Neutral Citation Number: [2017] EWCA Civ 1530

Case No: B2/2016/2856 & B2/2017/0942

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LIVERPOOL COUNTY COURT
DISTRICT JUDGE BENSON
AND
ON APPEAL FROM LIVERPOOL COUNTY COURT
DISTRICT JUDGE BALDWIN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2017

Before :

LADY JUSTICE ARDEN
LORD JUSTICE LEWISON
and
LORD JUSTICE McCOMBE

- -

Between :

	B2/2016/2856	
	Gahan	**Appellants**
	-and-	
	Emirates	**Respondents**
	and Between:	
	B2/2017/0942	
	Darren Buckley Karen Buckley Jordan Buckley	**Respondents**
	-and-	
	Emirates	**Appellants**
	Civil Aviation Authority and the International Air Transport Association	**Interveners**

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Brad Pomfret (instructed by **Hughes Walker Solicitors**) for the **Appellant in the first appeal and the Respondent in the second appeal**
Tim Marland (instructed by **DLA Piper Solicitors**) for the **Respondent in the first appeal and the Appellant in the second appeal**
Iain McDonald and Anna Medvinskaia (instructed by **Civil Aviation Authority**) for the **First**

Intervener
Robert Lawson QC (of **Clyde & Co LLP**) for the **Second Intervener – written submissions only**

Hearing dates: 26-27 July 2017
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Judgment Approved LADY JUSTICE ARDEN :

I. AIR PASSENGERS' EU LAW RIGHT TO COMPENSATION FOR FLIGHT DELAY

1. *Sturgeon* and Regulation 261

1. In (C-402/07 and C-432/07) *Sturgeon v Condor Flugdienst GmbH* [2009] ECR 1-10923, the Court of Justice of the European Union ("CJEU") held, by applying the principle of equal treatment, that airline passengers had a right to compensation in the event of delay under Regulation (EC) No 261/2004 ("Regulation 261") even though there was no express provision in Regulation 261 to that effect. These appeals concern claims for such compensation.

2. Regulation 261, as interpreted by the CJEU, establishes common rules on compensation and assistance to passengers in the event of denied boarding, cancellation or delay of three or more hours. It distinguishes between passengers on flights operated by Community carriers and passengers on flights operated by other carriers ("non-Community carriers"), according to whether the carrier's operating licence is issued in the EU or elsewhere. Where the carrier is a non-Community carrier, Regulation 261 only applies to passengers on flights leaving from an EU airport (Article 3).

3. Regulation 261 gives passengers different rights for three types of disruption: denied boarding, cancellation and long flight delay. The rights include a right to compensation (Article 7), a right to reimbursement and rerouting (Article 8) and a right to care and assistance (Article 9). Following *Sturgeon*, compensation is also payable where there is a delay of three hours or more on arrival at final destination. However, it is scaled with regard to the flight distance: €250 (all flights of 1500 kilometres or less), €400 (intra-Community flights of more than 1500 kilometres, and all other flights between 1500 and 3500 kilometres) and €600 (all other flights) (Article 7(1), *Sturgeon* [61]). Where the delay is more than three hours but less than four hours, the operator may reduce those amounts by 50% (Article 7(2), *Sturgeon* [63]).

4. The carrier involved in both appeals before us is Emirates, which is established in the Emirate of Dubai, United Arab Emirates, and is a non-Community carrier.

5. The principal issues are whether the right to compensation against a non-Community carrier is available at all if the flight is to a destination outside the EU, and whether the right to compensation can take account of delay on a connecting flight starting or ending outside the EU. The Liverpool County Court, from which both appeals come, reached

conflicting views on these questions.

6. As the regulator of civil aviation, the Civil Aviation Authority ("the CAA") and the International Air Transport Association ("IATA"), a representative body of airlines worldwide, have been given permission to intervene in these appeals.

2. The passengers in these appeals and their flights

7. The key difference between the two appeals is the amount of delay on the flights out of EU airspace (flight 1).

Miss Gahan

8. The appellant in the first appeal, Miss Thea Gahan, made a single booking with Emirates to travel from Manchester to Bangkok via Dubai. Her flight from Manchester to Dubai (flight 1) (a distance of some 5,652.02 km) was delayed so that it arrived in Dubai 3 hours 56 minutes late. She missed her connecting flight (flight 2) and arrived in Bangkok 13 hours 37 minutes after her originally scheduled arrival time.

9. Miss Thea Gahan sought compensation under Regulation 261, Article 7 for the delay. District Judge (DJ) Benson dismissed her claim. Emirates accepted that flight 1 fell within Regulation 261 but contended that was the only flight within the scope of Regulation 261. The judge took the view that flight 2 had to be viewed separately from flight 1. He followed the decision of Proudman J in *Sanghvi v Cathay Pacific Airways* [2012] 1 Lloyd's Rep 46. Emirates offered to pay €300 by reference to the delay on flight 1. DJ Benson agreed that no further compensation was payable. Ms Gahan appeals from that order.

Mr Darren Buckley, Mrs Karen Buckley and Mr Jordan Buckley

10. Mr Darren Buckley, Mrs Karen Buckley and Mr Jordan Buckley (together the Buckleys) made a single booking with Emirates to travel from Manchester to Sydney via Dubai. The first flight (flight 1) to Dubai was delayed 2 hours 4 minutes with the result that the Buckleys arrived in Dubai only 46 minutes before their connecting flight. They were automatically rebooked on to a flight the following day (flight 2). After a further delay of 16 hours 39 minutes, they arrived in Sydney.

