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Lipton v BA Cityflyer Ltd [2024] UKSC 24: pilot illness and the continuing erosion of "extraordinary circumstances"

What is the case about?

The case concerned Mr and Mrs Lipton's claim for compensation under Regulation (EC) No. 261/2004 ("**Regulation 261**") in respect of a BA Cityflyer flight from Milan to London on 30 January 2018.

Approximately one hour before the scheduled time of departure, the captain of the aircraft reported to the airline's medical provider MedAire that he had become unwell unexpectedly, and he was declared unfit to fly. The pilot was neither on duty nor at his place of work when he became ill, and the exact nature of his illness is unknown.

BA Cityflyer was unable to find a replacement for the captain at short notice and the flight was cancelled. Mr and Mrs Lipton were rerouted on another flight, which arrived at London City Airport 2 hours and 36 minutes after the scheduled arrival time of their original flight. On that basis, Mr and Mrs Lipton filed a claim for compensation for delay under Articles 5(1)(c) and 7 of Regulation 261.

How did it get to the UK Supreme Court?

Mr and Mrs Lipton's claim was dismissed at first instance in June 2019 on the basis that the captain's sickness constituted 'extraordinary circumstances' for the purposes of Regulation 261. Mr and Mrs Lipton appealed this decision, which was heard in February 2020, but HHJ Iain Hughes QC, who was sitting in the Portsmouth Combined Court, dismissed the appeal.

A further, successful, appeal was made by Mr and Mrs Lipton to the Court of Appeal in March 2021. The Court of Appeal found that a granular investigation of the cause of the captain's sickness (including, for example, "*when and where the member of staff ate the suspect prawn sandwich*") was not required. In doing so, the Court of Appeal determined that the captain's sickness was inherent within the carrier's activity and operations. The Court of Appeal also set out nine useful principles for interpreting what is now known as assimilated law and CJEU caselaw following Brexit.

BA Cityflyer appealed the Court of Appeal's decision. The appeal was heard by a panel of five Supreme Court justices in February 2024.

What was at stake?

The two grounds of appeal to be determined by the UK Supreme Court were as follows:

1. Ground 1: what is the meaning of "extraordinary circumstances"?
2. Ground 2: what law applies and why?

As the UK Supreme Court expressly recognised, although the financial stakes for the appellants may have been small, the wider ramifications of the case were likely to be considerable and had the potential to affect millions of passengers.

On Ground 1, if the UK Supreme Court determined that the captain's sickness was not an "extraordinary circumstance" for the purpose of Regulation 261, this would further erode the protection available to carriers in relation to delayed and cancelled flights. This, in turn, would increase the ability of passengers to claim compensation.

If, on the other hand, the UK Supreme Court determined that the captain's absence did, comprise "extraordinary circumstances", this would increase protection for carriers while also signalling a potential divergence in the approach of the UK courts from the CJEU in relation to the interpretation of Regulation 261. The UK courts are now able to do this with more freedom following the recent implementation of the Retained EU Law (Revocation and Reform) Act 2023 but, to date, have been reluctant to do so.

On Ground 2, the approach taken by the Court would have potentially far-reaching implications for the

interpretation and application of assimilated law and CJEU caselaw. This would naturally include Regulation 261, which has been retained in English law in a largely unamended form as Assimilated Regulation (EU) No. 261/2004 ("**Assimilated Regulation 261**") pursuant to the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019/278.

What did the UKSC determine?

The UK Supreme Court dismissed BA Cityflyer's appeal and ruled that the Liptons were entitled to compensation in the amount of €250 each.

On Ground 1, the UK Supreme Court determined unanimously that the captain's sickness did not qualify as "extraordinary circumstances." The UK Supreme Court found that this term needed to be interpreted in light of the purpose of the Regulation 261, which was to provide consumers with a high level of protection. In the UK Supreme Court's view, staff illness was an inherent part of the airline's activity and was comparable to the physical wear and tear of an aircraft's physical components.

This meant that, even though the illness in this case was external to the airline, it was still inherent to its operations. Further, the UK Supreme Court reaffirmed that the purpose of Regulation 261 is to provide a standardised level of compensation for passengers, and agreed with the Court of Appeal that this meant a complex analysis was not required.

On Ground 2, the UK Supreme Court took a different approach to the Court of Appeal. It decided that the applicable law in this case was Regulation 261 as it applied immediately prior to the end of the Brexit implementation period (i.e., before 11pm on 31 December 2020). This was on the basis that this was the law in force when the Liptons' cause of action accrued. The Court of Appeal had, wrongly, applied Assimilated Regulation 261 instead.

Key takeaways

The headline is that cancellations and delays caused by pilot sickness, even when suffered off duty, are not covered by "extraordinary circumstances" and will give rise to compensation rights.

However, following the UK Supreme Court's decision on Ground 2, this judgment technically only strictly relates to claims made under Regulation 261 and not to any claims made under Assimilated Regulation 261. Claims under Regulation 261 are obviously time limited post-Brexit but, with a six-year limitation period applying in England and Wales, there is still scope for affected passengers to bring claims under the older legislation until 2028. This is potentially significant in light of the "opt-in" class action litigation currently before the High Court (KBD) in *Smyth v British Airways Plc and easyJet Airline Company Limited*, where the Defendants' applications for the strike out of the Claimant's claim were heard earlier this week (with judgment reserved).

More broadly, and although they are not bound to do so, the approach taken by the UK Supreme Court to Ground 1 and the meaning of "extraordinary circumstances" will undoubtedly be followed by other UK courts when considering claims under Assimilated Regulation 261. For all intents and purposes, this means that the erosion of "extraordinary circumstances" has continued, and passengers are now able to claim delay and cancellation compensation in yet another situation.

There is also no reason why this judgment will be limited either to absences caused by sickness or to the absence of pilots in particular. Adopting the logic used by the UK Supreme Court, it is highly likely that the absence of other key aircrew members, and absences caused by other "wear and tear" issues, will also not be considered "extraordinary circumstances."

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