Neutral Citation Number: [2021] EWCA Civ 454

Case No: B2/2020/0456

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PORTSMOUTH COMBINED COURT
HHJ IAIN HUGHES QC
E17477835

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2021

Before :

LORD JUSTICE COULSON
LORD JUSTICE HADDON-CAVE
and
LORD JUSTICE GREEN

- -

Between :

Lipton & Anr.	**Appellant**
- and -	
BA City Flyer Limited	**Respondent**

- -
- -

Michael Rawlinson QC and Max Archer (instructed by **Hayward Baker Solicitors**) for the **Appellant**
Akhil Shah QC and Nicolas Damnjanovic (instructed by **Norton Rose Fulbright LLP**) for the **Respondent**

Hearing date : 2 March 2021

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Approved Judgment

LORD JUSTICE COULSON :

1. INTRODUCTION

1 Passengers whose flights are cancelled or significantly delayed are entitled to compensation under Regulation (EC) 261/2004 ("the Regulation"). The only way in which the air carrier can avoid paying such compensation is by demonstrating that the cancellation or significant delay was caused by 'extraordinary circumstances'. In the present case, the appellants' flight was cancelled because the captain did not attend for work due to illness. The respondent maintained that, because the captain became ill while he was off-duty, his non-attendance was an extraordinary circumstance within the meaning of the Regulation. Both the Deputy District Judge and the Circuit Judge accepted the respondent's argument. The appellants appeal to this court on the basis that the captain's non-attendance did not amount to an extraordinary circumstance, and that it cannot matter whether the captain became ill when he was on or off duty.

2 Although the point is ultimately a short one, a large number of authorities were referred to in the written submissions. We are grateful to both leading counsel for the economy and efficiency of their subsequent oral submissions.

2. JURISDICTION

3 Following the United Kingdom's departure from the EU, a question arose as to the status of the Regulation. Counsel were agreed that the Regulation formed part of domestic law by virtue of the European Union (Withdrawal) Act 2018.

4 At paragraphs 52-84 below, my lord, Lord Justice Green, explains the somewhat complex path that leads to his conclusion that the Regulation is indeed part of domestic law, and that therefore this court has jurisdiction to decide this appeal. I respectfully agree with his analysis.

3. THE FACTUAL BACKGROUND

5 On 30 January 2018, the appellants were booked on flight BA7304 from Milan to London City Airport, operated by the respondent. The flight was scheduled to depart from Milan at 17.05 local time (16.05 UTC) and arrive at London City at 18.05 local time.

6 The captain reported that he was not feeling well at 16.05 local time when he was off duty and not at his place of work. He was required to speak to Medaire, a medical services consultancy, who determined that he was not fit to fly. No further information regarding the captain's illness has been made available. As the respondent's operations control manager, Mr Robinson, made plain at paragraph 12 of his witness statement, the captain's medical records and the precise nature of his illness are both confidential.

7 As a result of the captain's illness, the flight was cancelled, there being no replacement captain available to operate the flight within a reasonable time. The decision to cancel the flight was not taken until 18.07 local time. The appellants were re-booked onto another flight and eventually arrived at London City 2 hours and 36 minutes after their scheduled arrival time.

4. THE PROCEDURAL HISTORY

8 The appellants' claim for compensation was disputed. There was an oral hearing before Deputy District Judge Printer on 26 June 2019. He said:

> "I was properly reminded that the defendant has the burden to prove his case and it was accepted by the defendant's counsel that I had no medical evidence before me today. However there was some evidence which I have considered, and I am satisfied that the captain was unwell. I am equally satisfied from that evidence that he was not on duty and that the cause of his illness was on balance caused by a matter unrelated to his work, the provenance of which I cannot be specific about…I am satisfied that the illness of the captain on the evidence before me can properly be ascribed to an external event outside the control of the airline and accordingly it is not intrinsically linked to the operating system of the aircraft. "

On that basis, DDJ Printer found that the respondent had made out its claim that the cancellation was due to extraordinary circumstances

9 The Appellants appealed to HHJ Iain Hughes QC. He dismissed the appeal in a clear and detailed written judgment handed down on 11 February 2020. He noted that there was no binding authority dealing with flight cancellation due to crew illness. He said that what mattered was "what brought about the captain's illness, not the captain's illness itself." He found that the DDJ had correctly answered that question and that the captain's illness, by reference to the test articulated by the Court of Justice of the (CJEU) in the authorities, amounted to an extraordinary circumstance.

5 THE LEGAL FRAMEWORK

5.1 The Regulation

10 The relevant parts of Regulation (EC) 261/2004 are as follows:

> "***Article 5***
>
> **Cancellation**
> 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 rerouting 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.
> 4. The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier. "

11 Although "extraordinary circumstances" are not defined in the Regulation itself, recitals 14 and 15 are of some assistance. They 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"

12 The purpose of Article 5 has been considered in a number of subsequent cases. In *Wallentin-Hermann v Alitalia* (Case C-549/07), [2009] Bus LR 1016 at [18], the CJEU said that the purpose of the Regulation was to ensure "a high level of protection for passengers and take account of the requirements of consumer protection in general, in as much as cancellation of flights causes serious inconvenience to passengers." In

Sturgeon & Anr v Condor Flugdienst GmbH (Case C-402/07), [2010] 2 All ER (Comm) 983, at [44], the CJEU confirmed previous authority to the effect that the Regulation had to be examined, not from the air carrier's perspective, but from the perspective of the passenger.

5.2 The Test for 'Extraordinary Circumstances'

13 The test to be applied when considering Article 5(3), and whether or not the particular cancellation in question was due to extraordinary circumstances, was dealt with by the CJEU in *Wallentin-Hermann.* By way of general guidance, at [17], the CJEU stated:

> "17 It is settled case law that the meaning and scope of terms for which Community law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. Moreover, when those terms appear in a provision which constitutes a derogation from a principle or, more specifically, from Community rules for the protection of consumers, they must be read so that that provision can be interpreted strictly: see, to that effect, *easyCar (UK) Ltd v Office of Fair Trading* (Case C-336/03) [2005] ECR I-1947, para 21 and the case law cited. Furthermore, the Preamble to a Community measure may explain the latter's content: see, to that effect, inter alia, *R (International Air Transport Association) v Department for Transport* (Case C-344/04) [2006] ECR I-403, para 76."