11. The Buckleys brought proceedings for compensation under Regulation 261, Article 7. Emirates again contended that only flight 1 was within the scope of Regulation 261 and that, since that flight was delayed less than three hours, no compensation was payable. DJ Baldwin disagreed and awarded the Buckleys compensation of £505.31 each, being the sterling equivalent of the compensation provided for by Article 7 on the basis of flights 1 and 2. DJ Baldwin noted that Regulation 261 referred to "flights" rather than "journeys". On the other hand, it also referred to "final destination" (Article 7(2)). He carefully analysed a number of decisions of the CJEU, and he rejected Emirates' argument that flight 2 should be disregarded because it started and ended outside the EU and because to take it into account would give Regulation 261 extra-territorial

jurisdiction. He accepted the argument for the Buckleys that the delay on flight 2 was merely the consequence of the delay on flight 1, which departed from an airport within the EU, which brought it within the scope of Regulation 261. That Regulation was aimed at protecting passengers and so should be interpreted to give effect to that purpose. Emirates appeals from the order of DJ Baldwin.

12. I will refer to Miss Thea Gahan and the Buckleys together as “the Passengers”.

3. Summary of the relevant provisions of regulation 261

13. Recitals (1) and (2) explain that the purpose of Regulation 261 is to afford a high level of protection for passengers, including protection against the inconvenience caused by delay to flights:

> (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.

14. Article 2 defines the “final destination” of a flight as follows:

> (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;

15. Article 3(1) of Regulation 261 defines the scope of the Regulation, which is to apply:

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

16. Articles 4 and 5 set out the passenger’s rights in respect of denied boarding and

cancellation respectively, which include but are not limited to the right to compensation.

17. Regulation 261 does not explicitly grant a right to compensation for delay but the CJEU interpreted it as having this effect in *Sturgeon*. In that case, the CJEU decided that a passenger, travelling on a Community carrier on a flight from Frankfurt to Toronto and who suffered a delay of more than three hours, could claim financial compensation as well as to be provided with care and assistance. The CJEU held that Articles 5, 6 and 7 of Regulation 261:

> must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.

18. The CJEU confirmed this view in (C-581/10) *Nelson v Deutsche Lufthansa AG* [2012], which concerned a delay on a flight from Frankfurt to Lagos.

19. Article 7 of Regulation 261 deals with the amount of compensation (see paragraph 3 above). As I have explained, it is scaled by reference to distance. Article 7 also contains a provision about how distance is to be calculated in these terms:

> 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.

III. INTERNATIONAL AGREEMENTS ABOUT COMPENSATION TO AIR PASSENGERS FOR DELAY

20. There is an important issue in these appeals about how international agreements restricting carriers' liability impinge on Regulation 261. The agreements are the Warsaw Convention 1929 and the Montreal Convention 1999. The UK is a party to these Conventions. They both limit the compensation which a passenger may claim for damage caused by delay. In advance of the Montreal Convention, the EU adopted Council Regulation (EC) 2027/97, which applied mainly to Community carriers and raised limits on their liability, but it also imposed information requirements on non-Community carriers using EU airspace.

21. The limit on liability in the Montreal Convention for damage caused by delay is contained in Article 19, which provides:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was

impossible for it or them to take such measures.

22. Liability is limited to 4,694 special drawing rights per person (approximately £5,042.74 at the rate of exchange applicable at the date of the hearing of these appeals). This limitation of liability was confirmed in Regulation (EC) 889/2002, which amended Regulation (EC) 2027/97. (The limit specified in Article 22(1) of the Montreal Convention has been increased in accordance with Article 24 of that Convention),

23. The Warsaw Convention is in similar terms to the Montreal Convention. The Warsaw Convention has to a large extent been replaced by the Montreal Convention but it remains in force in relation to non-Community carriers where the carriage is to or from the UK from or to a number of countries, for example, Bangladesh and Sri Lanka. The Warsaw Convention was amended in 1955 by The Hague Protocol. When I refer to the Warsaw Convention, I refer to it as so amended.

24. The EU became a party to the Montreal Convention as a regional economic integration organisation. It enjoys shared competence in the regulation of civil aviation with member states. The UK incorporated the Montreal Convention into UK law by amending section 1(1) of the Carriage by Air Act 1961. This now provides that both the Warsaw and Montreal Conventions have effect in the UK in relation to any carriage by air to which they apply irrespective of the nationality of the aircraft performing that carriage. There is an exception for Community carriers to the extent that Council Regulation 2027/97 (as amended) applies to them.

25. As Regulation 2027/97 shows, the intention was that the EU would have competence in relation to Community carriers and non-Community carriers within the EU. Consistently with this, recital 4 to the Council Decision 2001/539 states:

> The Community and its Member States share competence in the matters covered by the Montreal Convention and it is therefore necessary for them simultaneously to ratify it in order to guarantee uniform and complete application of its provisions within the European Union.

26. In *Sidhu v British Airways* [1997] AC 430*,* the House of Lords held that the provisions of the Warsaw Convention were exclusive. That meant that it was not open to signatories to pass legislation providing for alternative liability. Lord Hope held at page 447:

> Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the Convention are to apply. To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier. Thus the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention.

27. There is no authoritative court for interpreting the provisions of the Montreal Convention. Therefore, as Lord Hope explained in *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628, the courts of the parties to the Convention must do their best to interpret the Convention in the same way:

> 81 In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point at issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them.

28. The Supreme Court has applied the reasoning of *Sidhu* to the Montreal Convention, holding that it too provides for the liability of carriers on an exclusive basis. In *Stott v Thomas Cook Tour Operators Ltd (Secretary of State for Transport intervening)* [2014] AC 1347, the claimant passenger claimed damages for distress suffered by him as a person with disabilities. He sued for damages for discrimination under Regulation (EC) No 1107/2006 (the EU Disability Regulation). The Supreme Court held that he had no such claim due to the exclusivity of the Montreal Convention.

