

Passenger air rage: extraordinary circumstances under EU261

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Air rage and passenger flight delay claims under EU261: cause and effect

In the context of aviation law and specifically air passenger regulation, Brexit does not mark a stark departure from the status quo. From 1 January 2021, EU Regulations, to include EU261/2004^[1], stand incorporated into UK domestic law, amended as necessary by statutory instrument to be compatible with the same but not (for now) fundamentally changing the rights and obligations concerned. A second impact of The European Union (Withdrawal) Act 2018, is to incorporate into domestic law, all decisions of the Court of Justice of the European Union (CJEU) handed down prior to 31 December 2020.

Since entering into force in February 2005, EU 261 has vexed both carrier and passenger alike and provided a rich and steady stream of referrals to the CJEU by national courts. The pendulum swing of justice has oft swung in favour of the claimant passenger, so it is refreshing that in 2020 the CJEU delivered a judgment that is more balanced and in fact supportive of the carrier. In *LE v Transport Aéreos Portugueses SA*^[2] the CJEU further refined judicial interpretation of EU261, specifically entitlement of the carrier, in the context of unruly passenger behaviour, to seek relief under the defence of “extraordinary circumstance” from obligation to pay compensation for flight delay.

Background

Incidents of air rage even in times of Covid-19 remain on a worrying upwards trajectory. They can be alarming and upsetting for passengers and crew alike. In more extreme cases, they have the potential to cause serious air incident or accident. At an operational level, the antics of the unruly passenger may prompt an in-flight diversion and spawn passenger flight delay compensation claims. In 2020, the CJEU considered whether flight diversion prompted by unruly passenger behaviour constitutes an, “*extraordinary circumstance*,” under EU261 so to relieve the carrier of obligation to pay flight delay compensation, and whether this is so (and this was the novel aspect), not only as regards the diverted flight, but also of a subsequent flight operated by the carrier and using the same aircraft.

Facts

The claimant passenger made a reservation with Transportes Aéreos Portugueses SA (TAP) for a flight from Fortaleza (Brazil) to Oslo (Norway), with a stopover in Lisbon (Portugal). The flight was operated, but with a delay in arrival in Oslo of almost 24 hours. The aircraft which operated the first leg of his flight from Brazil to Portugal was delayed on its immediately preceding inbound flight : it diverted to Las Palmas de Gran Canaria to disembark an unruly passenger. In a disgraceful display of air rage, the individual concerned had bitten a fellow passenger and assaulted other passengers and members of the cabin crew. It was common ground that the pilot in command was justified in diverting the flight, mindful of his obligation for flight safety. The claimant was carried on the next flight operated by TAP, the following day. On account of the resulting flight delay he sought compensation of Euro 600 from TAP under EU261. TAP declined to pay, seeking recourse to the “*extraordinary circumstance*” defence in the EU261.

The referral for preliminary ruling

In broad terms, under EU261, long flight delay and cancellation entitle the inconvenienced passenger to monetary compensation. The regulation seeks to strike a balance: operating carriers are relieved of obligation to compensate if they prove that the delay or cancellation is caused by *extraordinary circumstances* that could not have been avoided, even if all reasonable measures had been taken (Article 5.3). In the instant case, the national Portuguese court had doubts as to the legal classification of the circumstances giving rise to the delay of the flight concerned, and as to the reasonableness of the measures implemented by TAP and so, in January 2019, referred the matter to the CJEU for a preliminary ruling.

Held

In its judgment, the Fourth Chamber held:-

- First, the unruly behaviour of a passenger which has justified the pilot in command in diverting in order to disembark that passenger, falls within the concept of ‘*extraordinary circumstances*’ since it is not inherent in the normal exercise of the activity of the carrier. Secondly, such behaviour is not, in principle, under the control of carrier, since, (i) it is the act of a passenger whose behaviour and reactions to the crew’s requests are not, in principle, foreseeable and, (ii) on board an aircraft, both the commander and the crew have only limited means of controlling such a passenger.

- Secondly, in order to be relieved of its obligation to compensate passengers under EU261, and by reference to the wording of EU261, an operating air carrier may rely on an, ‘*extraordinary circumstance*,’ which affected the cancelled or delayed flight, but also (as here) a previous flight which it operated using the same aircraft. This presupposes that there is a direct causal link between the occurrence of that circumstance which affected a previous flight and the delay or cancellation of a subsequent flight. That is a question for the national court to determine in the light of the facts available to it and taking into account, inter alia, the conditions of operation of the aircraft concerned.
- Finally, for the purposes of Article 5(3) of EU261, analysis carried out by the airline, which concludes that sending another aircraft would not avoid the situation of delay and therefore the transfer of the transit passenger to a flight scheduled for the following day (here TAP only operated one flight per day to the passenger’s final destination), corresponds to conduct by the airline that it took all reasonable measures, even if it was not possible to remedy the delay.

Comment

The decision prompts reflection:-

- What does the decision mean for carriers? An in-flight diversion to disembark an unruly passenger will not, in every situation, constitute an “*extraordinary circumstance*” under the regulation. There is a fact enquiry to be made in each case. The unruly behaviour of a passenger cannot be regarded as beyond the actual control of the operating air carrier, and therefore an, ‘*extraordinary circumstance*’, in all situations. It will not be so if the carrier contributed to the occurrence of the behaviour or was in a position to anticipate it and take appropriate measures on the basis of warning signs of such behaviour, but did not. This may be the case where the carrier accepts on board a passenger already displaying behavioural problems (eg aggression, use of abusive language at the boarding gate or being intoxicated) or where cabin crew in flight, offer and continue to serve alcoholic drinks to a passenger already exhibiting outward signs of inebriation.
- Is it time to nip the problem in the bud? In an earlier [article](#) ^[3] we considered whether, against a Covid-19 backdrop of growing public acceptance of testing, in the context of flight safety, the time has come to consider mandatory breathalyser tests prior to boarding, to quell incidents of alcohol-fueled air rage?
- Is EU261 still fit for purpose? Some 16 years after its entry into force, ambiguities in the regulation resulting in inconsistencies in how it is applied, continue to provide a steady stream of referrals by EU national courts to the CJEU. So often, the bone of contention for passengers and carriers alike is whether a given fact scenario constitutes an “*extraordinary circumstance*” under EU261, so to relieve the carrier of obligation to pay flight delay/cancellation compensation. Over recent years the CJEU has promulgated judicial guidance on EU261 in the context of delay or flight cancellation from incidents of bird strike, to unforeseen technical problems, from strikes to bad weather and crew sickness. In 2016, the European Commission published Interpretive Guidelines, to serve as a stop-gap measure pending reform of the passenger rights regulation. Dial forward five years, and reform (albeit in hand) is still awaited. In the UK in this new post-Brexit era, we do not expect reform of EU261, as now incorporated into UK domestic law, to be an immediate or pressing priority of the UK Government. However, opportunity may yet be taken to refine provisions, to give clarity of intention where there has for so long been irritating uncertainty.

[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.

[2] Case C-74/19, Judgment of the Court (Fourth Chamber) of 11 June 2020.

[3] ‘Breathalyser Test Before Boarding’ Lorraine Wilson, published 26 October 2020 .

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