Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 22 March 2012 [1]

Case C-12/11

Denise McDonagh
v
Ryanair Ltd

(Reference for a preliminary ruling from the Dublin Metropolitan District Court (Ireland))

(Air transport — Compensation and assistance to passengers in the event of denied boarding and the cancellation or long delay of flights — Notion of 'extraordinary circumstances' for the purposes of Regulation (EC) No 261/2004 — Volcanic eruption resulting in the closure of airspace)

1. By the present reference for a preliminary ruling, the Court is requested to define the scope of the obligation to provide care for passengers, imposed on air carriers by Articles 5 and 9 of Regulation (EC) No 261/2004. [2]

2. Article 5(1)(b) of Regulation No 261/2004 provides that, where a flight is cancelled, the passengers concerned are to be offered assistance by the operating air carrier in accordance with Article 9 of that regulation. The air carrier is required to meet that obligation even where the cancellation of the flight has been caused by extraordinary circumstances.

3. The background against which the present case has arisen is the eruption of the Eyjafjallajökull volcano which took place in Iceland from March to May 2010 and prompted the closure of airspace, resulting in the cancellation of more than 100 000 flights and affecting almost 10 million air passengers.

4. This case essentially hinges on the question whether an air carrier must be released from its obligation to provide care for passengers where their flights have been cancelled because of the closure of airspace following the eruption of a volcano. In other words, is an event such as the closure of airspace owing to the eruption of the Eyjafjallajökull volcano covered by the notion of 'extraordinary circumstances' as used in Regulation No 261/2004, requiring the air carrier to provide care for passengers whose flights have been cancelled, in accordance with Articles 5 and 9 of that regulation, or does it fall within a category of events above and beyond those extraordinary circumstances, thus releasing the carrier from such an obligation?

1 — Original language: French.

2 — Regulation 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).

5. The Dublin Metropolitan District Court (Ireland) also wonders whether the obligation under those provisions to provide care must be limited, in temporal or monetary terms, where the cancellation of the flight is caused by extraordinary circumstances. In the event of a negative answer, that court asks whether those provisions are invalid in so far as they are contrary to the principles of proportionality and non-discrimination, the principle of an 'equitable balance of interests' enshrined in the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 9 December 1999,[3] and Articles 16 and 17 of the Charter of Fundamental Rights of the European Union.[4]

6. In the present Opinion, I shall explain why I believe that Articles 5 and 9 of Regulation No 261/2004 must be interpreted as meaning that circumstances such as the closure of airspace owing to the eruption of a volcano constitute extraordinary circumstances for the purposes of that regulation.

7. I shall then show why, in my view, Articles 5 and 9 of Regulation No 261/2004 do not imply any release from or limitation of the obligation to provide care for passengers whose flights have been cancelled owing to extraordinary circumstances and why that finding cannot call into question the validity of those provisions.

I – Legislative framework

A – *International rules*

8. The Montreal Convention was approved on behalf of the European Community by Decision 2001/539/EC[5] and entered into force, so far as the European Union is concerned, on 28 June 2004.

9. The third and fifth paragraphs in the preamble to the Montreal Convention read as follows:

'Recognising the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

...

Convinced that collective State action for further harmonisation and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests'.

B – *European Union ('EU') rules*

10. Recital 1 in the preamble to Regulation No 261/2004 states that action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers.

3 — 'The Montreal Convention'.

4 — 'The Charter'.

5 — Council Decision of 5 April 2001 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).

11. Recital 14 to that regulation states that 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 which affect the operation of an operating air carrier.

12. Article 5 of Regulation No 261/2004 provides:

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

...

(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 ...

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.

...'

13. Article 9 of Regulation No 261/2004 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 e-mails.

3. In applying this Article, the operating air carrier shall pay particular attention to the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied children.'

II – The facts of the case before the referring court

14. On 20 March 2010, the Eyjafjallajökull volcano in Iceland began to erupt. On 14 April 2010, the volcano entered an explosive phase which resulted, on 15 April 2010, in the closure of the airspace of several Member States on account of the risk represented by the volcanic ash cloud caused by the explosion.

15. Between 15 and 23 April 2010, the competent air traffic authorities closed the airspace over most of northern Europe, including Irish and UK airspace. From then until 17 May 2010, the airspace of a number of Member States to and from which the airline Ryanair Ltd [6] provided services was sporadically and intermittently closed.

16. Because of the closure of that airspace, airlines were forced to cancel around 100 000 flights between 15 and 21 April 2010 alone and 10 million passengers were unable to travel during that period.