29. Lord Toulson held that the exclusivity principle laid down in *Sidhu* had been adopted by the Supreme Court of the United States in *El Al Israel Airlines Ltd v Tseng* (1999) 525 US 155, and by courts in many other parts of the world:

> 44 *Sidhu* and *Tseng* have been followed by the Federal Court of Australia in *South Pacific Air Motive Pty Ltd v Magnus* (1998) 157 ALR 443, the Court of Appeal of Hong Kong in *Ong (Joshua) v Malaysian Airline System Berhad* [2008] HKCA 88, the Federal Court of Appeal of Canada in *Air Canada v Thibodeau* 2012 FCA 246 and the High Court of Ireland in *Hennessey v Aer Lingus Ltd* [2012] IEHC 124. *Sidhu* was similarly followed by the Court of Appeal of New Zealand in *Emery Air Freight Corpn v Nerine Nurseries Ltd* [1997] 3 NZLR 723. The same principle has been recognised by the Supreme Court of Germany (Bundesgerichtsof) *Loss of Airplane Luggage Case (No X ZR 99/10)* 15 March 2011.

30. The question at issue was whether the claim for damages for discrimination was outside the substantive or temporal scope of the Montreal Convention. Lord Toulson, with whom Lord Neuberger, Lady Hale, Lord Reed and Lord Hughes agreed, held that that depended entirely on the proper interpretation of the scope of that Convention, and was not a question of EU law, and that it was not appropriate to refer any question to the CJEU ([59], [66]).

IV. CJEU: compensation under Regulation 261 IS NOT PRECLUDED BY THE Montreal Convention

31. The CJEU has, however, held that the type of compensation for which Regulation 261 provides is not within the scope of Article 19 of the Montreal Convention. Thus, in (C-344/04) *R (o/a IATA and ELFAA) v Department for Transport* [2006] ECR I-403, the

CJEU held that compensation to which Article 19 applies is individual damage requiring proof of loss caused by the delay, whereas that payable under Regulation 261 is a standardised sum for each passenger not requiring proof of loss.

> 43. Any delay in the carriage of passengers by air, and in particular a long delay, may, generally speaking, cause two types of damage. First, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned, through the provision, for example, of refreshments, meals and accommodation and of the opportunity to make telephone calls. Second, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis.
> 44. It is clear from Articles 19, 22 and 29 of the Montreal Convention that they merely govern the conditions under which, after a flight has been delayed, the passengers concerned may bring actions for damages by way of redress on an individual basis, that is to say for compensation, from the carriers liable for damage resulting from that delay.
> 45. It does not follow from these provisions, or from any other provision of the Montreal Convention, that the authors of the Convention intended to shield those carriers from any other form of intervention, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts.
> 46. The Montreal Convention could not therefore prevent the action taken by the Community legislature to lay down, in exercise of the powers conferred on the Community in the fields of transport and consumer protection, the conditions under which damage linked to the abovementioned inconvenience should be redressed. Since the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute such standardised and immediate compensatory measures, they are not among those whose institution is regulated by the Convention. The system prescribed in Article 6 simply operates at an earlier stage than the system which results from the Montreal Convention.
> 47. The standardised and immediate assistance and care measures do not themselves prevent the passengers concerned, should the same delay also cause them damage conferring entitlement to compensation, from being able to bring in addition actions to redress that damage under the conditions laid down by the Montreal Convention.

32. The CJEU has maintained its view that the Montreal Convention does not prevent the award of compensation under Regulation 261 in *Nelson.*

V. SUBMISSIONS OF THE PARTIES AND THE INTERVENERS

1. emirates

33. The primary submission of Mr Tim Marland, for Emirates, is that the only relevant flights for the purpose of calculating any delay are the original flights out of EU airspace. Those are the only flights within the scope of Regulation 261. The connecting flights are

not relevant unless they also fall within the scope of Regulation 261. The CJEU has made it clear that the expression "flight" is to be distinguished from a "journey". Thus in (C-173/07) *Emirates Airlines – Direktion fűr Deutschland v Schenkel* [2008] ECR I-05237, where a passenger sought to argue that he could obtain compensation for delay on the return leg of his round trip from Düsseldorf to Manila via Dubai, the CJEU held that a flight was a unit of travel and that, while the Montreal Convention treated successive carriage as 'one undivided carriage' where they were agreed on in a single contract, they were 'journeys' rather than 'flights' for the purposes of Regulation 261.

34. Mr Marland submits that *Schenkel* is correct and that it was correctly followed by Proudman J in *Sanghvi*. In that case, Proudman J rejected claims for compensation for delay and denied boarding under Regulation 261 by a passenger from London to Sydney via Hong Kong, who arrived too late in Hong Kong to board his flight to Sydney and suffered delay of two hours and eleven minutes to his final destination. The judge held that he had been denied boarding in Hong Kong, and that, as the CJEU had in *Schenkel* held that a flight was a "unit of travel", the relevant flight was that starting in Hong Kong. It therefore started from outside the EU and it was outside the scope of Regulation 261.

35. In support of his primary submission, Mr Marland submits that the effect of delay occurs outside the EU. Furthermore, the Passengers' interpretation depends on finding a causal link between the delay on flight 1 and the delay at the final destination. This is contrary to *Nelson* where the CJEU held that compensation under Regulation 261 is not concerned with such a causal link, since the Montreal Convention applies if there is such a link.