14 As to the test for 'extraordinary circumstances' under Article 5(3), the CJEU, having considered Recital 14, went on to say:

> "23 Although the Community legislature included in that list unexpected flight safety shortcomings" and although a technical problem in an aircraft may be amongst such shortcomings, the fact remains that the circumstances surrounding such an event can be characterised as "extraordinary" within the meaning of article 5(3) of Regulation No 261/2004 only if they relate to an event which, like those listed in recital 14 in the Preamble 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.
>
> 24 In the light of the specific conditions in which carriage by air takes place and the degree of technological sophistication of aircraft, it must be stated that air carriers are confronted as a matter of course in the exercise of their activity with various technical problems to which the operation of those aircraft inevitably gives rise. It is moreover in order to avoid such problems and to take precautions against incidents compromising flight safety that those aircraft are subject to regular checks which are particularly strict, and which are part and parcel of the standard operating conditions of air transport undertakings. The resolution of a technical problem caused by failure to maintain an aircraft must therefore be regarded as inherent in the normal exercise of an air carrier's activity.

> 25 Consequently, technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves, "extraordinary circumstances"…
>
> 26 However, it cannot be ruled out that technical problems are covered by those extraordinary circumstances to the extent that they stem from events which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. That would be the case, for example, in the situation where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism.
> …
> 36 As was stated at para 27 of this judgment, it is for the referring court to ascertain whether the technical problems cited by the air carrier in question in the main proceedings stem from events which are not inherent in the normal exercise of its activity and are beyond its actual control. It is apparent from that that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of "extraordinary circumstances" within the meaning of article 5(3) of Regulation No 261/2004 can be concluded."

15 These paragraphs have been said to stipulate a test comprising two limbs: inherency and control. The most comprehensive analysis of that test can be found in the decision of this court in *Jet2.com Limited v Huzar* [2014] EWCA civ 791; [2014] 4 All ER 581. As to whether the CJEU was setting out a single or a dual test, Elias LJ said:

> "**[47]** In my judgment, therefore, for all these reasons the appeal fails even on the assumption that the concept of extraordinary circumstances should be defined by reference to a single composite test and not two distinct conditions.
> If the appellant is right about there being a single composite test, then in my judgment it is essentially as the respondent described it. The second limb will take its meaning from the first rather than vice versa. The event causing the technical problem will be within the control of the carrier if it is part of the normal everyday activity which is being carried on and will be beyond the carrier's control if it is not.
> **[48]** I am inclined to think that this is indeed the correct analysis. I recognise that it can be said to render the second limb redundant. But it does not in my view strip the limb of all significance. It helps identify the parameters of those acts which can properly be described as inherent in the carrier's normal activities and those which cannot; and it also chimes with the examples of events identified in recitals (14) and (15) as being potentially capable of constituting extraordinary circumstances. It makes it clear that events which are beyond the control of the carrier because caused by the extraneous acts of third parties, such as acts of terrorism, strikes or air traffic control problems, or because they result from freak weather conditions, cannot be characterised as inherent in the normal activities of the carrier. It is not fanciful to suggest that there may otherwise be an argument that they can be so described; indeed, Mr Lawson advanced that very argument in the course of his submissions. So

> on this analysis the second limb is intended to help elucidate the scope of the first but is not intended to establish a distinct and independent condition."

In short, although it is a test with two limbs, the crucial question is that of inherency.

16 As previously noted, there are numerous decisions about the scope and operation of Article 5(3). I will outline them briefly below. In order to give my summary a comprehensible structure, I identify the relevant authorities under three general headings: mechanical defects in the aircraft; external or one-off events; and staff absence.

5.3 Mechanical Defects in the Aircraft

17 There is no reported case in which an air carrier has successfully maintained a submission that a mechanical defect in the aircraft itself amounted to an extraordinary circumstance. Thus, in *Wallentin-Hermann* at [25], mechanical problems coming to light during maintenance or because of a failure to carry out maintenance were found not of themselves extraordinary circumstances. That conclusion was repeated in *Sturgeon.* In *Jet2 v Huzar,* the technical problem was held not to amount to extraordinary circumstances, even though it was unforeseeable and was not preventable by prior maintenance or visual inspection. At [36], Elias LJ noted that "difficult technical problems arise as a matter of course in the ordinary operation of the carrier's activity. Some may be foreseeable, and some not, but all are, in my view, properly described as inherent in the normal exercise of the carrier's activity. They have their nature and origin in that activity; they are part of the wear and tear."

18 The same approach has been adopted in more recent cases. In *Van der Lans v Koninklijke Luchtvaart Maatschappij MV* (Case C-257/14, EU:C:2015:618); [2015] Bus LR 1107, the CJEU held that, whilst a breakdown due to the premature malfunction of certain components could be described as an unexpected event, air carriers were confronted with such problems as a matter of course, and the malfunction was therefore inherent in the normal exercise of the air carrier's activity. And in *A v Finnair Oyj* (Case C-832/18, EU:C:2020:204); [2020] Bus LR 1002*,* the same result eventuated, even though the flight was delayed by the failure of an "on condition" part, namely one which was only replaced when it became defective.

5.4 External or One-Off Events

19 There are authorities which demonstrate that the mere fact that the cancellation was caused by an external event (including an event perpetrated by a third party) did not necessarily comprise an extraordinary circumstance within the meaning of Article 5(3). But on the application of the inherency test, other one-off events have been so categorised.

20 In *Siewart v Flugdienst GmbH* (Case C-394/14) the flight was the subject of a lengthy delay when the aircraft was damaged by a set of mobile boarding stairs in the course of a preceding flight. The stairs were "operated by the airport and not the airline". The Court rejected the submission that this constituted extraordinary circumstances, observing at [19]:

> "However, as regards a technical problem resulting from an airport's set of mobile boarding stairs colliding with an aircraft, it should be pointed out that such mobile stairs or gangways are indispensable to air passenger transport, enabling passengers to enter or leave the aircraft and accordingly, air carriers are regularly faced with situations arising from their use. Therefore, a collision between an aircraft and any such set of mobile boarding stairs must be regarded as an event inherent in the normal exercise of the activity of the air carrier. Furthermore, there is nothing to suggest that the damage suffered by the aircraft which was due to operate the flight at issue was caused by an act outside the category of normal airport services…"

21 By contrast, in *Peskova & Anr v Travel Service as* (Case C-315/15, EU:C:2017:342); [2017] Bus LR 1134, the CJEU disagreed with the opinion of the AG, and held that a delay due to a bird strike amounted to extraordinary circumstances. Unlike the AG's opinion, the reasoning of the CJEU is extremely brief, and therefore not entirely satisfactory. It said:

