



Neutral Citation Number: [2021] EWHC 1336 (QB)

Case No: QB-2020-001410

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2021

Before:

GERAINT WEBB QC
(Sitting as a Deputy High Court Judge)

Between:

MARJOLYN VARANO
- and -
AIR CANADA

Claimant

Defendant

Harry Gillow (instructed by Hayward Baker Solicitors) for the Claimant
Tom Stewart Coats (instructed by Norton Rose Fulbright LLP) for the Defendant

Hearing date: 3 March 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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GERAINT WEBB QC

Geraint Webb QC:

(1) Introduction

The parties

1. The Claimant, Marjolyn Varano, seeks compensation from the defendant airline, Air Canada, in the fixed sum of €600 in respect of a delayed flight in April 2016. The claim has been brought pursuant to Article 7 of Parliament and Council Regulation (EC) No 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding, or cancellation, or long delay of flights (“**Regulation 261**”).
2. The Defendant, Air Canada, denies that the Claimant is entitled to compensation under Regulation 261.

Agreed facts

3. It is common ground that:
 - a. For the purposes of Regulation 261, Air Canada is not a “Community carrier”, meaning that it is not an air carrier with an operating licence granted by a Member State.
 - b. In 2016 the Claimant made a single booking with the Defendant to fly from London Heathrow to Austin-Bergstrom International Airport, Texas, USA, via Toronto Pearson International Airport, Canada, by means of two directly connecting flights.
 - c. There was no delay to the first flight from London Heathrow to Toronto Pearson International; it landed at Toronto slightly ahead of schedule at 14:53 UTC on 10 April 2016.
 - d. The second flight, from Toronto to Austin, was scheduled to depart at 18.25 UTC, over three and a half hours later.
 - e. The aircraft allocated to operate the second flight was due to fly into Toronto from J.A. Douglas McCurdy Airport, Nova Scotia, but that incoming flight was cancelled as a result of a technical issue raising safety concerns. An alternative aircraft was therefore allocated for the flight from Nova Scotia to Toronto and then from Toronto to Austin. That alternative flight arrived into Toronto at 22.44 UTC and departed Toronto at 23.42 UTC, over five and a quarter hours late.
 - f. As a result, the Claimant’s flight arrived in Austin five hours and forty-nine minutes after the originally scheduled arrival time.
 - g. The Claimant is domiciled in the USA and is not a citizen of any Member State.

- h. If the Claimant does have a right to compensation under the Regulation, contrary to the Defendant's position, then the appropriate compensation in this case would be €600 having regard to the length of the flight and the length of the delay.

The Issues

4. Ms Varano contends that she has a right to compensation from Air Canada for the delay to the flight pursuant to Regulation 261.
5. Air Canada's position is that Regulation 261, properly construed in accordance with principles of international law, cannot and does not apply in circumstances in which (i) the Defendant is a non-Community carrier and (ii) the causative delay arose on the second flight, being a flight operating outside of the EU (Toronto to Austin).

Procedural history

6. The claim form was issued on 5 August 2019 in the County Court. The Claimant applied, unsuccessfully, for summary judgment on 1 October 2019. The Defendant then successfully applied for this claim to be transferred to the High Court. The Claimant's application to have the matter transferred back to the County Court was dismissed by order of Senior Master Fontaine dated 13 July 2020; in doing so she noted that: "*the issues as to whether the Court of Appeal decision and CJEU authorities referred to by the Claimant can be distinguished, the effect of public international law upon the competence of the EU and whether an issue should be referred to the CJEU for a determination are complex issues of a type that would normally be dealt with by the High Court*".

(2) Regulation 261

7. Regulation 261, which repealed Regulation (EEC) No 295/91 (OJ 2004 L46, p 1), contains (amongst others) the following recitals:

"(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

(3) While Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays.

(4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market...”

8. Article 1, under the heading “subject” provides as follows:

“This Regulation establishes, under the conditions specified herein, minimum rights for passengers when:

- (a) they are denied boarding against their will;
- (b) their flight is cancelled;
- (c) their flight is delayed.”

9. Article 2 includes the following Definitions

“(b) ‘operating air carrier’ means an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger

(c) ‘Community carrier’ means an air carrier with a valid operating licence granted by a Member State ...

...

(h) ‘final destination’ means the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected;”

10. Article 3 sets out the “scope” of the Regulation as follows:

“This Regulation shall apply:

(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier”

11. Accordingly, the Regulation applies to passengers departing from an airport located in the territory of an EU Member State, regardless of whether the flight is operated by a

Community carrier or a non-Community carrier. Separately, it also applies (subject to the stated qualifications) to passengers departing from an airport located in a third country to an airport in the territory of a Member State, but only if the operating air carrier of the flight is a Community carrier.

12. Articles 4 and 5 set out the rights of a relevant passenger in respect of denied boarding and cancellation, respectively. Those rights include: compensation pursuant to Article 7 (determined by reference to the length of the flight and the length of the delay); assistance in the form of a right to reimbursement or re-routing pursuant to Article 8; and a right to certain types of care pursuant to Article 9 (which care includes meals and hotel accommodation, and particular provisions for persons with reduced mobility and unaccompanied children).
13. Article 6 of the Regulation sets out the rights of a relevant passenger in the event of the delay of a flight. Depending on the type and length of the flight and the length of the delay, those rights include assistance under Articles 8 and 9; it does not refer to any right of compensation under Article 7 in the event of delay.
14. The compensation provided for by Article 7 is determined by reference to the distance of the flight and the length of the delay: the amount of compensation under Article 7(1) being:

“(a) EUR 250 for all flights under 1,500 kilometres

(b) EUR 400 for all intra-Community flights of more than 1,500 kilometres, and for all other flights between 1,500 and 3,500 kilometres

(c) EUR 600 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”.

15. Article 7(2) allows the carrier to reduce compensation “*when passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked*”.