36. Mr Marland submits that DJ Baldwin failed to have regard to the fact that there is no express right to compensation for delay in Regulation 261. The CJEU held that delayed passengers had to be treated as if their flights had been cancelled but that was in the context of Community carriers: see *Sturgeon* and *Nelson*. Mr Marland also submits that on the Passengers' interpretation passengers whose flights are cancelled may get less compensation than those whose flights are delayed. On his submission, DJ Baldwin wrongly attached weight to the *Interpretative Guidelines* on Regulation (EC) No 261/2004 (C(2016) 3502) issued by the European Commission ("Interpretative Guidelines") and the CAA's opinion, when neither of these was admissible on the interpretation of Regulation 261.

37. Mr Marland submits that the decision of the CJEU in (C-11/11) *Air France SA v Folkerts* [2013], where the passenger flew from Bremen to Asunción via Paris and São Paulo and was awarded compensation for delay because the aggregate delay, including the delay on the last flight starting outside EU airspace, exceeded three hours, is distinguishable because it concerned a Community carrier. Mr Marland also suggests that on the facts there could have been sufficient delay before the passenger left Paris. In *Folkerts*, the CJEU held that the compensation was to be quantified by reference to the delay in arriving at the final destination, which in this case was Asunción.

38. Mr Marland's alternative submission, if the Court rejects his primary submission about the effect of Regulation 261, turns on the fact that Emirates is a non-Community carrier. He challenges the CJEU's holding in relation to the compatibility of Regulation 261 with

the Montreal Convention. He submits that, if contrary to his submission this Court considered that this question was within the competence of the CJEU, this Court would have to refer the matter to it. He submits that in this case the interpretation of the Montreal Convention should be treated as a matter of domestic law for the following reasons:

i) The Montreal Convention was, on his submission, only incorporated into EU law for Community carriers. Mr Marland submits that this follows from the definition of Community carriers in Regulation 2027/97. It follows that it would be outside the competence of the CJEU to interpret the Montreal Convention as it applies to non-EU carriers.

ii) The Warsaw Convention was in all other respects to be treated as a pre-accession obligation of the UK within Article 351 of the Treaty on the Functioning of the European Union, which provides:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties….

iii) The Montreal Convention was a post-accession obligation of the UK, which falls to be given effect in accordance with Article 27 of the Vienna Convention on the Law of Treaties 1969. This provides (in material part) that a state which is a party to the treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

iv) The UK is, by virtue of the Warsaw and Montreal Conventions, under treaty obligations not to impose liability on non-Community carriers outwith the conditions and limits laid down in those Conventions. It follows that this Court should decline to apply the reasoning in *Sturgeon* where doing so would put the UK in breach of its obligations under the Montreal Convention. He submits that under EU law secondary EU legislation is subordinate to international obligations. In this way, submits Mr Marland, the rights and obligations of the UK under the Montreal Convention are preserved. Damage is still damage even though it is standardised and fixed, and, therefore, the CJEU ought to have come to the same conclusion as the House of Lords in *Sidhu*.

v) If Regulation 261 were to apply to the flight sectors performed by non-Community carriers wholly outside the EU, it would offend the principle against extraterritoriality. No account can therefore be taken of delay which occurs outside the jurisdiction. The extraterritoriality principle was raised at the time of the negotiations over what became Regulation 261, and it explains why Community carriers and non-Community carriers are treated in a different way by Article 3 of Regulation 261. Advocate General Sharpston explained this point in *Schenkel*:

37. It is equally clear that Article 3(1) limits the scope of that protection. All

passengers departing from an airport located in the territory of a Member State are covered. Passengers departing from an airport in a third country to travel to an airport in a Member State are covered only if they are flying on a Community carrier. (16)
38. The travaux préparatoires show that the proper scope of the proposed new regulation in relation to flights from third country airports to the Community was the subject of specific consideration.
39. Under Article 3(1) of the Commission's original Proposal, (17) passengers departing from a third country to a Member State were to be covered if they had a contract with a Community carrier or with a tour operator for a package offered for sale in the territory of the Community.
40. A subsequent Council document issued following discussions both in COREPER and by the relevant Council Working Party, presenting the revised draft of the regulation, indicates that one of the two 'major outstanding issues' concerned, precisely, the scope of the regulation in relation to flights from third countries, as now defined by Article 3(1)(b). (18) A lengthy footnote to the text of that subparagraph (by then identical to the text finally adopted) shows that certain Member States favoured extending further the protection offered to passengers boarding a flight to a destination within the Community at an airport in a third country, whilst others opposed it; and that possible problems of extra-territoriality, unenforceability and discrimination between passengers were (variously) canvassed. (19)
41. The following week, the Presidency presented an unchanged text for, inter alia, Article 3(1)(b). However, it asked delegations to reflect on the possibility of entering into the Council minutes a statement by Member States related to what was at that stage Article 19 (entitled 'Report'), inviting the Commission, when drafting the report envisaged in that article, to focus in particular on the possibility of enlarging the scope of the regulation in respect of flights from third country airports to the Community. (20)
42. In December 2002 the Council reached political agreement on its common position on the draft regulation; and the suggestion for an entry in the Council minutes was elevated into a drafting amendment to the text of Article 19. (21) The regulation as promulgated duly requires the Commission to report 'in particular regarding... the possible extension of the scope of this Regulation to passengers having a contract with a Community carrier or holding a flight reservation which forms part of a "package tour"... and who depart from a third-country airport to an airport in a Member State, on flights not operated by Community... carriers'. (22)
43. Against that background, I find it impossible to accept that Article 3(1) should be read as covering a passenger on a return flight operated by a non-Community carrier from a third country to a Member State.

vi) The decision of the CJEU in *IATA* that a distinction can be drawn between standardised and individualised damage is not consistent with the Montreal Convention. In the event of delay, the cause of action for which compensation is available under Regulation 261 is not complete until the journey is completed and so it cannot be said that the delay is damage occurring before the flight begins.

vii) Section 3(1) of the European Communities Act 1972 requires the courts to accept

the decisions of the CJEU as to the effect of EU instruments, but since, on Mr Marland's submission, the Montreal Convention, as enacted into domestic law by section 1(1) of the Carriage by Air Act 1961 (as amended) is not an EU instrument, that enactment cannot apply.