> "23. Conversely, it is clear from the court's case law that the premature failure of certain parts of an aircraft does not constitute extraordinary circumstances, since such a breakdown remains intrinsically linked to the operating system of the aircraft. That unexpected event is not outside the actual control of the air carrier, since it is required to ensure the maintenance and proper functioning of the aircraft it operates for the purposes of its business....
>
> 24. In the present case, a collision between an aircraft and a bird, as well as any damage caused by that collision, since they are not intrinsically linked to the operating system of the aircraft, are not by their nature or origin inherent in the normal exercise of the activity of the air carrier concerned and are outside its actual control. Accordingly, that collision must be classified as 'extraordinary circumstances' within the meaning of Article 5(3)…"

22 Other examples of one-off events giving rise to a finding of extraordinary circumstances can be found in *Moens v RyanAir Limited* (Case C-159/18, EU:C:2019:535); [2019] Bus LR 2041, where the CJEU found that a delay due to petrol spilled on the runway (which led to the closure of that runway) was an extraordinary circumstance, when the petrol in question did not emanate from an aircraft of the carrier that operated the flight; *Germanwings GmbH v Pauels* (Case C-501/17, EU:C:2019:288); [2019] Bus LR1122, where a tyre damaged by a foreign object on the runway (FOD) could not be regarded as inherent in the normal exercise of the activity of an air carrier; and *LE v Transport Aereos Portugueses SA* (Case C-74/19, EU:C:2020:460); [2020] Bus LR 1503, where it was found that the delay caused by an unruly passenger (which was of such gravity that the pilot was justified in diverting the flight) did not meet the inherency test and was therefore capable of constituting an extraordinary circumstance (although, since such behaviour was within the control of the carrier, that outcome would be precluded if the carrier contributed to its occurrence or if it failed to take appropriate measures early enough).

23 In a similar category are all those cases concerned with unusual weather events such as the Icelandic dust cloud *McDonagh v Ryanair Limited* (Case C-12/11, EU:C:2013:43, [2013] 2 All ER (Comm) 735), and air traffic control decisions to close particular routes

or airports (*Blanche v Easyjet Airline Company Limited* [2019] EWCA Civ 69; [2019] Bus LR 1258). Unsurprisingly, perhaps, such cases are almost inevitably found to constitute extraordinary circumstances.

5.5 Staff Absence

24 There are very few cases concerned with the application of Article 5(3) to situations where staff absence has caused the cancellation of or significant delay to a flight. As HHJ Hughes rightly noted in the present case, there is no authority at all dealing with staff illness. Such authorities as there are under this heading are principally concerned with non-attendance due to strike action.

25 In *Finnair Oyj v Timy Lassooy* (Case C-22/11, ECLI:EU:C:2012:604), the dispute was concerned with the concept of "denied boarding". I note that the rescheduling which was the subject of the claim was originally necessitated by a strike by staff at Barcelona airport. That strike was apparently assumed to amount to extraordinary circumstances: certainly there is no analysis in the judgment of how and why that conclusion was reached.

26 In *Krüsemann and others v TUIfly GmbH* EU:C:2018:258, [2018] Bus LR 1191, there was unofficial strike action by airline staff after the announcement of a corporate restructuring process. This caused cancellations and delays. The airline claimed that this was an extraordinary circumstance. The court disagreed, on the basis that such strikes were inherent in the normal carrying out of the activity of the air carrier and that in any event the concept of 'extraordinary circumstances' had to be strictly interpreted. The court said:

> "38 In the present case, it is apparent from the file submitted to the Court that the 'wildcat strikes' among the staff of the air carrier concerned has its origins in the carrier's surprise announcement of a corporate restructuring process. That announcement led, for a period of approximately one week, to a particularly high rate of flight staff absenteeism as a result of a call relayed not by staff representatives of the undertaking, but spontaneously by the workers themselves who placed themselves on sick leave.
>
> 39 Thus, it is not disputed that the 'wildcat strike' was triggered by the staff of TUIfly in order for it to set out its claims, in this case relating to the restructuring measures announced by the management of the air carrier.
>
> 40 As correctly noted by the European Commission in its written observations, the restructuring and reorganisation of undertakings are part of the normal management of those entities.
>
> 41 Thus, air carriers may, as a matter of course, when carrying out their activity, face disagreements or conflicts with all or part of their members of staff.

> 42 Therefore, under the conditions referred to in paragraph 38 and 39 of this judgment, the risks arising from the social consequences that go with such measures must be regarded as inherent in the normal exercise of the activity of the carrier concerned.
>
> 43 Furthermore, the 'wildcat strike' at issue in the main proceedings cannot be regarded as beyond the actual control of the air carrier concerned."

The court went on to say that it was not appropriate to make a distinction between different kinds of strike in order to determine whether they should be classified as 'extraordinary circumstances', because a strike might be legal in one country and illegal in another, and that would then make the right to compensation dependant on the social legislation specific to each member state, thereby undermining the objectives of the Regulation (see [47]).

6. THE ISSUE FOR DETERMINATION IN THIS APPEAL

27 It is accepted that it is the respondent who has the burden of proving that the captain's non-attendance due to illness was an 'extraordinary circumstance'. The respondent submits that the court's investigation should not stop with the discovery that the pilot did not attend because he was ill, but should extend to investigating when, why and how he became ill. That is because, in the present case, the respondent has to say that the critical factor - which meant that the captain's illness was not an inherent part of their activity as an air carrier- was that he became ill when he was off duty. Mr Shah accepted that if the captain had become ill once he had clocked in for work, then the position would be very different and that the respondent would have much greater difficulty in relying on the Article 5(3) exception.

28 On behalf of the appellants, Mr Rawlinson argued that the court was neither obliged nor equipped to undertake such a granular analysis of causation, and that the details of precisely when, why and how the captain became ill were irrelevant to the Article 5(3) issue. He said that the captain did not attend for work because he was ill; that was the reason that the flight was cancelled; making provision for staff non-attendance was an inherent part of the Respondent's operations and was not therefore within the definition of 'extraordinary circumstances'.