17. Ryanair had to cancel around 9 500 flights because of the volcanic ash cloud, causing disruption to the travel plans of 1.4 million of its passengers. The referring court states that Ryanair was willing to provide services to its passengers, but it was not permitted to do so owing to the closure of airspace.

18. The Commission for Aviation Regulation in Ireland has stated that the eruption of the Eyjafjallajökull volcano and the resulting airspace closures constituted extraordinary circumstances for the purposes of Regulation No 261/2004. Pursuant to Article 5(3) of that regulation, therefore, passengers whose flights had been cancelled had no basis for seeking compensation under Article 7 of the regulation.

19. Ms McDonagh was one of the passengers whose flights were cancelled because of the volcanic eruption. She had purchased a ticket for a Ryanair flight from Faro to Dublin on 17 April 2010.

20. On that very day, her flight was cancelled following the closure of the airspace. Flights between continental Europe and Ireland did not resume until 22 April 2010. Ms McDonagh was finally able to return to Ireland on 24 April 2010.

21. Between 17 and 24 April 2010, Ryanair did not provide Ms McDonagh with care in accordance with Article 9 of Regulation No 261/2004. According to Ms McDonagh, Ryanair is required to pay her compensation or damages in the amount of EUR 1 129.41, corresponding to the costs which she incurred for meals, refreshments, accommodation and transport. She has therefore brought an action before the referring court.

III – The questions referred

22. The Dublin Metropolitan District Court has doubts as to the interpretation to be given to Articles 5 and 9 of Regulation No 261/2004 and as to the validity of those provisions. It has therefore decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Do circumstances such as the closures of European airspace as a result of the eruption of the Eyjafjallajökull volcano in Iceland, which caused widespread and prolonged disruption to air travel, go beyond “extraordinary circumstances” within the meaning of Regulation No 261/2004?

2. If the answer to Question 1 is yes, is liability for the duty to provide care excluded under Articles 5 and 9 [of that regulation] in such circumstances?

3. If the answer to Question 2 is no, are Articles 5 and 9 [of that regulation] invalid in so far as they violate the principles of proportionality and non-discrimination, the principle of an “equitable balance of interests” enshrined in the Montreal Convention, and Articles 16 and 17 of the Charter ...?

6 — ‘Ryanair’.

4. Is the obligation in Articles 5 and 9 [of Regulation No 261/2004] to be interpreted as containing an implied limitation, such as a temporal and/or a monetary limit, to provide care in cases where cancellation is caused by "extraordinary circumstances"?

5. If the answer to Question 4 is no, are Articles 5 and 9 [of that regulation] invalid in so far as they violate the principles of proportionality and non-discrimination, the principle of an "equitable balance of interests" enshrined in the Montreal Convention, and Articles 16 and 17 of the Charter ...?

IV – My analysis

23. As a first step, the referring court asks the Court, by Questions 1 and 2, whether Articles 5 and 9 of Regulation No 261/2004 must be interpreted as meaning that circumstances such as the closure of airspace owing to the eruption of a volcano go beyond 'extraordinary circumstances', thereby releasing the operating air carrier from its obligation to provide care for passengers whose flights have been cancelled owing to that closure.

24. By Question 3, the referring court asks, in essence, whether, if such closures constitute circumstances which go beyond 'extraordinary circumstances' but nevertheless do not release the air carrier from its obligation to provide care for passengers whose flights have been cancelled, Articles 5 and 9 of Regulation No 261/2004 are invalid in so far as they are contrary to the principles of proportionality and non-discrimination, the principle of an 'equitable balance of interests' enshrined in the Montreal Convention, and Articles 16 and 17 of the Charter.

25. As a second step, the referring court asks the Court, by Question 4, to make a ruling as to whether the obligation laid down in Articles 5 and 9 of Regulation No 261/2004 is innately tempered by an implied limitation – such as a temporal and/or a monetary limit – on the provision of care to passengers whose flights have been cancelled, where the cancellation is caused by 'extraordinary circumstances'.

26. If that is not the case, the referring court asks, by Question 5, whether those provisions are invalid in so far as they are contrary to the principles of proportionality and non-discrimination, the principle of an 'equitable balance of interests' enshrined in the Montreal Convention, and Articles 16 and 17 of the Charter.