39. Mr Marland also submits that the cause of action for compensation under Regulation 261 does not arise until the passenger arrives at the final destination (see *Nelson*). That means 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. Under that principle, one state can only claim jurisdiction over a legal person domiciled in another state on a territorial basis: the legal person must be within its territory at the time when the claim arises. That was not so in this case.

40. Mr Marland also submits that, under *Folkerts*, the damage did not occur until arrival. He submits that this contrasts with (C-366/10) *R* (*o/a Air Transport Association of America) v Secretary of State for Energy and Climate Change* [2013] PTSR 209 ("*ETS*"), where events outside the jurisdiction was only used to enable a calculation to be made.

41. Mr Marland submits that the position is analogous to that considered by the House of Lords in *Holmes v Bangladesh Biman Corp* [1989] AC 1112, where the question arose as to the jurisdiction of the English courts under the Warsaw Convention by virtue of the Carriage by Air Act (Application of Provisions) Order 1967. The deceased had been killed on an internal flight in Bangladesh operated by the defendant. In the House of Lords, four categories of carriage were identified. For the case in question, the House concentrated on category 4, namely "carriage in which the places of departure and destination and any agreed stopping places are all within the territory of a single foreign state, being either a Convention or a non-Convention country" but also considered category 3: "…carriage between places of departure and destination in two foreign states with no agreed stopping place in the United Kingdom or other British territory." Lord Bridge of Harwich observed in relation to category 3 that: "Contracts of carriage by air in direct flights between two non-Convention countries can be of no legitimate concern to the United Kingdom legislature and if Parliament claimed to regulate the rights and liabilities of the parties to such contracts, it would indeed be asserting a jurisdiction over foreign subjects who have done nothing to bring themselves within that jurisdiction". The House concluded that such flights were excluded from the ambit of the legislation.

42. Finally, Mr Marland submits that the decision of this Court in *Dawson v Thomson Airways Ltd* [2015] 1 WLR 883 is distinguishable because it concerned (as it did) Community carriers, and not non-Community carriers. In *Dawson*, the question before this Court was whether the limitation period for claims under Regulation 261 was governed by the Montreal Convention, which imposes a two-year limitation period, or by national law, in view of the fact that Regulation 261 is silent on the point. This Court held that that question was governed by EU law as it concerned the issue of the compatibility of Regulation 261 with the Montreal Convention. On that basis, this Court held that Regulation 261 was compatible with the Montreal Convention and that the applicable period was that provided by the Limitation Act 1980.

2. passengers' submissions

43. Mr Brad Pomfret, for the Passengers, submits that the Passengers in Gahan suffered a delay of three hours or more because of the delay on flight 1, and that accordingly they are entitled to compensation under Regulation 261. In the Buckleys' case, the delay on flight 2 was the consequence of the delay on flight 1.

44. Mr Pomfret submits that under Regulation 261, as interpreted by the CJEU, the relevant delay is not that on flight 1 but the flight to the final destination. Thus, the CJEU, seeking to ensure equal treatment between passengers whose flights were cancelled and passengers whose flights were delayed, held in *Sturgeon*:

> In those circumstances, the Court finds that passengers whose flights are delayed may rely on the right to compensation laid down in Article 7 of Regulation No 261/2004 where they suffer, on account of such flights, a loss of time equal to or in excess of three hours, that is to say when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.

45. The CJEU repeated this point in *Folkerts*. It held that the position of the passengers in that case, whose flights were delayed, was the same as those whose flights were cancelled and not re-routed: in each case the length of the delay was calculated by reference to the delay at final destination (*Folkerts,* [32]). The CJEU on his submission attached no significance in *Folkerts* to the fact that the carrier was a Community carrier.

46. Mr Pomfret further submits that, as the CJEU explained in its judgment in *Nelson* at [54], under Regulation 261 the compensation was not for "damage occasioned by the delay" for the purposes of Article 19 of the Montreal Convention, and therefore differed from such damage.

47. *Schenkel* does not on Mr Pomfret's submission undermine his argument. This case raised the meaning of "flight" for the purposes of a return flight. Notably the CJEU did not hold that flight 1 in that case was outside Regulation 261 because the destination was outside EU jurisdiction.

48. Mr Pomfret distinguishes *Sanghvi*. He submits that it was rightly decided because it was a denied boarding claim where the denial of boarding occurred outside the EU. Mr Pomfret submits that the position as between a delayed passenger, flying with non-EU carriers and using a connecting flight starting outside the EU, and a passenger, whose connecting flight, starting from a place outside the EU with non-EU carriers, was cancelled, was not discriminatory as regards the latter. The situation of the two passengers was different. This was because the former passenger had to show that his delay was caused by a delay on a flight departing from EU airspace.

49. Mr Pomfret relies on the *Interpretative Guidelines* issued by the European Commission. He submits that these *Interpretative Guidelines* support his submission about the function of the final destination. They state:

"4.4.7. Compensation for late arrival in the case of connecting flights The Court (43) takes the view that a delay must be assessed for the purposes of the compensation provided for in Article 7 of the Regulation, in relation to the scheduled time of arrival at

the passenger's final destination as defined in Article 2(h) of the Regulation, which in the case of directly connecting flights must be understood as the destination of the last flight taken by the passenger. In accordance with Article 3(1)(a), passengers who missed a connection within the EU, or outside the EU with a flight coming from an airport situated in the territory of a Member State, should be entitled to compensation, if they arrived at final destination with a delay of more than three hours. Whether the carrier operating the connecting flights is an EU carrier or a non-EU carrier is not relevant.
In the case of passengers departing from an airport in a non-EU country to an airport situated in the territory of a Member State as their final destination in accordance with Article 3(1)(b), with directly connecting flights operated successively by non-EU and EU carriers or by EU carriers only, the right to compensation in case of a long delay on arrival at the final destination should be assessed only in relation to the flights operated by EU carriers.