7. HAS THE RESPONDENT MADE OUT A CASE OF EXTRAORDINARY CIRCUMSTANCES?

29 In my view, for the six inter-linked reasons set out below, the respondent has not made out a case of extraordinary circumstances on these facts. The non-attendance of the captain due to illness was an inherent part of the respondent's activity and operations as an air carrier, and could in no way be categorised as extraordinary.

7.1 Ordinary Meaning of the Words

30 As the CJEU emphasised at [17] of their judgment in *Wallentin-Hermann*, the expression 'extraordinary circumstances' in Article 5(3) of the Regulation must be given its usual meaning in everyday language. 'Extraordinary circumstances' means

something out of the ordinary: see *Sturgeon* and *Jet2 v Huzar*. Staff illness, and the need to accommodate such illness on a daily basis, is a commonplace for any business. It is a mundane fact of commercial life: it is in no way out of the ordinary. To use the rather convoluted language of *Wallentin-Hermann* at [44(1)], the possibility of the captain's absence was, by its nature and origin, inherent in the normal exercise of the activity of the respondent. It was part of its operating system.

31 That straightforward reading of the Regulation takes account of its purpose, which is to provide a high level of protection for consumers: see paragraph 12 above. Moreover it interprets Article 5(3) strictly, which is required because it derogates from this purpose and principle: see [20] of *Wallentin-Hermann* and [16] of *Siewart.*

7.2 Consistent with the Authorities in respect of Staff Absence

32 That interpretation is consistent with the authorities in respect of staff absence. Staff absence is *not* one of the factors identified in Recital 14 as indicative of 'exceptional circumstances'. The only factor there listed that is potentially referable to staff absence is strike action, which is, of course, much more likely to be out of the ordinary than a sick member of staff. As I have indicated, there is no authority anywhere to support the proposition that staff absence due to illness is an extraordinary circumstance.

33 The absence of airport staff was apparently assumed to be an extraordinary circumstance in the *Finnair* case (see paragraph 25 above). In *Krüsemann*, when the strike by the air carrier's staff was the subject of the court's analysis, it was said not to be extraordinary, and was instead found to be an inherent part of the carrier's activity and operations. If, as the CJEU said at [41] of *Krüsemann*, air carriers may, "as a matter of course when carrying out their activity" face disagreements or conflicts with all or part of their members of staff, then it can also be said with certainty that, again "as a matter of course when carrying out their activity", air carriers have to take account of the potential absence of some of their staff at any given time due to illness, bereavement or the like.

34 Mr Shah sought to distinguish *Krüsemann* on the basis that the CJEU's decision turned on the fact that it was a 'wildcat strike' due to the air carrier's own proposed reorganisation. He said that this showed that a detailed analysis of causation was required. I disagree with that for two reasons. First, I do not accept that the precise nature of the strike ultimately made any difference to the outcome in *Krüsemann*, for the reasons explained by the CJEU at [47]. Secondly, I consider that the CJEU was required in that particular case to do a certain amount of investigation, because strikes are one of the *indicia* of extraordinary circumstances listed in Recital 14. That is not the case here where, as I have said, staff absence is not identified in Recital 14 at all.

7.3 Consistent with the Authorities in respect of Technical Defects

35 The interpretation noted above is also consistent with the authorities concerned with technical defects. As set out in Section 5.3 above, defects in the aircraft (what was called mechanical "wear and tear" in *Jet2 v Huzar*), have regularly been held to be an inherent part of an air carrier's activity and not an extraordinary circumstance. In my view, those cases strongly suggest a similar answer to this appeal. An air carrier's operation depends on two principal resources: its people and its aircraft. Wear and tear of the aircraft and its component parts is not extraordinary; the wear and tear on people,

manifesting itself in occasional illness, should not be regarded as any different. To put it another way, the captain is just as much part of "the operating system" (*Peskova*) as the mechanical components of the aircraft.

36 Mr Shah submitted that this approach was in some way dehumanising. I disagree: it simply reflects the reality that an air carrier depends just as much (if not more) on its human resources as it does on its aircraft. Both are an inherent part of its operations; both are necessary to fly passengers from A to B. The occasional illnesses of staff and the occasional wearing out of parts of the aircraft are ultimately no different when considering inherency, because they both need to be allowed for in the air carrier's operating system.

37 Furthermore, as noted at paragraph 12 above, the CJEU has been clear that the operation of the Regulation, and therefore Article 5(3), must be seen through the eyes of the consumer. The appellants were wholly unconcerned with whether their flight was cancelled because the captain did not attend for work or because a key component in the engine was found to have failed. The precise reason for the cancellation was a matter of supreme indifference to them. What mattered from their perspective was that their flight was cancelled. They would not have differentiated between a cancellation due to wear and tear of a part, on the one hand, and the captain's illness, on the other. Neither should the court.

7.4 Consistent with the Authorities in respect of External or One-Off Events

38 In my view, the interpretation noted above is also consistent with these authorities, set out at Section 5.4 above. For example, the petrol spillage that closed a runway, the foreign object on the runway, and the unruly passenger whose conduct was so bad that the pilot had to divert the flight, were all one-off events which, so it seems to me, were not matters that fell within the carrier's normal everyday activity (to use the words of Elias LJ cited above). But those authorities are very different to the mundane circumstances of the present appeal which, unlike them, involved the carrier's own employee. On any view, those cases concerned rare or infrequent events.

39 Although Mr Shah maintained that, by reference to [36] of *Wallentin-Hermann*, the court should not have regard to the frequency of the particular event when applying the inherency test, I consider that this submission was based on a mis-reading of that paragraph of the court's judgment. What the court was saying was that the frequency of the technical problems experienced by an air carrier was not *in itself* a factor from which the presence or absence of extraordinary circumstances could be concluded. But as a matter of common sense, frequency will sometimes be relevant to whether or not the event in question could be categorised as being out of the ordinary. If something happens every day, that might be a pointer to it not being an extraordinary circumstance; if it last happened in 1958, it might suggest that it could be. Frequency can never be determinative, but it will not always be irrelevant. That is doubtless why, in *Siewart*, the court referred to a situation that the carrier was "*regularly* faced with".

40 *Siewert* is authority for the proposition that an event can be external but still be inherent to the airline's operation. Thus, even if it could be said that the captain's illness here was in some way external (because it happened when he was off duty), that would not take it outside the inherency test. The mobile stairs in that case were described as being "indispensable to air passenger transport" and that air carriers were "regularly faced

with situations arising from their use". Similarly in my view, captains are indispensable to air passenger transport and air carriers are regularly faced with situations arising from their non-attendance (for whatever reason). There is again no material difference for these purposes.