A – *Questions 1, 2 and 3*

27. As a preliminary point, it should be noted that, under Article 5(1)(b) of Regulation No 261/2004, the operating air carrier is to provide care for passengers whose flights have been cancelled. By contrast with the obligation under Article 5(1)(c) of that regulation to pay compensation, the obligation to provide care for passengers applies even where the cancellation is caused by 'extraordinary circumstances'.[7]

28. In the proceedings before it, the referring court wonders whether it is not the case that circumstances such as the closure of airspace owing to the eruption of the Eyjafjallajökull volcano go beyond 'extraordinary circumstances' and accordingly release the operating air carrier from any obligation to provide care for passengers whose flights have been cancelled owing to that closure.

7 — See Case C-294/10 *Eglītis and Ratnieks* [2011] ECR I-3983, paragraphs 23 and 24.

29. I do not think so. On the contrary, it is my view that the notion of 'extraordinary circumstances' also encompasses all exceptional events, such as the closure of airspace owing to the eruption of a volcano, which could not have been avoided even if all reasonable measures had been taken.

30. That notion is not defined in Regulation No 261/2004. Recital 14 to the regulation merely gives a few examples, by way of illustration, [8] of events which may be regarded as extraordinary circumstances, namely cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes which affect the operation of an operating air carrier.

31. As the Court has consistently held, the meaning and scope of terms for which EU law provides no definition must be determined in accordance with their usual meaning in everyday language, account also being taken of the context in which they occur and the purpose of the rules of which they form part. Moreover, if those terms appear in a provision which constitutes a derogation from a principle or, more specifically, from EU rules for the protection of consumers, they must be read in such a manner that the provision can be narrowly construed. [9]

32. In everyday language, the term 'extraordinary' is defined as something which is out of the usual course or order, which is abnormal, exceptional or unusual. To my mind, the choice of that term clearly shows that the EU legislature intended the notion of 'extraordinary circumstances' to embrace all circumstances over which the air carrier has no control. In that connection, the Court ruled in *Wallentin-Hermann* that extraordinary circumstances for the purposes of Regulation No 261/2004 relate to an event which – in common with the events listed in recital 14 to that regulation – is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin. [10]

33. Furthermore, I note that, in the *travaux préparatoires* for Regulation No 261/2004, the EU legislature had initially wished to use the notion of '*force majeure*' rather than 'extraordinary circumstances', [11] since '*force majeure*' is the notion generally used to describe events over which humans have no influence because they are unforeseeable, irresistible and external to them.

34. In my view, this shows that the EU legislature wanted to bracket together under a single notion – 'extraordinary circumstances' – all circumstances which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity. I therefore consider that there is no room for a category of events which go beyond extraordinary circumstances, as proposed by Ryanair. An event such as the eruption of the Eyjafjallajökull volcano thus certainly constitutes, to my mind, an example of extraordinary circumstances for the purposes of Regulation No 261/2004, triggering for the air carrier the attendant obligation of providing care for passengers whose flights have been cancelled owing to that eruption.

35. Furthermore, the clear – and substantively different – wording of Articles 5 and 9 of Regulation No 261/2004 means that it is not possible, without adding to the text, to create a separate category of 'particularly extraordinary' events which would fully release the air carrier from its obligations.

8 — See Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 22.

9 — Ibid. (see, to that effect, paragraph 17 and the case-law cited).

10 — Ibid., paragraph 23.

11 — See Common Position (EC) No 27/2003 adopted by the Council on 18 March 2003 (OJ 2003 C 125 E, p. 63), and the Communication from the Commission to the European Parliament of 25 March 2003 concerning the common position of the Council on the adoption of a regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights (SEC(2003) 361 final, p. 4). It was only in the course of the *travaux préparatoires* and on a proposal from the Council that the notion of extraordinary circumstances was preferred to that of *force majeure* for reasons of legal clarity. See also the Position of the European Parliament adopted at first reading on 24 October 2002 (p. 5).

36. That assessment is borne out, in my view, by the aim pursued by the regulation and the context of those provisions.

37. As the Court pointed out in *Sturgeon and Others*,[12] it is apparent from recitals 1 to 4 to Regulation No 261/2004 that the regulation seeks to ensure a high level of protection for air passengers regardless of whether they are denied boarding or whether their flight is cancelled or delayed, since they are all caused similar serious trouble and inconvenience connected with air transport.[13]

38. In that regard, the obligation on the air carrier, which consists in providing care for passengers whose flights have been cancelled, by supplying them with refreshments, meals or accommodation or making available to them means of communication with third parties, is designed to cater for passengers' immediate needs on the spot, whatever the cause of the flight's cancellation,[14] and to enhance the protection afforded to passengers' interests.[15]

39. The rationale underlying that obligation to provide care can be distinguished, by its very nature and by the aim pursued, from the rationale underlying the obligation to pay compensation, which is incumbent upon the air carrier if it has not warned passengers in good time of the cancellation of the flight in question.