Missed connecting flights due to significant delays at security checks or passengers failing to respect the boarding time of their flight at their airport of transfer do not give entitlement to compensation."

50. Footnote 43 in this citation refers to *Folkerts* (at [47]).

51. On extraterritoriality, there is on Mr Pomfret's submission no exercise by the EU of extraterritorial jurisdiction. The delay on flight 2 was merely relevant to the calculation of the compensation under Regulation 261. He submits that Regulation 261 does not conflict with sovereignty.

52. Mr Pomfret relies on the *ETS* case. He submits that this is on all fours because the airlines had to surrender emissions allowances from outside the EU. The basis of jurisdiction is three-fold: (i) the flight departs from or arrives in the EU; (ii) the EU takes the view that a carrier wishes to use the facilities of the EU must comply with the emissions trading scheme and (iii) the effects of emissions are felt within the jurisdiction.

53. Mr Pomfret further submits that the use of events outside EU airspace to measure the effects of delay within it can usefully be analysed in the way in which it was analysed by Professor Joanne Scott in *Extraterritoriality and Territorial Extension in EU Law* (2014) 62 Am Jo Comp Law 87. Professor Scott argues that there is a distinction between extraterritoriality and territorial extension. The latter occurs when the application of a measure is triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad. On this basis, it is immaterial that the CJEU did not specifically consider the position of non-Community carriers in *Sturgeon*, *Nelson* or *Folkerts*.

54. Mr Pomfret further submits that this court is bound by *Dawson* even though it did not concern non-Community carriers. As Mr Marland accepts, no distinction was made between Community and non-Community carriers. He submits that that is not a relevant distinction. The point was that the question was one of the validity of Regulation 261 and that the courts must by virtue of Section 3 of the European Communities Act 1972 treat any question of the validity of Regulation 261 as governed by any decision of the CJEU.

55. Mr Pomfret submits that Emirates accepts that Regulation 261 would apply to flight 1, out of EU airspace, and notes that it has produced further arguments about the Montreal Convention on these appeals, but takes no objection to that.

3. CAA

56. Civil Aviation Authority ("the CAA") is a public corporation, established by the Civil Aviation Act 1971 as an independent specialist civil aviation regulator. Its responsibilities include acting as the national enforcement body for a range of consumer protection provisions, including Regulation 261. It has been designated by the United Kingdom for the purposes of enforcement in accordance with Article 16 of Regulation 261.

57. Mr Iain MacDonald, who appears with Ms Anna Medvinskaia, for the CAA, makes submissions which support those of the Passengers. He submits that it would be illogical for compensation to be payable for flight 1 only because, where an airline allows a longer period for a passenger to board a connecting flight, there may be no delay at all in reaching the final destination. He submits that its position is supported by the *Interpretative Guidelines* issued by the European Commission.

58. Mr MacDonald relies on the decision of the Cour de Cassation in France of 30 November 2016 in *X v Emirates*. In that case, the passengers were booked to fly from Paris to Kuala Lumpur via Dubai but they were delayed on the flight to Dubai by over two hours and by over ten hours in reaching their final destination. The Cour de Cassation held that the passengers were entitled to compensation by reference to the delay to the final destination.

59. Mr MacDonald submits that *Sanghvi* ought to have been decided on the basis that there was a delay in reaching the final destination and not on the basis of denied boarding. The passenger would then have been entitled to compensation if there was a delay of over 3 hours in reaching the final destination.

60. Mr MacDonald submits that the questions to be determined on this appeal are questions of EU and not domestic law. At paragraphs 59 and 66 of the judgment of Lord Toulson in *Stott,* Lord Toulson made it clear that any issue as to the compatibility of Regulation 261 with the Montreal Convention had to be determined in accordance with EU law:

> 59 To summarise, this case *[see para 28 above]* is not about the interpretation or application of a European Regulation, and it does not in truth involve a question of European law, notwithstanding that the Montreal Convention has effect through the Montreal Regulation. The question at issue is whether the claim is outside the substantive scope and/or temporal scope of the Montreal Convention, and that depends entirely on the proper interpretation of the scope of that Convention. The governing principles are those of the Vienna Convention on the Law of Treaties. If the issue concerned the compatibility of the Regulation with the Convention (as in *Nelson*) it would indeed involve a question of European law, but no such question arises and there is no basis for supposing that the Montreal Convention should be given a different "European" meaning from its meaning as an international convention. On the contrary, it was the acknowledged purpose of the

Regulation to ensure full alignment between the Convention as an international instrument and community law.

…
66 I would not make a reference to the CJEU for two reasons. As I have explained, I do not consider that the questions of interpretation of the Montreal Convention on which the appeal turns are properly to be regarded as questions of European law merely because the Convention takes effect via the Montreal Regulation. Secondly and in any event, I consider the answer to be plain.

61. Mr MacDonald submits that the effect of Emirates' interpretation is that Community carriers are treated differently from non-Community carriers. This places Community carriers at a competitive disadvantage and reduces the protection extended to passengers and should be rejected for those reasons.