(3) Judicial consideration of Regulation 261

16. The meaning and effect of Regulation 261 has been the subject of detailed consideration by the Court of Justice of the European Union (“**the CJEU**”) in a number of cases. It has also been considered by the High Court and the Court of Appeal. The authorities bundle produced by the parties includes 49 authorities and other materials, running to over 1500 pages. The following paragraphs summarise the key authorities relied upon by the parties in chronological order.

CJEU decisions prior to the Court of Appeal's decision in Gahan

17. In *Sturgeon and others v Condor Flugdienst GmbH* (Joined Cases C-402/07 and C-432/07) [2010] Bus LR 1206 the CJEU considered two joined cases involving flights operated by Community carriers from outside the European Union to an airport within a member state. In both cases the claimants had been told that their flights were cancelled and they were booked onto different flights; the claimants eventually arrived at their EU destination over 22 hours after the originally scheduled arrival time. In both cases the defendant air carriers refused to pay compensation on the basis that the flights had been merely delayed (delay not giving rise to any entitlement to compensation under Article 6) rather than cancelled (cancellation potentially giving rise to a right to compensation under Article 5).
18. The CJEU, with the benefit of an Opinion from Advocate General Sharpston, considered whether a right to compensation arose in respect of delay under the Regulation, notwithstanding the absence of any such express right in Article 6. The Court noted: (i) the high level of protection for air passengers afforded by the Regulation, as set out in recitals 1 to 4, at [44]; (ii) that the provisions conferring rights on air passengers must be “interpreted broadly”, at [45] and (iii) that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified, at [48]. The court considered, at [54], that passengers whose flights have been cancelled and whose flights are delayed “suffer similar damage” and that the situation of passengers whose flights are delayed is “scarcely distinguishable” from that of passengers whose flights are cancelled.
19. In the circumstances, and in accordance with the principle of equal treatment, it was held, at [69], that Articles 5, 6 and 7 of the Regulation must be interpreted, as meaning that passengers whose flights are delayed such that “*they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier*” are entitled to compensation under Article 7, even though the Regulation did not expressly provide for such a right.
20. In *Nelson v Deutsche Lufthansa AG* (Joined Cases C-581/10 and C-629/10) [2013] 1 All ER (Comm) 385 the CJEU again considered two cases, with the benefit of an Opinion from Advocate General Bot. The first case concerned the delay of a flight from Lagos to Frankfurt; it was argued by the Community carrier that the right to compensation for delay could not be reconciled with the rules on claims for damages under the Montreal Convention and that the CJEU had exceeded its jurisdiction in *Sturgeon*. The second case concerned a reference made by the High Court in the context of a challenge by an international leisure group against a decision by the Civil Aviation Authority that it was bound to give effect to the ruling in *Sturgeon* such as to permit claims for compensation for delay. The reference included a question as to whether Articles 5 to 7 of the Regulation were invalid as inconsistent with the Montreal Convention and/or for breach of the principle of proportionality and/or for breach of the principle of legal certainty.
21. The CJEU held that compensation for delay in accordance with the decision in *Sturgeon* did not contravene Article 29 of the Montreal Convention and did not violate the principles of legal certainty and proportionality. The court confirmed the decision in

Sturgeon and followed the decision in **R. (on the application of International Air Transport Association (IATA)) v Department of Transport** (C-344/04) [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 20 in which the CJEU had considered the interplay between the Regulation and the Montreal Convention.

22. The CJEU in *Nelson* noted that the Montreal Convention concerned damage arising as a result of delay and that it implied the need for a causal link between the delay and the damage, which damage would be individual to the passenger. In contrast, the CJEU held that Regulation 261 provided compensation for loss of time caused by a delay, which the court considered could not be categorised as damage occasioned by delay within the meaning of the Convention. The court concluded, at [54], that “*the specific obligation to pay compensation, imposed by Regulation 261/20004, does not arise from each actual delay, but only from a delay which entails a loss of time equal to or in excess of three hours in relation to the time of arrival originally scheduled*”. The CJEU rejected, at [68], the contention that Articles 5-7 of the Regulation were invalid in light of the principle of legal certainty.
23. **Air France SA v Folkerts** (Case C-11/11) [2013] All ER (EC) 1133, concerned a flight operated by a Community carrier from Bremen, Germany, to Asunción, Paraguay which involved connecting flights in Paris, France, and São Paulo, Brazil. The departing flight from Germany was delayed by two and a half hours, resulting in the claimant missing her connecting flight in Paris. As a result, she also missed the connecting flight from São Paulo. She eventually arrived in Paraguay 11 hours after the originally scheduled arrival time. An issue arose as to whether compensation was payable notwithstanding that the delay to the first flight was less than the threshold specified in Article 6(1). The court held that the compensation was to be quantified by reference to the delay in arriving at the final destination, which included the delay on the last leg of the journey (Brazil to Paraguay), notwithstanding the fact that this flight both started and terminated outside EU airspace.
24. Following *Sturgeon* and *Nelson* the court noted at [33] and [34] that it had been determined that “*the irreversible loss of time*” giving rise to the right to compensation is that which arises on arrival at “*the final destination*”, defined by Article 2(h) of the Regulation. Accordingly, the court held that “*It follows that, in the case of directly connecting flights, it is only the delay beyond the scheduled time of arrival at the final destination, understood as the destination of the last flight taken by the passenger concerned, which is relevant for the purposes of the fixed compensation under Article 7...*” It was irrelevant that the individual flights were delayed for less than the relevant threshold; it was the length of the delay at “*the final destination*” which triggered the right to compensation.

The Court of Appeal’s judgment in Gahan

25. The Court of Appeal considered Regulation 261 in the joined appeals of **Gahan v Emirates and Buckley and others v Emirates** [2017] EWCA Civ 1530, [2018] 1 WLR 2287 (CA), the Civil Aviation Authority and the International Air Transport Association intervening. In both cases the claimants had booked flights with a non-Community carrier to fly from Manchester to a destination outside the EU.