40. The compensation under Articles 5(1)(c) and 7 of Regulation No 261/2004 is intended to make good the loss – almost identical for all passengers – sustained as a result of the cancellation of the flight and consisting in a loss of time which, given that it is irreversible, can be redressed only by means of compensation.[16] The intention of the EU legislature was clearly to encourage air carriers to give advance warning to the passengers of the flight concerned so as to spare them inconvenience and trouble and to enable them to make their arrangements in time.[17] Only where cancellation of the flight is brought about by extraordinary circumstances may the air carrier be released from such an obligation, since the EU legislature took the view that, in such cases, the air carrier is not responsible for the cancellation of the flight.[18]

41. The thinking behind the obligation under Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care is quite different. That care – through the supply of meals, refreshments and, if necessary, accommodation – is intended to make it possible for passengers to continue with their travel under satisfactory conditions, and to avoid abandoning them to their fate whilst they wait to be re-routed or for an alternative solution to be found.

42. The care to be provided is therefore assistance to air passengers who are considered particularly vulnerable in such circumstances. Consequently, that assistance is even more vital where the passengers are stranded at an airport on account of extraordinary circumstances.

43. That, to my mind, is why the EU legislature took the view that, by contrast with the obligation for the air carrier to pay compensation, which does not apply where the air carrier proves that the cancellation of the flight was the result of extraordinary circumstances which could not have been avoided, the obligation to provide care must remain compelling, whatever the event which resulted in the cancellation and whether or not the air carrier was responsible for that event.

12 — Joined Cases C-402/07 and C-432/07 [2009] ECR I-10923.

13 — Paragraph 44.

14 — Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 86.

15 — Ibid., paragraph 48.

16 — *Sturgeon and Others*, paragraph 52.

17 — See the Proposal for a Regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights (COM(2001) 784 final; paragraph 22 of the Explanatory Memorandum).

18 — Ibid.; paragraph 20 of the Explanatory Memorandum.

44. It seems to me, therefore, that the provision of care for air passengers is especially important and essential where their flights have been cancelled as a result of the eruption of a volcano which has caused the airspace of a number of Member States to be closed for several days, thus forcing some passengers to remain at the airport – very often a long way from home – until that airspace is reopened.

45. If it were to be recognised that, in such circumstances, the air carrier is not required to provide care for its passengers, this would significantly undermine the effectiveness of Articles 5(1)(b) and 9 of Regulation No 261/2004 and the system of which those provisions form part, which seeks to ensure a high level of protection for air passengers.

46. In consequence, it is my view that Articles 5 and 9 of Regulation No 261/2004 must be interpreted as meaning that circumstances such as the closure of airspace owing to the eruption of a volcano constitute extraordinary circumstances for the purposes of that regulation.

47. In the light of those considerations, there is no need, I believe, to answer Questions 2 and 3.

B – *Questions 4 and 5*

48. By its questions, the referring court asks, in essence, whether the obligation under Articles 5 and 9 of Regulation No 261/2004 to provide care must be limited, in temporal or monetary terms, where the cancellation of the flight has been caused by extraordinary circumstances. In the event of a negative answer, the referring court asks whether those provisions are invalid in so far as they are contrary to the principles of proportionality and non-discrimination, the principle of an 'equitable balance of interests' enshrined in the Montreal Convention, and Articles 16 and 17 of the Charter.

49. Ryanair contends that the obligation on the air carrier to provide care must be limited where the cancellation is caused by extraordinary circumstances. For example, Ryanair argues that accommodation should be limited to a fixed daily amount, namely EUR 80 per night, for a maximum of three nights. Similarly, it argues that there should also be a temporal and monetary limit on the provision of meals and refreshments and that cover of the costs of transport between the airport and the place of accommodation should be limited to the cost of a journey by public transport.

50. I do not think that Articles 5 and 9 of Regulation No 261/2004 imply any such limitation of the provision of care for passengers whose flights have been cancelled owing to extraordinary circumstances.