7.5 Inherency and the Relevance of Off Duty Events

41 That last observation brings me on to what I consider to be the obvious conclusion to the inherency analysis. The pilot of an aircraft is critical to the air carrier's activity and operations. His attendance for work is an inherent part of the carrier's operating system. If he fails to attend work due to illness, that non-attendance is "inherent in the normal exercise of the activity of the air carrier concerned" (*Krüsemann*).

42 In my view, it simply cannot matter to that analysis if the captain falls ill an hour before he clocks on for work, rather than half an hour afterwards. It is unrealistic to say that the captain is only an inherent part of the airline's operation when he has clocked on for work, and that in the minutes leading up to that point, he is somehow irrelevant to the air carrier's activity.

43 Perhaps the best example of this is the law that a pilot cannot drink alcohol in the 24 hours before he or she flies. Let us assume that the pilot is not on duty during that 24-hour period. Mr Shah sought to argue that, if the captain drank during that period and so clocked in with alcohol in his or her system, the plane could not be flown and the flight cancelled, that would be an extraordinary circumstance, because the pilot would have been drinking on what Mr Shah described a "frolic of his own".

44 I profoundly disagree with that submission. Even though in this example the pilot is not at work at the relevant time, he is under an obligation imposed by his employer and the criminal law not to drink during his or her off duty period. If the pilot drinks so as to be unfit to report for work and the flight is cancelled, then the reason for the cancellation is inherent in the airline's activity and operations. The same is also true of the need for the captain and indeed other cabin crew to ensure that they are properly rested during stopovers. They have numerous obligations both to their employers and to the public during those periods. They are all inherent in the carrier's activity and operations and if, for whatever reason, they are unable to attend for work as a result of something going awry during those rest periods (whether it is their fault or not), that failure to attend is not an extraordinary circumstance.

7.6 Too Granular An Investigation

45 A final reason for concluding that precisely when, why or how the staff member in question fell ill is irrelevant to the proper operation of Article 5 arises from the nature of the Regulation itself. The Regulation is concerned to provide a standardised, if modest, level of compensation to those who suffer the inconvenience of cancelled or delayed flights. The exception at Article 5(3) has to be considered in that light. Most of these claims are assigned to the Small Claims Track, and the vast bulk of them should be capable of being determined on the papers. In those circumstances, it is contrary to the scheme of the Regulation to allow the carrier to embark on a complex analysis of precisely when, why or how a staff member became ill so as to explain their absence and the subsequent cancellation of the flight.

46 In any event, there are obvious difficulties in identifying precisely when, why or how someone first falls ill. Is it when they first exhibit the symptoms? Or is it when they are first exposed to the infection? Why are they unwell? How has that happened? If a crew is on a particularly tight schedule, with a meal then a flight, then a rest and then a repeat for the return flight, how can it be safely worked out when, why or how the crew member actually fell ill, and whether that happened, as the respondent would have it, on their own time or the carrier's time? The scheme under the Regulation is not designed to investigate these questions. Without wishing to trivialise the issue or the illness in this case (about which we have no details), I am of the view that the consumer's right to compensation under the Regulation cannot depend on when and where the member of staff ate the suspect prawn sandwich.

47 Furthermore, these issues are rendered all the more complex by the likely absence of any medical records. I have referred at paragraph 6 above to the fact that there were no medical records in this case. How can the consumer be expected realistically to address and meet an argument that is based on the say-so of third parties (with whom the consumer never comes into contact), and which is not supported by primary documents (because they are confidential)?

48 This approach is consistent with the authorities. The analysis of causation in the cases noted above is generally cursory: see *Peskova* and *Siewart*, in particular.

49 Accordingly, I am entirely satisfied that the sort of investigation into causation which the respondent urges in the present case is inconsistent with the authorities and inappropriate for a claim for compensation under the Regulation. I can see that there may possibly be a need for a more detailed investigation in a case where there is an issue as to whether or not the Recital 14 *indicia* are in play (as occurred in *Krüsemann*) but that is not this case.

7.7 Summary

50 Accordingly, for all these reasons, I consider that the captain's non-attendance for work due to illness was inherent in the air carrier's activity and operations and was not an 'extraordinary circumstance' within the meaning of Article 5(3) of the Regulation. If my Lords agree, I would allow this appeal and order that the respondent compensate the appellants for their cancelled flight from Milan to London.

LORD JUSTICE GREEN

51 I agree with the judgment of Lord Justice Coulson, for the reasons that he has given, and I also would allow the appeal. This appeal boils down to a conclusion that it forms part of the normal operating system of an airline that it should make provision for the sickness of its staff and in particular key staff such as pilots. The risk of non-attendance of workers is an inherent risk which any airline needs to cater for. The unavailability of a pilot is a predictable event and if it occurs the risk that a scheduled flight might not be able to take of is self-evident. It is not out of the ordinary and as such if it occurs and becomes the cause of a delay then the duty to compensate arises.

The approach to be adopted following exit from the EU by the UK

52 In this appeal the Court has had to construe a Regulation emanating from the Parliament and Council of the EU. This is 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 ("*Regulation 261/04*"). In coming to a conclusion we have had to construe the recitals to Regulation 261/04 to discover its object and purpose which includes an emphasis on consumer protection and determine how these affect the proper interpretation of the substantive provisions of the measure. We have also had to consider whether there is guidance to be had from the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, which is a treaty whose underlying policy is incorporated by reference into the recitals of Regulation 261/04 and thereby into the meaning of its substantive provisions. We have had to consider judgments of the Court of Justice of the EU (*"the CJEU*"). We have also had to consider whether a provision of the Trade and Cooperation Agreement signed on 26th December 2020 between the UK and the EU had any relevance.

53 Submissions and argument advanced to us during the appeal proceeded very much as it would have done in 2019, when the UK was a member of the EU, or even in 2020 when the transitional period ("*the Transitional Period*") governing the extrication of the UK from the EU was still in force (until 11pm 31st December 2020). However, the hearing took place in February 2021 when the transitional Period had expired. As at this point in time a new set of legal arrangements are in place which governed the relationship of the UK to EU law. The Court cannot therefore assume that the old ways of looking at EU derived law still hold good. We must apply the new approach. There is much that is familiar but there are also significant differences.

The new legislative structure following the exit of the UK from the EU and the expiry of the Transitional Period.