26. In the first case Miss Gahan's flight from Manchester was delayed and arrived in Dubai 3 hours and 56 minutes late, resulting in the claimant missing her connecting flight to Bangkok; she arrived in Bangkok over thirteen hours after the originally scheduled arrival time. The airline, Emirates, offered to pay €300 for the delay to the first flight, but contended that the second flight did not fall within the scope of the Regulation as it had not departed from within the European Union. The judge at first instance agreed and dismissed the claimant's claim, following the decision of the High Court in *Sanghvi v Cathay Pacific Airways* [2012] 1 Lloyd's Rep 46. In *Sanghvi* the claimant's flight from London to Hong Kong had been delayed and the claimant missed his connecting flight, arriving in Sydney, Australia, 2 hours 11 minutes late; the claim was dismissed on the basis, at [24], that the Regulation was not applicable as it is concerned with delay on individual flight components of a journey and that the relevant flight had departed from Hong Kong and not the UK. The court in *Sanghvi* had been referred to *Emirates Airlines v Schenkel* Case C-173/07 [2009] 1 Lloyd's Rep 1 concerning a claim in respect of an outward and return journey rather than an interconnecting flight, but no reference was made to *Sturgeon* in that judgment.
27. In the second case the flight from Manchester was delayed, landing in Dubai 2 hours and four minutes late. As a result, the claimants landed in Dubai only 46 minutes before the connecting flight to Sydney was due to depart; the claimants were automatically rebooked onto a flight the following day, arriving in Sydney over 16 hours later than originally scheduled. The airline offered no compensation, contending that only the first flight fell within the Regulation and that since that flight had been delayed for less than three hours, no compensation was due. In that case the judge had allowed the claim, awarding compensation for the overall delay.
28. The defendant airline contended in both cases that the two legs of the interconnecting flights were separate flights and had to be treated as distinct units of travel, that the Regulation was only applicable to the first leg out of EU airspace and that only this leg was relevant to the calculation of any delay. It was submitted that the reasoning in *Schenkel* was applicable and had been correctly followed in *Sanghvi*.
29. It was further contended that the decision of the CJEU in *Air France SA v Folkerts* should be distinguished on the basis that it concerned a Community carrier. The defendant also argued that it was outside the competence of the CJEU to interpret the Montreal Convention as it applies to non-EU carriers.
30. In addition, the defendant maintained that if Regulation 261 were to apply to flights performed by non-Community carriers then it would offend against the principle of extraterritoriality and that no account, therefore, could be taken of delay which occurs outside the jurisdiction. The defendant noted that the extraterritoriality principle was raised at the time of negotiations over what became Regulation 261 and it was submitted that this explained why Community carriers and non-community carriers are treated differently under Article 3. Further, it was submitted (see [39]) that the cause of action for compensation under Regulation 261 does not arise until the passenger arrives at the final destination (relying on *Nelson*), meaning that the cause of action arises outside the jurisdiction and so the imposition of an obligation to pay compensation on a non-Community carrier must involve a breach of the extraterritoriality principle.

31. The Court of Appeal rejected the various arguments of the defendant airline and held that the claimants were entitled to compensation for delays in reaching the final destination in accordance with Article 7. The court held that *Sturgeon* and *Folkerts* established that liability for compensation for delay under Article 7 depends on the delay in reaching “the final destination”. Where a carrier provides a passenger with directly connecting flights to a final destination, those flights were taken together for the purpose of assessing whether there had been a delay of three hours or more, at the final destination [73]. It was noted, at [74], that *Schenkel* concerned the different question as to whether an outward and return flight had to be taken together. The court also noted, at [75], that the reasoning of the decision of the High Court in *Sanghvi* was not binding on the court and, in any event, no compensation was due in that case if the flights were treated together as the total delay at the final destination was less than 3 hours.
32. The Court of Appeal noted, at [86], that in *Dawson v Thomson Airways Ltd* [2014] EWCA Civ 845, [2015] 1 WLR 883 it had been held that the jurisprudence of the CJEU as to the meaning of Regulation 261 is binding on the court even though it conflicts with the jurisprudence of the Supreme Court. Arden LJ, as she then was, concluded that: “*It is correct that the decision in Dawson concerned a Community carrier and not a non-Community carrier but the principle was that a point of international law decided by the Court of Justice was binding on the national court if it was a necessary step in reaching a conclusion as to the meaning of an EU Regulation. This is equally applicable to Community and non-Community carriers and thus Dawson cannot be distinguished*”. This was notwithstanding concerns about the way in which the CJEU arrived at its decision in *Nelson*, at [88].

Decisions of the CJEU since Gahan – Wegener and České aerolinie

33. I have been referred to two further decisions of the CJEU since the Court of Appeal’s judgment in *Gahan* in 2017.
34. In *Wegener v Royal Air Maroc SA* (Case C-537/17) [2018] Bus LR 1366 the claimant had booked a flight, as a single unit, with a non-EU carrier from Berlin to Agadir with a scheduled stopover in Casablanca and a change of aircraft. The flight departed late from Berlin. On arrival at Casablanca the claimant presented herself for boarding of the aircraft destined for Agadir, but was refused boarding and was informed that her seat had been reassigned to another passenger. She had to take a later flight with the result that her arrival in Agadir was four hours later than originally scheduled. The air carrier refused her application for compensation under Regulation 261. The German court found that it was on the arrival of the second flight that there was a delay of four hours and made a reference to the CJEU. The reference, rephrased by the CJEU, at [11], was: “*whether article 3(1)(a) of Regulation No 261/2004 must be interpreted as meaning that the Regulation applies to passenger transport effected under a single booking and comprising, between its departure from an airport situated in the territory of a third state, a scheduled stopover outside the European Union, with a change of aircraft*”.
35. The court noted, at [15], that “*if a flight such as the second flight, which was made entirely outside the European Union, were to be considered a separate transport operation, it would not come within the remit of Regulation No 261/2004. On the other hand, if a transport such as that at issue in the main proceedings were to be considered*