51. First of all, as the French Government has pointed out,[19] the EU legislature deliberately refused to release the air carrier from its obligation to provide care for passengers whose flights have been cancelled where the cancellation is caused by extraordinary circumstances.[20]

52. Furthermore, as I stated in point 44 above, the provision of care is particularly important in the case of extraordinary circumstances which persist over a long time. It is precisely in situations where the waiting period occasioned by the cancellation of a flight is particularly lengthy that it is necessary to ensure that an air passenger whose flight has been cancelled can have access to essential goods and services throughout that period. It should be noted in that connection that Article 9 of Regulation

19 — See paragraphs 43 to 49 of the observations.

20 — See *IATA and ELFAA*, paragraphs 51 to 54.

No 261/2004, far from placing an implied limitation on the provision of care, states that passengers are to be offered free of charge 'meals and refreshments *in a reasonable relation to the waiting time* [21]'. Accordingly, there is no question here of temporal or monetary limits being placed on the provision of care.

53. Again, I consider that a limitation along the lines proposed by Ryanair would in some measure deprive Articles 5 and 9 of Regulation No 261/2004 of their effectiveness, since after a few days the air passengers concerned would be abandoned to their fate.

54. In my view, that analysis cannot call into question the validity of those provisions, as Ryanair suggests.

55. As regards, first of all, the principle of proportionality, in *IATA and ELFAA* the Court stated, in assessing the validity, inter alia, of Articles 5 and 6 of Regulation No 261/2004, which refer to Article 9 of that regulation, that standardised and immediate compensatory measures – such as the re-routing of passengers, the provision of refreshments, meals or accommodation or the making available of means of communication with third parties – vary according to the significance of the damage suffered by the passengers and they do not therefore appear to be manifestly inappropriate merely because carriers cannot rely on the extraordinary circumstances defence. [22]

56. According to the European Commission, the obligation under Article 9 of Regulation No 261/2004 to provide care must be applied without imposing a disproportionate and unfair burden on the carriers concerned, and assistance must accordingly be provided within the limits of what is proportionate and reasonable in the light of the specific circumstances of the case and the cost of care and re-routing. [23] The Commission also sets out a number of factors which could be taken into account by the air carriers, such as the distance between the airport and the place of residence, the distance between the place of accommodation and the airport, and the availability and average prices of accommodation in the relevant area. [24]

57. To my mind, the application of such factors by the air carriers would effectively place an implied limitation on the provision of care. In my view, it is for the national court, where necessary and in the event of differences, to take those factors into account and to assess whether or not the sums claimed by the air passenger on the basis of the obligation to provide care are reasonable in the light of the specific circumstances of each case.

58. Nor, moreover, does it appear to be disproportionate to impose on air carriers such an obligation to provide care in so far as – as the United Kingdom Government has observed – they are free to pass on the costs incurred as a result of that obligation to airline ticket prices. [25]

59. It is worth noting in that regard that, on 4 April 2011, Ryanair itself introduced an 'EU 261' levy per passenger and per flight in order to cover the costs which it has incurred in connection with its obligation, among other things, to provide care for passengers whose flights have been cancelled in cases of *force majeure*. [26] Ryanair expressly refers to the closure of airspace owing to the eruption of the Icelandic volcano. It also states that passengers consent to the levy when they sign their contract with Ryanair at the time of booking and that, if the costs incurred through the obligation to provide

21 — My italics.

22 — See paragraph 86.

23 — See paragraph 31 of the observations.

24 — See paragraph 33 of those observations.

25 — See paragraph 23 of the observations.

26 — The relevant press release is available at: http://www.ryanair.com/ie/news/briefing-note-cancellation-levy.

care decline in 2011, the levy will itself be reduced in 2012. Conversely, if costs increase in 2011, the levy will be raised in 2012. In so far as Ryanair passes on to passengers, as it is entitled to do, the costs incurred as a result of compensation, if is difficult to see how it can be suffering an inequitable imbalance.

60. As an experienced operator, the air carrier must foresee costs of this kind, connected with its obligation to provide care, so as to be able to meet that obligation where necessary. Moreover, the figures produced by the Commission [27] – according to which 'only' around 10 000 passenger complaints have been submitted out of a total of more than 10 million people affected by the closure of airspace owing to the eruption of the Icelandic volcano – suggest that that obligation was not insurmountable for air carriers, since the great majority of them have fulfilled their obligations under Regulation No 261/2004. [28]

61. Consequently, in the light of the foregoing, Articles 5 and 9 of Regulation No 261/2004 do not seem to be contrary to the principle of proportionality.

62. Ryanair also contends that the obligation to provide care for passengers where the cancellation of a flight is caused by extraordinary circumstances is contrary to the principle, enshrined in the third and fifth paragraphs in the preamble to the Montreal Convention, that compensation for consumers must be based on an equitable balance of interests.

