3 Locked Out of Heaven: The Air Greenland Case and Extraordinary Circumstances

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1. Introduction

Since the establishment of the European Community which later emerged into to the European Union, protection of individuals’ rights has been at the forefront of the agenda of the European Court of Justice. Long before the lawmakers had even contemplated the forming of a Constitutional Treaty, the then European Court of Justice had in its famous decision in Van Gend en Loos1 in 1963 held that the Treaty of Rome had created a Community not only of governments but of peoples, and that the Member States had agreed to limit their sovereign rights in certain fields. Thereby, the European Court of Justice had made protection of rights of individuals one of its most important tasks.

The judgment in Van Gend en Loos was later followed by other landmark judgments such as Costa v. ENEL2 establishing the principle of supremacy and Simmenthal3 concerning pre-emption. The general sentiment of the jurisprudence from the European Court of Justice was protection of the rights of individuals. In 1970 the Advocate General in the Internationale Handelsgesellschaft case4 formulated that the principle of the protection of the rights of individuals was one of the most fundamental principles in European Union law:

The fundamental principles of national legal systems contribute to forming that philosophical, political and legal substratum common to the Member States from which

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1 Case C-26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen.
2 Case C-6/64 Costa v ENEL.
3 Case C-106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA.
4 Case C-11/70 International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide.
through the case law an unwritten community law emerges one of the essential aims of which is precisely to ensure the respect of the fundamental rights of the individual.\(^5\)

Based on the above judgments, the European Union legislature as well as the European Court of Justice has ever since developed a fine mesh of rules with the aim of strengthening the protection of legal rights of individuals of the Member States. This trend has naturally implied not only that fundamental rights have been safeguarded but also that focus has been made on more ancillary, but nevertheless important, individual rights such as consumer protection.

However, strengthening of individual rights necessarily implies limits to the sovereignty of Member States, that is, the Member States will be barred from regulating areas which fall within the scope of the rights of individuals. One of the areas where this schism between sovereignty and individual rights has created some tension is the interference of EU rules and judgments with the labour models of the Member States. This tension between protection of individuals’ rights on the one side and respect of the Member States different labour models on the other side has recently been elucidated within the context of airline passenger rights and the European Union rules concerning compensation for delayed and cancelled flights. Thus, in the case before the Danish courts of *Daniel Biltzing v. Air Greenland*\(^6\) the Danish Eastern High Court had to decide whether passengers on a number of Air Greenland flights would be entitled to compensation since the flights were delayed due to Air Greenland’s lock-out of its pilots.

Taking its outset in the Air Greenland judgment, this article will deal with the question whether a lock-out due to a labour dispute may be qualified as an extraordinary circumstance and, consequently, whether an air carrier will be liable to pay compensation if a delay or cancellation of a flight is caused by the air carrier’s lock-out of employees essential for the operation of its aircraft.

2. **The legal framework**

The relevant European Union rules concerning passenger rights are set out in Regulation 261/2004 of the European Parliament and of the Counsel of 11 February 2004 establishing common rules and compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation 295/91 (“the Regulation”).

The Regulation contains a number of rights for passengers in case their flight is delayed, cancelled or if they are denied boarding. The rules in the Regulation apply to the vast majority of flights in and out of the European Union and consequently to the many millions of passengers who are daily transported by air in the European Union.

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5 Opinion of Mr. Advocate General Dutheillet de Lamothe of 2 December 1970, page 1146.

6 Judgment by the Danish Eastern High Court of 7 June 2012. Air Greenland was represented by Jacob Skude Rasmussen, attorney-at-law and Morten L. Jakobsen, partner, each Gorrisen Federspiel.