*as a whole, with its point of departure in a member state, the Regulation would apply". The Court noted, at [16-17], that in *Folkerts* it had been held (i) that it is delay "at the final destination" which triggers the right to compensation (at [32] and [33]) and (ii) that "the concept of "final destination" is defined in article 2(h) of the Regulation, as the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight taken by the passenger concerned" (at [34] and [35]). The court held, at [18], that "It follows from the term "last flight" that the concept of "connecting flight" must be understood as referring to two or more flights constituting a whole for the purpose of the right to compensation...."*

36. The CJEU held, at [25], that *"the answer to the question referred is that article 3(1)(a) of Regulation No 261/2004 must be interpreted as meaning that the Regulation applies to a passenger transport effected under a single booking and comprising, between its departure from an airport situated in the territory of a member state and its arrival at an airport situated in the territory of a third state, a scheduled stopover outside the European Union with a change of aircraft"*.
37. In *CS and others v České aerolinie a s* (Case C-502/18) [2019] Bus LR 1893, the claimants had booked a flight with a Community airline from Prague to Bangkok via Abu Dhabi. The first flight, operated by the Community carrier, arrived at Abu Dhabi on time, but the second flight, operated by a non-Community carrier, arrived at the final destination over eight hours late. The Czech court made a reference to the CJEU in respect of the liability of a contractual carrier for delay in relation to a connecting flight operated by another, non-Community, carrier.
38. The court re-iterated, at [16], that *"a flight with one or more connections which is the subject of a single reservation constitutes a whole for the purposes of the right of passengers to compensation... implying that the applicability of Regulation No 261/2004 is to be assessed with regard to the place of a flight's initial departure and the place of its final destination: Wegener's case, para 25."*
39. It was held, at [25-27], that the flight was booked as a single reservation and that *České aerolinie*, as the relevant contracting party, was the "operating air carrier" liable to pay the compensation, regardless of the fact that the delay was caused on the connecting flight operated by another air carrier. The court emphasised, [at 27], that *"flights with one or more connections that are the subject of a single reservation must be regarded as a single unit"*.

(4) Submissions of the parties

Submission on behalf of the Defendant

40. The position of Air Canada is that Regulation 261, when properly construed in accordance with international law principles, cannot and does not apply to the claim because: (i) the Defendant airline is a non-Community airline and (ii) the causative delay arose on a flight operated wholly outside the EU.
41. Mr Stewart Coats, on behalf of Air Canada, submits that it is a fundamental principle of customary international law that whilst a state has primary jurisdiction to regulate activities within its own territory, a state's jurisdictional competence to regulate

conduct that occurs beyond its borders is permissible only on the basis of certain limited exceptions; and no relevant exceptions apply in this case. In the context of domestic court decisions, the territoriality principle is given effect to by the interpretative presumption against the extra-territorial application of legislation. In addition, in the context of air transport it is a rule of customary international law that every state has complete and exclusive sovereignty over the airspace above its territory: reliance being placed on *R (on the application of Kibris Turk Hava Yollari) v Secretary of State for Transport* [2009] EWHC 1918 (Admin) at [32]-[33] and [37] and Article 1 of the Chicago Convention on International Civil Aviation of 1944 to which all EU Members States are a party. Reliance was also placed on the CJEU's judgment in *R (Air Transport Association of America and others) v Secretary of State for Energy and Climate Change* (case C-366/10) [2013] PTSR 209 ("*ETS*") as recognising, amongst other things, that the relevant principles of customary international law could be relied on by an individual for the purpose of challenging the validity of an act of the EU.

42. Air Canada's position is that it follows that (i) the EU does not have jurisdictional competence (absent a recognised exception, none of which are relevant here) to regulate the activities of non-EU persons in another state's territory or in the air space above that other territory; and (ii) even if Regulation 261 could be read as having extra-territorial effect, it must be interpreted as not having such effect, at least in the absence of a clear CJEU ruling to the contrary.
43. As to the proper interpretation of Regulation 261, Air Canada's submission is that Article 3(1)(a) relates to conduct taking place within the EU, namely events taking place at the airport of departure in respect of denied boarding, cancellation and delay beyond the scheduled time of departure. Article 3(1)(b) provides for a different scope in that it applies to flights departing from non-EU states destined for EU states, but only in respect of Community carriers. Properly construed, both provisions reflect customary international law principles of jurisdictional competence. It is said that the relevant *travaux préparatoires* similarly recognise the proper territorial scope of the Regulation, as explained by Advocate General Sharpston in *Schenkel* and that it was only the CJEU's interpretation of the Regulation in *Sturgeon* and *Nelson* that created the risk of extra-territorial regulation of non-Community carriers.
44. Mr Stewart Coats submitted that if it were correct that the Regulation applies to delays arising before or during an extra-EU flight then the EU would be asserting a right to regulate, and for its courts to make factual determinations about, events occurring outside the EU, including whether particular circumstances were within the actual control of the carrier and whether the airline had taken all reasonable measures to avoid a cancellation or delay.
45. As to *Wegener*, Air Canada submits that the fact that the event causing the delay took place in the EU puts it in a different category for the purposes of extra-territorial jurisdiction. The case should therefore be distinguished from the present case where there was no causative delay on departure from the EU.
46. Mr Stewart Coats submitted that *České aerolinie* should be distinguished on the basis that the carrier was a Community carrier and so the EU had jurisdictional competence over it under the nationality principle.