54 Terms governing the departure of the UK from the EU were agreed on 17th October 2019 and came into legal effect on 1st February 2020. This was the Withdrawal Agreement which established the terms of the United Kingdom's withdrawal under Article 50 TEU ("*the Withdrawal Agreement*"). The Withdrawal Agreement was implemented into domestic law by a series of measures including the European Union (Withdrawal) Act 2018. This was subsequently amended by the European (Withdrawal Agreement) Act 2020. ("*the E(WA)A 2020*") and the European Union (Withdrawal) Act 2018 Exit Day Regulations 2019.

55 For convenience I refer to the European Union (Withdrawal) Act 2018 in its amended form as the "*EU(W)A 2018*" [1].

56 On 26th December 2020, the UK also entered into a free trade agreement with the EU entitled the "*Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part*" ("*the TCA*"). This was incorporated into domestic law by the European Union (Future Relationship) Agreement 2020 ("*the EU(FR)A 2020*") which received Royal Assent on 31st December 2020.

[1] Consolidated versions of the 2018 Act exist, for example on Westlaw.

The status of an EU regulation

57 This appeal has concerned a judgment which addressed the scope and effect of a measure of EU law, i.e. Regulation 261/2004. This is a measure adopted prior to the exit of the UK from the EU and the expiry of the Transitional Period. It was adopted pursuant to Article 80(2) of the Treaty Establishing the European Union ("*the TEU*"). It is a typical "regulation". Under EU law it is directly applicable in the sense that it takes effect in the domestic law of the Member States of the EU (which obviously no longer includes the UK) without the need for any domestic law measure of implementation or transposition. It had the force of law by virtue of section 2(1) European Communities Act 1972 ("*the ECA 1972*"). By the time of the appeal the status of the measure had changed.

58 Section 3(1) EU(W)A 2018 has the effect of retaining "*Direct EU legislation*":

> "Direct EU legislation, so far as operative immediately before IP completion day, forms part of domestic law on and after IP completion day'

59 Under section 3(2) this includes any EU regulation, EU decision or EU tertiary legislation "*as it has effects in EU law immediately before IP completion day"*, which is the end of the Transitional Period.

60 Regulation 261/04 was operative prior to IP completion day and therefore continues to have force. Under section 3(4) it is only the English language version of the direct EU legislation that is brought into effect in English domestic law.

61 Under section 5(1) the principle of supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP completion day. However, under section 5(2) the principle:

> "… continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP Completion Day."

62 This means that so far as Regulation 261/04 is concerned the doctrine of supremacy applies. It therefore applies and takes precedence over any other measure of domestic law which might be inconsistent.

Relevance of general principles of EU law

63 Under Section 5(4) the Charter of Fundamental Rights is not part of domestic law or on or after IP completion Day. However, under section 5(5) this does not affect the retention in domestic law on or after IP completion day of "*…any fundamental rights or principles which exist irrespective of the Charter".* Further, under section 5(5) any:

> "… references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles."

64 Schedule 1 paragraph (2), entitled "*General principles of EU law*", makes general principles part of domestic law provided they were recognised in relevant case law prior to IP completion day:

> "No general principle of EU law is part of domestic law on or after IP completion day if it was not recognised as a general principle of EU law by the European Court of Justice in a case decided before IP completion day (whether or not a essential part of the decision in the case)".

The relevance of judgments of the CJEU

65 Section 6(1) is concerned with the interpretation of retained EU law. It deals both with the binding effect of EU law and with the non-binding persuasive effects of such law. Under the section the English Court is not bound by any principles laid down, or any decisions made by the CJEU, on or after IP completion day and may not refer any matter to the European Court. However, the court can "*have regard to*" anything done on or after IP completion day by the CJEU or another EU entity or the EU "*so far as it is relevant to any matter before the court or tribunal*".

66 Section 6(3) states that any question as to the validity, meaning or effect of any "*retained EU law*" is to be decided:

> "(a) in accordance with any retained case law and any retained general principles of EU law, and
>
> (b) having regard … to the limits, immediately before IP completion day, of EU competences.

67 Section 6(7) defines "*retained EU law*" as anything which continues to be, or forms part of, domestic law by virtue of sections 2, 3 or 4. Regulation 261/04 is part of domestic law by virtue of section 3 and is therefore "retained EU law" for the purposes of section 6(3).

68 Section 6(7) also defines "*retained case law*" as including retained EU case law which is "*any principles laid down by, and any decision of, the European Court, as they have effect in EU Law immediately before IP completion day"*.

69 Section 6(3) provides that lower courts are bound to decide any question as to the meaning, validity or effect in accordance with the decision of the CJEU made prior to IP completion day. However, section 6(4)(ba) and (5A) empower a relevant Minister to make regulations which provide that a "*relevant court*" should not be bound by retained EU case law. This power was exercised and by virtue of Regulation 3(b) of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 the Court of Appeal is a "*relevant court*" for the purposes of section 6.

70 Under Regulation 4(2) a "*relevant court is bound by retained EU case law so far as there is post-transition case law which modifies or applies that retained EU case law and which is binding on the relevant court*". Regulation 5 provides that *"[i]n deciding whether to depart from any retained EU case law by virtue of section 6(4)(ba) of the*

2018 Act and these Regulations, a relevant court must apply the same test as the Supreme Court would apply in deciding whether to depart from the case law of the Supreme Court."

Domestic legislation in relation to passenger compensation

71 Direct EU legislation, such as Regulation 261/04, can be amended by domestic law. In the present case the Air Passenger Rights and Air Travel Organisers' Licencing (Amendment) (EU Exit) Regulations 2019 ("*the Air Passenger Regulations 2019"*) came into force on 31st December 2020. They were made by the Secretary of State in the exercise of the regulation making power under section 8(1) of, and paragraph 21 of Schedule 7 to, the EU(W)A 2018, and section 71 of the Civil Aviation Act 1982.

72 Regulation 8 amended Regulation 261/04. The cumulative effect is that the present governing law is Regulation 261/04 as amended.