63. In that connection, the Court ruled in *IATA and ELFAA* that, since the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 – which makes a *renvoi* to Article 9 of that regulation – in the event of a long delay to a flight constitute standardised and immediate compensatory measures, they are not among those regulated by the Montreal Convention. [29] It is true that the Court held in *Walz* [30] that, in the various situations in which an air carrier is held liable, the equitable balance of interests requires that there be limits on compensation so as not to impose a very heavy burden of damages, which would be difficult to determine and to calculate, and would be liable to undermine, and even paralyse, the economic activity of that carrier. [31] However, that case did not turn on the obligation to provide care for passengers, but their right, pursuant to Chapter III of the Montreal Convention, to obtain individual reparation in the event of damage sustained. [32] The legal context of that judgment is different, therefore, from that of the case under consideration here.

64. Consequently, it is my view that Articles 5 and 9 of Regulation No 261/2004 are not contrary to the principle, enshrined in the Montreal Convention, of an equitable balance of interests.

65. As regards the question whether, in imposing an obligation to provide care for passengers which is not imposed on operators of other modes of transport, those provisions are contrary to the general principle of non-discrimination, it need only be noted that the Court has ruled that, given in particular the manner in which they operate, the conditions governing their accessibility and the distribution of their networks, different modes of transport are not interchangeable as regards conditions of use. [33] Furthermore, with regard to air transport, passengers whose flights are cancelled

27 — See MEMO/11/235 of 12 April 2011, entitled 'Volcanic ash disruption: one year on and crisis preparedness'.

28 — Ibid., pp. 5 and 6.

29 — See paragraph 46.

30 — Case C-63/09 [2010] ECR I-4239.

31 — Paragraphs 35 and 36.

32 — See, inter alia, paragraph 17.

33 — See *IATA and ELFAA*, paragraph 96.

or significantly delayed are in a situation which is objectively different from the situation of passengers using other means of transport in the event of incidents of the same nature.[34] The Court concluded from this that Articles 5 to 7 of Regulation No 261/2004 are not invalid by reason of a breach of the principle of equal treatment.[35]

66. Lastly, Ryanair argues that the obligation to provide care for passengers where the cancellation of their flight is caused by extraordinary circumstances impairs the freedom of air carriers to conduct their business and their right to own, use and dispose of their property, rights which are enshrined, respectively, in Articles 16 and 17 of the Charter. Consequently, Articles 5 and 9 of Regulation No 261/2004 are invalid.

67. Ryanair essentially maintains that the obligation to provide care has the effect of depriving a party of the fruits of its labour and of its investments.[36]

68. It should be noted in that regard that Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

69. As the French Government has noted, Article 169(1) TFEU provides that the European Union must promote the interests of consumers and ensure a high level of consumer protection.[37] Similarly, Article 38 of the Charter provides that EU policies must ensure a high level of consumer protection. Furthermore, as observed in point 37 above, Regulation No 261/2004 seeks to ensure a high level of protection for air passengers, regardless of whether they are denied boarding or whether their flight is cancelled or delayed, since they are all caused similar serious trouble and inconvenience connected with air transport.

70. In addition, as I explained in points 55 to 61 above, the obligation on the air carrier under Articles 5 and 9 of Regulation No 261/2004 to provide care for air passengers where the cancellation of the flight is caused by extraordinary circumstances does not appear to be capable of breaching the principle of proportionality.

71. Consequently, it does not seem to me that Articles 5 and 9 of Regulation No 261/2004 infringe Articles 16 and 17 of the Charter.

72. In the light of all the foregoing considerations, I take the view that Articles 5 and 9 of Regulation No 261/2004 must be interpreted as not implying any release from or limitation of the obligation to provide care for passengers whose flights have been cancelled owing to extraordinary circumstances. That finding cannot call into question the validity of those provisions.

34 — Ibid., paragraph 97.

35 — Ibid., paragraph 99.

36 — See paragraph 45 of the observations.

37 — See paragraph 79 of the observations.

V – Conclusion

73. In the light of the foregoing, I propose that the Court state as follows in answer to the questions referred by the Dublin Metropolitan District Court:

Articles 5 and 9 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:

— circumstances such as the closure of airspace owing to the eruption of a volcano constitute extraordinary circumstances for the purposes of Regulation No 261/2004;

— the above provisions do not imply any release from or limitation of the obligation to provide care for passengers whose flights have been cancelled owing to extraordinary circumstances. That finding cannot call into question the validity of those provisions.