47. Air Canada also relied on the fact that in October 2021 a request for a preliminary ruling was made by a Belgium Court (C-561/20) in the context of a claim for compensation against a non-Community airline arising in respect of delay on the second leg of a journey between airports outside of the EU; the referring court noted that the facts were not identical to those on which the CJEU has already given a ruling. It was submitted that the fact of the reference demonstrates that the Belgium court did not consider the legal issues arising on those facts, which reflects the facts in the present case, to have been determined by the CJEU.
48. As to *Gahan*, it was submitted by Mr Stewart Coats that the decision should be distinguished on its facts because the relevant delays to the EU-departing flights were causative of the delays in question. It was submitted that the claimants in *Gahan* expressly relied on the fact that the causative delays were to EU-departing flights and that this provided the necessary jurisdictional nexus; paragraphs [43], [48] and [51] were relied on in this regard. It was further submitted that “*to the extent some of Arden LJ’s reasoning arguably goes further than required by the facts in Gahan to encompass the facts of the present case, it is respectfully suggested that the reasoning is obiter and ... should not be followed*”.
49. Mr Stewart Coats noted that Canada (since 2019) has implemented its own regulations providing compensation for delay, cancellation and denial of boarding and submitted that it would be untenable for Air Canada to be subject to different, and potentially contradictory regulatory obligations.
50. Prior to the hearing, Air Canada served a supplemental skeleton in which it argued that if, contrary to its primary position, Regulation 261 cannot be interpreted consistently with customary international law obligations, then it should be declared to be invalid and that this court could and should make such a declaration. To the extent that it needed permission to amend its Defence to advance this position, it sought permission to do so. The Claimant did not oppose Air Canada raising its arguments on validity, but contended (which contention was disputed by Air Canada) that any challenge would have to be made pursuant to the Challenges to Validity of EU Instruments (EU Exit) Regulations 2019 (as amended). The Claimant submitted that it was now too late for the requirements of that Regulation to be complied with given that the relevant authorities had not been provided with notice as required by regulation 5 and not been provided with the opportunity to be joined as parties to the proceedings as required by regulation 6.
51. Air Canada was directed at the hearing to provide any draft amended Defence setting out its claim for relief (whether by declaration or otherwise) in respect of any challenge to the validity of the Regulation and the parties were given permission to serve further submissions in writing on the issues arising.
52. In the event, Air Canada elected not to submit a draft Amended Defence and not to pursue its arguments in respect of the validity of the Regulation, stating that it considered that it would not be a productive use of the court’s time to consider whether to make a formal declaration of invalidity. Air Canada’s position was that this court should approach the relevant issues as a matter of interpretation, rather than validity. It was said that it was unclear what value a declaration of incompatibility in respect of

Regulation 261 would have because *The Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019* now provide for the application of an amended version of Regulation 261 and any challenge to the validity of the amended version of Regulation 261 would need to be considered in respect of a claim under that legislation.

Submissions on behalf of the Claimant

53. Mr Gillow, on behalf of the Claimant, submits that in *Wegener* the CJEU held that connecting flights should be treated as part of a single flight for the purposes of the Regulation such that a journey which begins in the EU, involves a connecting flight in a non-EU airport, and has a final destination outside the EU, will be covered in its entirety by the Regulation. It was submitted that the approach of the Court of Appeal in *Gahan*, following *Folkerts*, is entirely consistent with the subsequent reasoning of the CJEU in *Wegener*.
54. The Claimant contended that the arguments raised by Air Canada to the effect that it would be contrary to the requirements of customary international law to interpret Regulation 261 as covering flights taking place entirely outside the EU and operated by non-Community carriers have already been considered, and dismissed, by the Court of Appeal in *Gahan*.
55. It was further submitted by Mr Gillow that there is no basis for distinguishing the claim of Ms Varano from the cases considered by the CJEU in *Wegener* and the Court of Appeal in *Gahan*. Mr Gillow acknowledged that neither of those decisions concerned cases in which compensation was sought from a non-EU carrier in respect of delay arising on the second leg of the journey commencing outside the EU, but submitted that in neither case was the decision of the relevant court founded on whether the delay was or was not caused by an occurrence within the EU. In both cases the flight was treated as a whole unit and it was the overall delay on arrival at the ultimate destination which was triggered the liability on the part of the air carrier to pay compensation in circumstances in which the original flight had left an EU airport.
56. Mr Gillow also relied on the reasoning and decision in *ETS* in which the CJEU dismissed the contentions of a number of airlines that the EU's Emissions Trading Scheme was an unjustified extension of the EU's jurisdiction under international law. The CJEU also confirmed, it was submitted, that the risk of double regulation (regulation imposed both by the EU and by a third state) was irrelevant in the context of that case.

(5) The approach to be adopted following exit from the EU

57. Since the hearing of this matter the Court of Appeal has given judgment in the case of *Lipton & Anr. v BA City Flyer Limited* [2021] EWCA Civ 454, 2021 WL 01176100. The claimant's flight in January 2018 had been cancelled because the captain became ill while he was off-duty and it was held at first instance that this amounted to "extraordinary circumstances" within the meaning of Article 5(3). The Court of Appeal upheld the claimant's appeal, finding that the captain's non-attendance due to illness was not an extraordinary circumstance. In doing so, the court had regard to various decision of the CJEU including, in passing, *Sturgeon*, at [12].