> "8.—(1) 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 is amended as follows.
>
> (2) In Article 1 (subject) omit paragraphs 2 and 3.
>
> (3) In Article 2 (definitions)—
>
> (a) for point (c), substitute—
>
> "(c) 'Community carrier' means an air carrier with a valid operating licence granted by a Member State in accordance with Chapter II of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community as it has effect in EU law;";
>
> (b) in point (d), for "Article 2, point 2, of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours" substitute "regulation 2(1) of the Package Travel and Linked Travel Arrangements Regulations 2018";
>
> (c) in point (e), for "Article 2, point 1, of Directive 90/314/EEC" substitute "regulation 2(5) of the Package Travel and Linked Travel Arrangements Regulations 2018";
>
> (d) after point (l) insert—
>
> "(m) 'UK air carrier' means an air carrier with a valid operating licence granted by the Civil Aviation Authority in accordance with Chapter II of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008

on common rules for the operation of air services in the United Kingdom.".

(4) In Article 3 (scope)—

(a) in paragraph 1, in point (a), for "the territory of a Member State to which the Treaty applies" substitute "the United Kingdom";

(b) for point (b) substitute—

"(b) to passengers departing from an airport located in a country other than the United Kingdom to an airport situated in—

(i) the United Kingdom if the operating air carrier of the flight concerned is a Community carrier or a UK air carrier; or

(ii) the territory of a Member State to which the Treaty applies if the operating air carrier of the flight concerned is a UK air carrier, unless the passengers received benefits or compensation and were given assistance in that other country.";

(c) in paragraph 6, for "Directive 90/314/EEC" substitute "the Package Travel and Linked Travel Arrangements Regulations 2018".

(5) In Article 6 (delay), in paragraph 1, in point (b), omit "intra-Community flights of more than 1500 kilometres and of all other".

(6) In Article 7 (right to compensation)—

(a) for paragraph 1 substitute—

"1. Where reference is made to this Article, passengers shall receive compensation amounting to—

(a) £220 for all flights of 1500 kilometres or less;

(b) £350 for all flights between 1500 and 3500 kilometres;

(c) £520 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.";

(b) in paragraph 2, in point (b), omit "intra-Community flights of more than 1500 kilometres and for all other".

(7) In Article 8 (right to reimbursement or re-routing), in paragraph 2, for "Directive 90/314/EEC" substitute "the

> Package Travel and Linked Travel Arrangements Regulations 2018".
>
> (8) In Article 10 (upgrading and downgrading)—
>
> (a) in paragraph 2, in point (b), omit the words from "intra-Community" to "other";
>
> (b) in paragraph 2, in point (c), omit the words from ", including" to the end.
>
> (9) In Article 16 (infringements)—
>
> (a)f or paragraphs 1 and 2 substitute—
>
> "1. A body designated under the Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005(3) for the purposes of this paragraph is responsible for the enforcement of this Regulation. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected.
>
> 2. Without prejudice to Article 12, each passenger may complain to anybody designated for the purposes of paragraph 1 or to a body designated for the purposes of this paragraph, about an alleged infringement of this Regulation.";
>
> (b) omit paragraph 3.
>
> (10) Omit Article 17 (report).
>
> (11) After Article 19 (entry into force) omit the paragraph beginning with the words "This Regulation".

Trade and Cooperation Agreement

73 Finally, the TCA contains an article relevant to consumer protection in relation to compensation in the case of "*denied boarding, cancellation or delay*s". It provides:

> "Article AIRTRN.22: Consumer protection
>
> 1. The Parties share the objective of achieving a high level of consumer protection and shall cooperate to that effect.
>
> 2. The Parties shall ensure that effective and non-discriminatory measures are taken to protect the interests of consumers in air transport. Such measures shall include the appropriate access to information, assistance including for persons with disabilities and reduced mobility, reimbursement and, if applicable, compensation in case of denied boarding, cancellation or delays, and efficient complaint handling procedures.

> 3. The Parties shall consult each other on any matter related to consumer protection, including their planned measures in that regard."

74 It is evident that both the UK and the EU considered that there was a need to enshrine the principle of consumer protection in international law relations between them. Whether this is because they considered that the existing legislative regime was insufficient or to guard against it becoming so in the future is unclear. Either way, the TCA has something of relevance to say about the subject matter of the present dispute. The issue therefore is whether Article AIRTRN.22 affects the task of this court in construing and applying Regulation 261/04.

75 COMPROV.16(1) provides that nothing in the TCA is to be construed as conferring or imposing rights or obligations "*on persons other than those created between the Parties under public international law"*. Further, the TCA precludes *direct* invocation of its terms in domestic law. Nothing in the TCA permits it "*to be directly invoked in the domestic legal systems of the Parties"*. In other words the TCA does not have direct effect:

> "Article COMPROV.16: Private rights
>
> 1. Without prejudice to Article MOBI.SSC.67 [Protection of individual rights] and with the exception, with regard to the Union, of Part Three [Law enforcement and judicial cooperation], nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.

76 The effect of Article AIRTRN.22 cannot therefore be directly invoked and its legal effect in this litigation thus depends upon how it is implemented into domestic law. The Long Title of the EU(FR)A 2020 includes the following: "*An Act to make provision to implement and make other provision in connection with, the Trade and Cooperation Agreement …*" The Act thus seeks to implement the TCA. It contains different parts relating to a wide variety of subject matters covered by the TCA. By way of illustration section 8 on passenger and vehicle registration empowers the Secretary of State to disclose vehicle registration data in accordance with specified provisions of the TCA; it incorporated the TCA by cross reference.

77 However, there is nothing in the TCA which specifically implements Article AIRTRN.22. This does not however mean that it is not implemented. Section 29 EU(FR)A 2020 provides a sweeping up mechanism. This is entitled "*General implementation of agreements*". It provides:

> "29 General implementation of agreements
>
> (1) Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement

or the Security of Classified Information Agreement so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.

(2) Subsection (1) -

(a) is subject to any equivalent or other provision—

(i) which (whether before, on or after the relevant day) is made by or under this Act or any other enactment or otherwise forms part of domestic law, and

(ii) which is for the purposes of (or has the effect of) implementing to any extent the Trade and Cooperation Agreement, the Security of Classified Information Agreement or any other future relationship agreement, and

(b) does not limit the scope of any power which is capable of being exercised to make any such provision.

(3) The references in subsection (1) to the Trade and Cooperation Agreement or the Security of Classified Information Agreement are references to the agreement concerned as it has effect on the relevant day.

