

Blanche v EasyJet

The Court of Appeal has provided guidance on the circumstances in which airlines will be able to avoid paying compensation to passengers whose flights have been delayed as a result of air traffic control decisions, in the case of *Blanche v EasyJet* [2019] EWCA Civ 69.

The Claimant was booked onto a flight travelling from Brussels to London Gatwick on 10 October 2014, scheduled to leave Brussels at 17:45 and to arrive at Gatwick at 18:55. The flight was delayed, leaving at 23:45 and arriving at 00:37, and so was 5 hours and 42 minutes late in total.

The reason for the delay was that there had been thunderstorms that afternoon with the result that Air Traffic Control (“ATC”) at Gatwick had suspended all eastbound flights. The aircraft, which had been scheduled to fly from London to Brussels at 16:10, had been delayed, meaning that it did not depart for Brussels until 21:40, and hence that it was not there in time to fly the Claimant to Gatwick at 17:45.

The Claimant issued proceedings claiming compensation for the delay to the flight.

The claim was brought under Regulation (EC) No. 261/2004. This provides, in Regulation 5, that in the case of a cancelled flight (and it was common ground that passengers subjected to a delay of more than three hours are also entitled to compensation under the regulation, under previous CJEU case-law), passengers have a right to compensation unless the airline can rely on the defence in Regulation 5(3). This states that: *“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.”*

The Regulation contains no definition of “extraordinary circumstances”, but there is some interpretative assistance to be gained from the Recitals, which state as follows: *“(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”* and *“(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.”*

In short, the Claimant, relying on Recital 14, argued that in this case extraordinary circumstances could not be said to have been present, since the cause of the ATC action was a thunderstorm, which is not out of the ordinary, and is something inherent in the normal exercise of the operation of an airline, and not beyond its control on account of its nature or origin (as was said in *Wallentin-Hermann v Alitalia-Linee Aeree Italiane SpA* [2009] Bus LR 1016 to be the test for whether “flight safety shortcomings” amounted to extraordinary circumstances for the purpose of Regulation 5(3)).

The Court of Appeal, affirming the decision of HHJ Melissa Clarke, roundly rejected these arguments and held that the Defendant airline was not obliged to pay compensation in the circumstances of the case.

Coulson LJ, giving the judgment of the court, stated that Recital 15 could not be clearer, and was mandatory in effect, and hence it followed that extraordinary circumstances definitively did exist where an ATC decision had caused a long delay to a flight, as had occurred in this case.

He also did not find any support for the Claimant's argument in any of the past authorities on Regulation 5(3). *Wallentin-Hermann* was irrelevant, since it was addressing the kind of situations that *might* amount to extraordinary circumstances under Recital 14, not ATC decisions, which under Recital 15 did amount to such circumstances. The test in *Wallentin-Hermann* did not apply to cases under Recital 15, in which extraordinary circumstances were deemed automatically to exist.

The same could be said about *Huzar v Jet2.com Ltd* [2014] EWCA Civ 791, save that Elias LJ in that case had referred (albeit obiter) to air-traffic control problems not being able to be characterized as being inherent in the operations of an airline (and hence by implication would be extraordinary circumstances even under Recital 14). None of the other cases relied on by the Claimant assisted as they were not concerned with Recital 15.

Finally on the Recital 15 point, the court concluded that policy considerations also weighed in favour of the interpretation contended for by the Defendant. Passenger safety is of paramount importance in the regulation of carriage by air, and it would be invidious for airlines to have an incentive to challenge ATC decisions for fear of compensation claims, and/or to have to seek detailed explanations from ATC for every decision that might cause delays to flights for that reason.

The court noted, however, that Recital 15 did not provide an absolute "get out of jail free" card to airlines, since in order to rely on air-traffic management decisions under Regulation 5(3), they would still have to show that all reasonable measures had been taken to avoid the delay caused by the impact of the decision.

In addition, the court dismissed the Claimant's alternative argument that for an ATC decision to be within the scope of Recital 15, it had to apply (and only apply) to the particular aircraft in which the Claimant was flying. This argument was rejected, and the reference to a "*particular aircraft*" in Recital 15 was explained as being merely a requirement to show that the ATC decision was in fact the reason for the delay of the flight in question.

This decision will be welcomed by airlines, since it removes a significant sub-group of delayed boarding claims: it will now be much harder to bring such claims where the reason for the delay is an ATC decision (although as noted above, the airline still needs to prove that it has taken all reasonable measures to avoid the delay). Claims where there has been no such ATC issue, such as technical issues with an aircraft, or weather problems with no ATC order in place, will still be determined in accordance with the previous case-law under Recital 14.