58. In that case (as in the present case) it was noted by Green LJ, at [53], that “*submissions and argument advanced 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 ... was still in force*” notwithstanding the fact that the hearing took place in February 2021 when the transitional period had expired. Green LJ emphasised that at the time of the appeal “*a new set of legal arrangements are in place which governed the relationship of the UK to EU law*” and that “*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*”.
59. Green LJ set out a detailed consideration of the proper approach to be adopted in the circumstances, at [54] to [83]. He noted, at [58 to 60], that pursuant to sections 3(1) and 3(2) of the European Union (Withdrawal) Act 2018 as amended (“**the EU(W)A 2018**”), Regulation 261, which was operative prior to implementation period (“**IP**”) completion day (31 December 2020 at 11pm), continues to have force and the English language version of the Regulation is brought into effect in domestic law following the end of the transitional period.
60. Pursuant to section 5(2) of EU(W)A 2018, the principle of supremacy of EU law continues to apply so far as relevant to the interpretation of Regulation 261 and it therefore applies and takes precedence over any other measure of domestic law which might be inconsistent (at [61-62]). General principles of EU law became part of domestic law provided that they were recognised in relevant case law prior to IP completion day, pursuant to Schedule 1, paragraph (2) of the EU(W)A 2018. Thus, general principles of EU Law from case law and as derived from the Charter of Fundamental Rights of the European Union and the Treaty on the Functioning of the European Union are relevant to interpretation (at [63-64] and 83(vi)).
61. The next stage of the analysis, at [65 -70], summarised the effect of sections 6(1) to 6(3) of the EU(W)A 2018. In particular, section 6(3) provides that any question as to the validity, meaning or effect of any retained EU law is to be decided (by the lower courts), so far as that law is unmodified on or after IP completion day and so far as they are relevant to it (a) in accordance with any retained case law and any retained general principles of EU law, and (b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences. The Court of Appeal is not so bound pursuant to the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020.
62. The court then addressed the issue of domestic legislation noting, at [71] that “*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 Organiser’s Licensing (Amendment) (EU Exit) Regulations 2019... came into force on 31st December 2020.*” Green LJ concluded, at [72], that “*the cumulative effect is that the present governing law is Regulation 261/04 as amended*”.
63. Green LJ then proceeded (see [56] and [75]) to consider the effect of the Trade and Cooperation Agreement (“**the TCA**”) signed on 26 December 2020 between the UK and EU, which was incorporated into domestic law by the European Union (Future Relationship) Agreement Act 2020 (“**the EU(FR)A 2020**”) which received Royal

Assent on 31st December 2020. This contains the following provision of potential relevance to the proper construction of Regulation 261:

“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.”

64. Section 29 EU(FR)A 2020 provides that domestic law “*has effect ...with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement.*” Green LJ explained, and emphasised, at [79-80], the process of “automatic modification” provided for by section 29; first, it applies only so far as is necessary (such that it does not modify a domestic law that, otherwise, is already consistent with the TCA) and second it covers modifications necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.
65. The court noted that the TCA imposes a duty on the parties to “ensure” that “effective” measures are taken to protect consumers in the field of transport, including in relation to compensation. In the context of the provisions relevant to that case, Green LJ concluded, at [82], that “*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*”.
66. Finally, at [83] Green LJ set out various principles of relevance to the appeal. I do not repeat them here, but take them as read. For present purposes I note, in particular, the following four principles: (a) Regulation 261 takes effect in domestic law as amended by the Air Passenger Regulation 2019; (b) 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*”; (c) “*to the extent necessary this process of interpretation would include any provision of international law that has been incorporated into the Regulation by reference*”; and (d) “*the meaning and effect of the measure should be determined by reference to case law of the CJEU made prior to 11pm 31st December 2020*”. He concluded, at [84], that none of the relevant principles caused any difficulty in that case.

67. The submissions of both parties at the hearing of this matter had proceeded on the basis that Regulation 261, rather than Regulation 261 as amended by Regulation 8 of the Air Passenger Rights and Air Travel Organisers' Licencing (Amendment) (EU Exit) Regulations 2019 (the "**Amended Regulation 261**"), was the governing law. In the circumstances, I provided the parties with the opportunity, if they wished to do so, to provide further written submissions on three points. First, whether it was agreed, in light of *Lipton*, that it is the Amended Regulation 261 which is the relevant law which falls to be interpreted and applied in this case (and if not, why not). Second, whether it is common ground that there are no substantive differences as between Regulation 261 and the Amended Regulation 261 insofar as is relevant to this case (and if not, what the differences are said to be). Third, any other submissions following from *Lipton*, for example, whether it is agreed that this court should have regard to the TCA in relation to the interpretation of the Amended Regulation 261 and, if so, any submissions on this issue.
68. In response, the Claimant confirmed, on the first and second points, that, following *Lipton*, its position is that it is the Amended Regulation 261 which falls to be applied in the present case and that there are no substantive differences between Regulation 261 and the Amended Regulation, at least insofar as relevant to this case. As to the third point, the Claimant confirmed that its position is that it is appropriate to have regard to the TCA and Article AIRTRN.22 and reliance was placed on the judgment of Green LJ at [73] to [83] and the principles set out there.
69. Air Canada's position in response was that it respectfully disagrees with the conclusion of Green LJ in *Lipton* that the relevant law for claims decided after 31 December 2020 in respect of rights accrued before that date is Amended Regulation 261. Rather, its position was that for claims brought before 31 December 2020 but heard and determined after that date, the governing law is Regulation 261 as retained EU law, but not as amended by the 2019 Regulations. In this regard, Air Canada contends that by virtue of s.16 of the Interpretation Act 1978 rights which have accrued under a repealed statute remain enforceable unless the contrary intention appears in the repealing Act and the Defendant is not aware of any provision in the EU(W)A 2018 which provides that accrued rights do not remain enforceable. The Defendant accepted that if the conclusion of Green LJ in *Lipton* was part of the *ratio* of the Court of Appeal's judgment then it is not open to challenge in this court, but suggested that the better view is that its reasoning in relation to the Amended Regulation 261 was not necessary for the Court of Appeal's decision and should be treated as *obiter*.
70. Further, and in any event, Air Canada's position was that the issue in this case as to whether the claim falls outside the scope of Regulation 261 would fall to be decided in the same way regardless of whether Regulation 261 or the Amended Regulation is applicable. First, there is no reason why Article AIRTRN.22 should require the Court to interpret the scope of the Amended Regulation 261 in a more consumer friendly way than under the existing jurisprudence of the CJEU which already requires regard to be had to consumer protection principles under EU law. Secondly, as Green LJ noted at [81] in *Lipton*, the TCA also requires relevant provisions to be interpreted in accordance with customary international law, counterbalancing any greater emphasis on consumer protection that might be involved.