(4) In this section—

"domestic law" means the law of England and Wales, Scotland or Northern Ireland;

"existing domestic law" means—

(a) an existing enactment, or

(b) any other domestic law as it has effect on the relevant day;

"existing enactment" means an enactment passed or made before the relevant day;

"modifications" does not include any modifications of the kind which would result in a public bill in Parliament containing them being treated as a hybrid bill;

"relevant day", in relation to the Trade and Cooperation Agreement or the Security of Classified Information Agreement or any aspect of either agreement, means—

(a) so far as the agreement or aspect concerned is provisionally applied before it comes into force, the time and day from which the provisional application applies, and

> (b) so far as the agreement or aspect concerned is not provisionally applied before it comes into force, the time and day when it comes into force;
>
> and references to the purposes of (or having the effect of) implementing an agreement include references to the purposes of (or having the effect of) making provision consequential on any such implementation."

78 The section 29 mechanism provides that domestic law (as defined) "*has effect ... with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement*". The phrase "*has effect*" is important. Parliament has mandated a test based upon the result or effect. The phrase "*has*" makes clear that this process of modification is automatic i.e. it occurs without the need for further intervention by Parliament. The concept of modification is interpreted broadly in section 37(1) to "*include*" (and therefore is not limited to) amendment, repeal or revocation. Section 29 is capable of achieving any one or more of these effects. This does not lay down a principle of purposive interpretation (such as is found in section 3 Human Rights Act) but amounts to a generic mechanism to achieve full implementation. It transposes the TCA into domestic law, implicitly changing domestic law in the process. Applying section 29 to domestic law on a particular issue now means what the TCA says it means, regardless of the language used.

79 "*Domestic law*" is defined broadly by section 29(4)(2) to include "*an existing enactment*" but also "*any other domestic law*". "*Enactment*" is also defined broadly in section 37(1) to include all forms of primary and subordinate measure, instruments, orders, regulations, rules, schemes, warrants, by-laws or other instrument made under an Act of Parliament, and Orders in Council made in the exercise of the Royal Prerogative. The definition would include all of the legislative measures arising in this case.

80 The process of automatic modification in section 29 is subject to two statutory clarifications. First, it applies only so far as necessary i.e. it does not modify a domestic law that, otherwise, is already consistent with the TCA. Secondly, it covers modifications "*necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement*". This ensures that the construction of domestic law which best secures compliance by the United Kingdom with its international law obligations is to be applied. This is needed because under the TCA the parties bind themselves to a variety of international law obligations beyond the TCA itself.

81 The courts and tribunals will in due course confront many situations where they must interpret and apply the TCA in order to find out what the effect of domestic law is. Parliament has instructed the courts and tribunals as to the principles of interpretation to be applied to the TCA. The Act cross-refers to the TCA which itself incorporates the Vienna Convention on the Law of Treaties. Section 30 EU(FR)A 2020 provides:

> "30 Interpretation of agreements
>
> A court or tribunal must have regard to Article COMPROV.13 of the Trade and Cooperation Agreement (public international

> law) when interpreting that agreement or any supplementing agreement."

COMPROV.13 provides:

> "Article COMPROV.13: Public international law
>
> 1. The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.
>
> 2. For greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party.
>
> 3. For greater certainty, an interpretation of this Agreement or any supplementing agreement given by the courts of either Party shall not be binding on the courts of the other Party."

82 Applying section 29 there are three steps to take. The first is to identify the relevant domestic law. This is Regulation 261/04 as amended. The second step is to determine whether the domestic law is the same as the corresponding provisions of the TCA. If it is then under section 29(1) there is no need to apply the automatic read-across. If there is inconsistency, daylight or a lacuna then the inconsistent or incomplete provision is amended or replaced, and the gap is plugged. As to this the TCA imposes a duty on the parties, in pursuit of a principle of consumer protection, to "*ensure"* that "*effective*" measures are taken to protect consumers in the field of transport including in relation to compensation for denied boarding and with ensuring "*efficient handling complaint handling procedures*". In my view Regulation 261/04 as amended does this provided that it is construed purposively to achieve that requisite degree of consumer protection. The judgment of Lord Justice Coulson achieves this. The claims permitted under this measure are modest; if satisfaction of such claims entails litigation the costs could subsume the compensation within moments of a lawyer being instructed. This case has arisen as a test case of the scope of the right to compensation. Article AIRTRN.22: provides that there should be "*efficient complaint handling procedures*. Litigation is to be avoided but if it arises then it should be adjudicated upon, with the principle of consumer protection well in mind, on as summary a basis as possible. I endorse the conclusions of Lord Justice Coulson at paragraphs [45] – [49] of his judgment who emphasises that cases concerning compensation should be resolved with minimum cost and on the papers if at all possible.

Summary of basic principles

83 It is helpful to set out some basic principles:

i) It is helpful to summarise some basic conclusions. In this case, the task of the court has been relatively straightforward since as of the

date of this judgment the new legal regime has been in place for only a few months and nothing of relevance in the case law of the CJEU has changed. As time moves on, and the case law of the CJEU evolves, then the differences between the current state of EU law and that which the Court is to take account of might become more accentuated. At that stage the analysis might become more complex. The basic principles of relevance in this appeal can be summarised as follows:

ii) Regulation 261/04 is direct EU legislation.

iii) It takes effect in domestic law as amended by the Air Passenger Regulations 2019.

iv) It should be given a purposive construction which takes into account its recital and other principles referred to in the body of the regulation and in the recitals.

v) To the extent necessary this process of interpretation would include any provision of international law that has been incorporated into the Regulation by reference.

vi) The meaning and effect of the measure should be determined by reference to case law of the CJEU made prior to 11 pm 31st December 2020.

vii) General principles of EU Law from case law and as derived from the Charter of Fundamental Rights and the TFEU, are relevant to interpretation.

viii) In construing and applying such a Regulation the Court can depart from any retained CJEU case law or any retained general principles. The Court is not bound by such principles and may depart from them if it considers it right to do so. It has not been necessary to do so in this case.

ix) The provisions of the TCA and the EU(FR)A 2020 may be relevant to the effect of domestic law insofar as the subject matter of the domestic law in issue overlaps with the subject matter of the TCA and/or EU(FR)A 2020 and in so far as domestic law does not already cover the subject matter of the TCA.

x) If domestic law does not already reflect the substance of the TCA then domestic law takes effect in the terms of the TCA. In this case domestic law already implements the relevant provisions of the TCA and there is no need for any further transposition in order to achieve the requisite effect.

84 As observed, none of these principles caused any difficulty in the present case. I would allow the appeal.

LORD JUSTICE HADDON-CAVE

85 I agree with the judgments of Lord Justice Coulson and Lord Justice Green.