62. Mr MacDonald submits that the compensation for delay is only a component of Regulation 261. There are also rights to reimbursement or re-routing. Again, any compensation is assessed by reference to final destination. On Emirates' construction, if there was a cancellation of the passenger's flight to Bangkok, Emirates could simply produce a ticket to Dubai. In *Schenkel* there was an outbound and return flight and it is clearly distinguishable. If the claimant in *Schenkel* was right, the point of departure is the same as the final destination and that is absurd as the CJEU pointed out. It is no answer for Emirates to say that there is a high level of protection under the Montreal Convention.

63. Mr MacDonald adopts Mr Pomfret's submissions on extraterritoriality and his submissions on incompatibility with the Montreal Convention.

64. The CAA's written submissions raised issues of flight coupon sequencing and unfair contract terms but these issues were for background. They were not pursued orally by any party.

4. IATA

65. IATA was incorporated by a special Act of the Canadian Parliament in 1945 and it represents the interests of 275 airlines from 120 countries, with its members carrying approximately 83% of all scheduled international air passengers (about 1.1bn passengers in 2016). Emirates is a member of IATA. Its particular concern is to ensure that this Court has before it all the relevant arguments on customary international law.

66. IATA accepts that the EU has "undoubted competence" to legislate with regard to flights from EU airspace, citing Article 1 of the Chicago Convention on International Civil Aviation 1944. However, it submits that the EU is not competent to legislate for flights by non-Community carriers which start from outside EU airspace, and Regulation 261, Article 3 observes this limitation.

67. Mr Robert Lawson QC, who authored the written submissions filed by IATA, submits that Regulation 261 must therefore be interpreted as meaning that a non-Community

carrier is not liable to pay compensation under Article 7 in respect of a delay on a directly connecting flight which takes place outside EU airspace because to hold otherwise would offend basic principles of customary international law as to jurisdictional competence which the EU, the CJEU and the courts are bound to observe and uphold. So, he submits, *Sanghvi* was correctly decided. Indeed, he goes so far as to argue that the EU has no competence whenever the flight by a non-Community carrier ends outside EU airspace. He points out that neither *Sturgeon* nor *Nelson* concerns a non-Community carrier. Likewise, *Folkerts* concerned a Community carrier. On that basis, compensation is not payable to any of the Passengers. He further submits that to hold a non-Community carrier liable for delays on connecting flights would be inconsistent with *Schenkel* (which makes it clear that Regulation 261 adopts a "flight-specific approach") and the structure of Regulation 261, Article 3.

68. In *ETS,* AG Kokott opined that:

"154. The territoriality principle does not prevent account also being taken in the application of the EU emissions trading scheme of parts of flights that take place outside the territory of the European Union. Such an approach reflects the nature as well as the spirit and purpose of environmental protection and climate change measures. It is well known that air pollution knows no boundaries and that greenhouse gases contribute towards climate change worldwide irrespective of where they are emitted; they can have effects on the environment and climate in every State and association of States, including the European Union.
155. A comparison with the aforementioned fisheries case is also worthwhile in this context. If it is permissible under the territoriality principle for fish caught outside the European Union to be confiscated from a vessel sailing under the flag of a third country whilst at a port within the European Union, (138) there cannot be any prohibition against exhaust gases from an aircraft emitted outside the airspace of the European Union being taken into account on its departure from or arrival at an aerodrome within the European Union for the purposes of calculating the emission allowances to be surrendered."

69. The CJEU came to the same conclusion.

70. Mr Lawson submits that *ETS* is distinguishable because the non-Community carrier does not carry with it the delay to the final destination when it starts from an EU airport. Internal EU policy objectives of protecting passengers cannot justify an extension of jurisdiction for the purposes of international customary law.

71. Mr Lawson relies on the decision of the German Federal Court of Justice in *X ZR 12/12.* That reached the same conclusion as DJ Benson and held that Regulation 261 only gave compensation if there was sufficient delay on the flight by a non-Community carrier from an EU airport and disregarded delay on the directly connecting flight.

VI. ANALYSIS and discussion

72. In my judgment, the answer to these appeals is clear under EU law. There are three points of EU law which together lead me to reject the primary case for Emirates.

1. What counts is delay in reaching the final destination

73. The CJEU 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* (see paragraphs 44 and 45). While the *Interpretative Guidelines* are not an admissible aid to interpretation, they are consistent with my reading of the judgments of the CJEU. Moreover, that interpretation is also consistent with the conclusion of the Cour de Cassation in *X v Emirates* (paragraph 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.

74. This conclusion is not undermined by *Schenkel*, which was concerned with the question whether a booking of an outward and return flight meant that both those flights had to be taken together. *Schenkel* does not decide that flight 2 is irrelevant and is distinguishable for the reasons given by Mr MacDonald (paragraph 62 above).

75. *Sanghvi* (see paragraph 34 above) could not in any event have given rise to compensation for delay if the flights from London to Sydney were treated together, following *Folkerts*, as the total delay in that case was less than three hours. The reasoning in the decision, being a decision of the High Court, is not binding on us. Mr Pomfret accepts that there was also no denied boarding claim in that case because the claim arose outside EU airspace.

2. Article 7 applies to non-Community carriers in respect of flights to their final destination

76. 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. It does not help Emirates to argue that the delay on flight 2 has to be caused by a delay on flight 1 within EU jurisdiction: that does not of itself show that the territoriality principle has been contravened. It follows that I would reject IATA's submission that Regulation 261 cannot apply where the destination on flight 1 is outside the EU.

77. The basis of jurisdiction asserted over non-Community carriers is territorial. I agree with Mr Pomfret that there is no need for EU law to rely on the effects of delay. It is sufficient if flight 1 begins in the EU, as Article 3(1)(b) requires. There are two reasons why this is in my judgment so.

78. First, 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. Reference has been made to the decision of the CJEU in *ETS* on the EU emissions trading scheme.