(6) Analysis

71. I am extremely grateful to both Counsel for their helpful and focused submissions.
72. The effect of the analysis set out by Green LJ in *Lipton* is potentially far reaching. Leaving aside wider potential implications, I note that Amended Regulation 261 is limited in scope to passengers departing from an airport located in the UK, rather than (under Regulation 261) to passengers departing from an airport located in the territory of a Member State. It is conceivable, for example, that a claimant might have issued proceedings in 2019 in respect of delay to a flight departing from, say, Paris. If such a claim were heard in 2021 then the defendant airline might seek to rely on the analysis in *Lipton* to contend that the claimant has no cause of action under the Amended Regulation 261, even though such an argument would not have been available had the claim been heard in 2020. The correct approach to any such claims (including the effect of s.16 of the Interpretation Act 1978) would call for detailed consideration in light of *Lipton*.
73. Green LJ concluded in *Lipton*, at [72], that the present governing law is the Amended Regulation 261, as foreshadowed at [53]. He repeated this conclusion at [82] in the context of determining the law applicable to the claim: “*The first [step] is to identify the relevant domestic law. This is Regulation 261/04 as amended*”. He then concluded that the Amended Regulation 261 had been properly construed by the judgment of Coulson LJ. Accordingly, reading the judgment as a whole, I do not consider that the relevant analysis as to the applicable Regulation in *Lipton* can properly be treated as *obiter*, albeit that the analysis was perhaps primarily concerned with setting out “*basic principles*” of more general application. I therefore consider that this court is bound to treat this claim as brought under the Amended Regulation 261, as now contended by the Claimant.
74. In my view, however, the amending provisions, which are set out in *Lipton*, at [72], and which I shall take as read, introduce no modifications of substance relevant to the determination of this case (see further paragraph 94 below).
75. Pursuant to section 6(3) of the EU(W)A 2018, any question as to the validity, meaning or effect of Amended Regulation 261 is to be decided, by this court, in accordance with the relevant retained case law and retained general principles of EU law and having regard to the limits of EU competences immediately before 31 December 2020. The new legal regime has been in place for only a few months and (as in *Lipton*) nothing of relevance in the case law of the CJEU has changed in the context of this case.
76. The Claimant’s claim concerns delay at the final destination arising from the delayed departure of the second of two connecting flights from a non-EU airport in circumstances in which the contract for the flights was with a non-Community carrier. Air Canada is correct to note that this precise fact pattern has not arisen in any of the various authorities of the CJEU and of the Court of Appeal to which I have been referred. Nevertheless, those authorities do, in my view, provide the answers as to how Regulation 261 falls to be interpreted and applied in this case.
77. In *Gahan* the contention of the defendant (summarised, at [33]) was that any delay to the second flight did not fall to be taken into account because the second flight fell

outside the scope of the Regulation as they departed from a non-EU airport and, in the alternative (at [38]), was irrelevant because Emirates was a non-EU carrier.

78. The first basis on which Arden LJ rejected the primary case of Emirates, at [73], was that as a matter of EU law: *“The Court of Justice has held that the liability for compensation for delay depends on the delay in arriving at “the final destination”. Where the carrier provides a passenger with more than one flight to enable him to arrive at his destination, the flights are taken together for the purpose of assessing whether there has been three hours’ or more delay. This is established by Sturgeon... and Folkerts... While the Interpretative Guidelines are not admissible as an aid to interpretation, they are consistent with my reading of the judgments of the conclusion of the Cour de Cassation in X v Emirates Appeal No 15-21590, 30 November 2016: para 58 above. In the case of directly connecting flights, travelled without any break between them, the final destination is the place at which the passenger is scheduled to arrive at the end of the last component flight”.*

79. The second point of EU law identified by Arden LJ and summarised in the heading at [76], was that *“Article 7 applies to non-Community carriers in respect of flights to their final destination”*. The critical analysis, for present purposes, was that:

“Regulation 261 applies to flights by non-Community carriers out of EU airspace even if flight 1 or flight 2 lands outside the EU. The necessary starting point here is that there is no requirement in Regulation 261 that they should land in the EU. Regulation 261 takes effect when the carrier is present in the EU and it imposes a contingent liability on the carrier at that point. The liability may never crystallise but if it does do so, it will crystallise outside the jurisdiction.”

80. Arden LJ held, at [77], *“The basis of jurisdiction asserted over non-community carriers is territorial... It is sufficient if flight 1 begins in the EU, as article 3(1) requires.”* She relied on two reasons to support this conclusion:

- a. The first, at [78], was that *“... this is a case where the measure uses an activity outside the jurisdiction not to claim jurisdiction but to quantify a sanction imposed within the jurisdiction...”*. She noted that in *ETS* the CJEU had rejected the argument that the EU emissions trading scheme involved a breach of the extraterritoriality principle in circumstances in which the scheme required an operator using an EU airport to surrender emissions allowances calculated on the basis of the whole flight and that *“[s]o too in the present case, Regulation 261 applies to a non-Community carrier because they use EU airports. It is rational for the EU legislature to measure delay by reference to the final destination where there are two or more flights which are directly connecting as that is likely to be the best measure of the inconvenience to the passenger.”*
- b. The second point, at [79], was that this conclusion *“is supported by the decision of the House of Lords in Holmes [1989] AC 1112... “category (2) cases” as defined by Lord Bridge of Harwich were held not to offend against the extraterritoriality principle, and they are more closely analogous to Regulation 261 since they concerned “carriage involving a place of departure or destination*

or an agreed stopping place in a foreign state and a place of departure or destination or an agreed stopping place in the United Kingdom or other British territory” ...”

