) Could the extraordinary circumstances apply not just to those on the cancelled flight, but those on other subsequent flights affected as a consequence of the airline seeking to ensure that passengers affected by the cancelled flight were not unreasonably delayed?

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**The ECJ confirmed the concept of 'denied boarding' must be interpreted as relating to those cases where boarding is denied on other grounds**

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### *The Decision*

On the first point the Third Chamber of the ECJ confirmed the concept of 'denied boarding', within the meaning of Article 2(j) and 4 of the Regulations, must be interpreted as relating not only to cases where boarding is denied because of overbooking but also to those where boarding is denied on other grounds, such as operational

reasons. In response to the second and third questions, which were dealt with together, the Court held that Articles 2(j) and 4(3) of the Regulation must be interpreted as meaning that the occurrence of 'extraordinary circumstances' resulting in an air carrier re-scheduling flight after those circumstances arose cannot give grounds for denying boarding on those later flights or for exempting the carrier from its obligations, under Article 4(3) of the Regulation to compensate a passenger to whom it denies boarding on such a flight.

## ***German Rodriguez Cachafeiro v Iberia Case C-321/11***

### *The facts*

Mr Rodriguez Cachafeiro and Ms Martinez-Reboredo Varela-Villamor ('the passengers') bought airline tickets from Iberia for a journey from La Coruna in Spain to Santo Domingo in the Dominican Republic. Their tickets comprised of two flights: a one hour and ten minute flight from La Coruna to Madrid and then a second flight from Madrid to Santo Domingo the same day. The passengers' flight between La Coruna and Madrid was

delayed by 1 hour and 25 minutes and Iberia cancelled their boarding tickets for the second leg of their flight thinking that they were going to miss the connection because of the delay. In fact the passengers made it to the boarding gate for their connecting flight in time, but Iberia's staff would not allow them to board on the grounds that their boarding cards had been cancelled and their seats had been allocated to other passengers. The passengers had to wait until the following day for a flight to Santo Domingo and they reached their destination twenty-seven hours late.

The passengers brought a claim against Iberia in La Coruna's Commercial Court No 2 when it refused to compensate them for not allowing them to board their original flight from Madrid to Santo Domingo. The passengers claimed the sum of 600 Euros, in accordance with Articles 4(3) and 7(1)(c) of the Regulations. Iberia argued that these circumstances did not amount to 'denied boarding' under the Regulations, as the decision to deny the passengers access to the second leg of their flight was not overbooking, but a delay to the first leg of their journey. This was despite the fact that it had paid compensation under the Regulation to seven other passengers for denied boarding on the same flights.

The question that the domestic court sought clarification on was:

'May the concept of 'denied board' contained in Article 2(j), in conjunction with Article 3(2) and 4(3) of the Regulations be regarded as including a situation in which an airline refuses to allow boarding because the first flight included in the ticket is subject to a delay attributable to the airline and the latter mistakenly expects the passengers not to arrive in time to catch the second flight, and so allows their seats to be taken by other passengers?'

Article 2 of the Regulations, provides:

'For the purposes of this Regulation:

...

"denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down

in Article (3)(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety, or inadequate travel documentation;

...'

### *The Decision*

The Third Chamber of the ECJ again confirmed the concept of 'denied boarding', within the meaning of Article 2(j), was not limited to 'overbooking' situations and could include all circumstances in which an air carrier may refuse to carry a passenger. Although the Court confirmed that reasonable grounds for denying boarding under Article 2(j) were not limited to

those specific examples given in Article 2(j), it held that the air carrier's reason for denying boarding in these proceedings was insufficient since it was in no way attributable to the passenger to whom boarding was denied.

The Court therefore gave a ruling that Article 2(j) of the Regulation:

"...must be interpreted as meaning that the concept of 'denied boarding' includes a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies boarding to some passengers on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight".

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**It had paid compensation to seven other passengers for denied boarding on the same flights**

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