81. In my judgment, the above analysis of Arden LJ sets out the relevant principles of EU law necessary to determine the current claim.
82. It is common ground that Ms Varano should be taken as having booked interconnecting flights with Air Canada to take her from Heathrow to Austin, Texas. It was, in effect, a single booking. Regulation 261 was engaged in the present case because the flight operated out of Heathrow. The Amended Regulation 261, following, *Lipton*, is now engaged on the same basis. Air Canada provided the claimant with more than one flight to enable her to arrive at her destination and the CJEU has held, as Arden LJ noted at [73], that “*the flights are taken together for the purpose of assessing whether there has been three hours’ or more delay*”.
83. This analysis is also consistent with the subsequent decisions of the CJEU in *Wegener* and *České aerolinie*, both of which emphasised the importance of the fact that the connecting flights were booked as “*a single reservation*” or “*under a single booking*”; in the latter case it was held that flights with one or more connections that are the subject of a single reservation must be regarded as a “*single unit*”.
84. The correct analysis of the relevant CJEU case law, following *Gahan* at [76], is that Regulation 261 imposed a contingent liability on Air Canada when it operated the flight from Heathrow, namely a liability to pay compensation to Ms Varano if she experienced relevant delay in respect of arrival at the final destination. It is common ground that the delay at the final destination, Austin, was over 5 hours. The liability therefore crystallised in this case.
85. Contrary to the submissions of Air Canada, the existing case law has held that such an interpretation of Regulation 261 is not precluded by the territoriality principle. As explained by Arden LJ, at [77], “*[t]he basis of jurisdiction asserted over non-community carriers is territorial... It is sufficient if flight 1 begins in the EU, as article 3(1) requires.*” It is irrelevant whether the delay was caused within the jurisdiction or outside the jurisdiction; the contingent liability was imposed when Air Canada was within the jurisdiction.
86. In the present case it seems to me that the heart of Air Canada’s arguments on extraterritoriality are fundamentally the same as those advanced, and rejected, in *Gahan*. Indeed, reliance is placed by Air Canada on the same *travaux préparatoires* and the same opinion of Advocate General Sharpston in *Schenkel*. The answer to the extraterritoriality argument was provided by the Court of Appeal, in particular, at [76]. Regulation 261 applies to Community and non-Community carriers in respect of connecting flights (units of travel) starting in the EU and imposes a contingent liability on the carrier at that point in time.
87. Air Canada correctly did not dispute that aspects of the Court of Appeal’s judgment in *Gahan* could be read as applying to the facts of the present case. However, by its skeleton argument Air Canada suggested that “*to the extent some of Arden LJ’s reasoning arguably goes further than required by the facts of Gahan to encompass the facts of the present case, it is respectfully suggested that the reasoning is obiter and, for*

the reasons set out above, should not be followed". I do not accept Air Canada's contention in this regard. Arden LJ's judgment addressed the multiple contentions raised by the defendant in *Gahan* and, in so doing, summarised and explained the relevant case law of the CJEU and identified the approach to be followed in respect of the proper interpretation of Regulation 261. Furthermore, that analysis is consistent, in my view, with the approach taken by the CJEU in the subsequent decisions of *Wegener* and *České aerolinie*.

88. I have taken on board Air Canada's reliance on the fact that in October 2021 a Belgium Court (C-561/20) considered it appropriate to make a reference to the CJEU in the relation to a claim for compensation against a non-Community airline arising in respect of delay on the second leg of a journey between airports outside of the EU. In my view, however, the existing case law of the CJEU, and of the Court of Appeal, provides a clear answer to the issues of interpretation arising in this case.
89. Air Canada also relied on the European Commission's proposal of March 2013 to amend Regulation 261 COM (2013) 130 final 2013/0072 (COD), which proposal included provision for a new Article 6a concerning missed connecting flights and it was contended that this should be seen as explicit clarification as to how the Regulation as presently drafted should be interpreted. I note that the proposal also included amendments to Article 6 itself to provide expressly for the right to compensation in respect of delays at the final destination. I do not consider that the proposal is of assistance (leaving aside issues of admissibility) in relation to the proper interpretation of the Regulation in the context of the issues arising in this case and, in any event, I am required to apply the further relevant decisions of the CJEU since its publication.
90. As to Air Canada's contention that it ought not to be placed in the "impossible position" of having to comply with two different sets of regulations, namely Regulation 261 and the new Canadian Air Passenger Protection Regulations introduced in 2019, I note that no possible inconsistency arises in the present case as the Canadian regulations post-date the relevant flight. Second, the fact that Canada has introduced new regulations is not, in itself, a basis for challenging the interpretation of Regulation 261 set out by the Court of Appeal or the CJEU previously. If a future case gives rise to a conflict in respect of the two sets of regulations then, no doubt, such conflict will fall to be considered in such a case and the court can then decide whether, as the Claimant contends, it is appropriate to adopt the approach indicated by the CJEU in *ETS* in respect of double regulation.
91. As noted by Arden LJ in *Gahan*, at [80], there will inevitably be cases where the remedies conferred by Regulation 261 produce some odd results. Certain cases might also give rise to further issues in relation to the construction and/or application of the Amended Regulation 261. For example, additional issues might arise in respect of the obligations imposed by Articles 6 and 9 as to the provision of assistance (as opposed to the payment of compensation) to passengers in the event of a delay on an interconnecting flight in a foreign jurisdiction and/or in respect of the determination of arguments relating to "*extraordinary circumstances*" under Article 5(3) said to arise in a foreign jurisdiction. No such issues arise, however, in the present case.
92. As noted above, Amended Regulation 261 does not contain modifications of substance in respect of the provisions of Regulation 261 which are relevant to this claim.

Accordingly, Amended Regulation 261 falls to be interpreted in accordance with the retained case law of the CJEU and the decision of the Court of Appeal in *Gahan*, at least in so far as this court is concerned. As set out above, in my judgment, the existing case law provides the answers to each of the points raised by the Defendant in the present case.

93. In light of *Lipton*, at [82], I have considered the corresponding provisions of the TCA and am satisfied that the above construction of the Amended Regulation 261 accords with the requirements of the TCA and provides appropriate protection to consumers in the context of the matters under consideration in that case.
94. In case it is of relevance hereafter, my conclusions in respect of the proper construction of Amended Regulation 261 and the application of its provisions to this case would have been the same had I been construing and applying Regulation 261 to the facts of this case.

(7) Conclusion

95. For the reasons set out above, in my judgment Ms Varano is entitled to the compensation claimed in respect of her delayed flight, albeit in the sum of £520, being the sum provided for by the Amended Regulation 261, rather than €600 as would have been due under Regulation 261.