In brief, what happened in that case was that the EU Aviation Emissions Directive 2008/101/EC required an operator using an EU airport to surrender emissions allowances calculated on the basis of the whole of the flight. AG Kokott and the CJEU rejected the argument that that involved a breach of the extraterritoriality principle essentially for the reasons given at paragraphs 68 and 69 above (though the EU subsequently took what was known as the "stop the clock decision" to suspend the scheme temporarily following international protests). The Aviation Emissions Directive applied to an operator because it chose to land or depart from an EU airport. So 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.

79. Second, contrary to the submission of Mr Marland, the conclusion is supported by the decision of the House of Lords in *Holmes*. As the CAA point out, "category (2) cases" as defined by Lord Bridge 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."

80. Inevitably there will be cases where the remedies conferred by Regulation 261 produce some odd results. For example, it is possible that there is no compensation for delay on a flight which starts outside the EU and has several "legs", some of which take place in the EU. Thus if in *Folkerts* the passenger's flights to Asúncion had been Moscow, Bremen, Paris, Sao Paulo and Asúncion, it is possible that Regulation 261 would not have applied if for the purposes of Regulation the relevant flight is treated as starting in Moscow and the carrier was a non-Community carrier. On the other hand, it is also possible to find striking examples of coherence in the system of remedies if Mr Pomfret is right. For example, rights on cancellation operate by reference to the final destination, so that they include compensation for any connecting flight that is cancelled and not re-routed so as to arrive within three hours of the original scheduled time of arrival at the final destination.

3. EU law governs questions of incompatibility with the Montreal Convention

81. I now turn to Emirates' alternative submission, which is that the determination of the liability of non-Community carriers is a matter of domestic law, not EU law, because the UK is bound by the Montreal Convention independently of the EU.

82. Before addressing the substance of the alternative submission I will deal with two preliminary points. The first is about the allocation of responsibility between the UK and the EU. First, the sharing is not on the basis that the UK regulates non-Community carriers and the EU regulates Community carriers. The basis for the competence which the UK shares with the EU is as stated in Council Decision 2001/539, namely that the EU may regulate carriers' activities within the EU, including those of non-Community carriers. So far as the UK is concerned, its competence is in relation to non-Community carriers outside the EU. The fact that section 1(1) of the Carriage by Air Act 1961 (as amended in 2004) appears to go wider than this does not matter because that section

would have to be interpreted compatibly with the UK's international obligations, in this case, its obligations under the TFEU.

83. The second preliminary point arises from the fact that the Montreal Convention is not a pre-accession treaty to which Article 351 TFEU applies. The Warsaw Convention, which came into effect in 1939, is clearly a pre-accession treaty to which Article 351 applies. The Montreal Convention, on the other hand, is not such a treaty as it was ratified in by the UK in 2004, after the UK became a member of the EU. The UK entered into the Montreal Convention with the full knowledge of the EU and therefore no doubt with the intention that the UK should continue to perform certain obligations under it. The obligation of the UK to fulfil its obligations under the Montreal Convention may be no different from its obligations had it been a pre-accession treaty as it is a principle of EU law that the Member State institutions should not take any step to prevent the performance by the EU of its international obligations: see generally, for example, the Opinion of AG Geelhoed in *IATA* at [32], and AG Kokott in *ETS* at [58]. The same principle must extend to member states who have been permitted to enter international agreements during the currency of their membership of the EU or to remain party to such agreements entered into prior to their membership of the EU.

84. Turning now to the substance of Mr Marland's alternative submission for Emirates, I would reject it on the basis that this Court is bound by its decision in *Dawson*. In my judgment that case cannot be distinguished simply because it concerned Community carrier. The reasoning applies equally to non-Community carriers. In the light of *Dawson*, Article 27 of the Vienna Convention (see paragraph 38(iii) above) does not assist Emirates.

85. As explained under the parties' submissions, the issue in *Dawson* was whether the limitation period for claims under Regulation 261 was governed by the Montreal Convention (which permits national courts to fix the appropriate limitation period) or EU law. This Court held that that question was one to be determined by Regulation 261, i.e. by EU law. In reaching his conclusion, Moore-Bick LJ, with whom Kitchin and Fulford LJJ agreed, cited and applied paragraph 59 from the judgment of Lord Toulson in *Stott*, which I have already set out in paragraph 60 above. Later in his judgment Moore-Bick LJ held:

> 24 In my view, therefore, we are bound to follow and apply the decisions of the European Court of Justice in relation to the nature of the claim for compensation under article 7 and its compatibility with the Montreal Convention. That includes the court's ruling that the obligation in question lies outside the scope of the Convention. If that be correct, the Convention has no application to it. In so far as it is said that that involves a departure from *Sidhu v British Airways plc* [1997] AC 430, it is no more than a consequence of the decisions in *R (International Air Transport Association) v Department for Transport* [2006] ECR I-403, *Sturgeon v Condor Flugdienst GmbH* [2010] Bus LR 1206, *Nelson v Deutsche Lufthansa AG* [2013] 1 All ER (Comm) 385 and *Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV* [2013] 2 All ER (Comm) 1152. The European Court of Justice has ruled on the nature of the obligations created by Regulation No 261/2004 and its decisions have to be taken

> into account when deciding whether the claim falls within the scope of the Convention. …

86. This Court in *Dawson* thus made it clear that the jurisprudence of the CJEU as to the meaning of Regulation 261 is binding on this Court even though it conflicts with the jurisprudence of the Supreme Court and House of Lords. 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 CJEU 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.

87. This Court's view was reached on the clearly expressed view of the Supreme Court in *Stott*. (Indeed, the Supreme Court also refused permission to appeal to it in *Dawson*). The view was expressed in a condensed fashion but, by referring (even if parenthetically) to *Nelson,* the Supreme Court clearly had in mind the different meaning given to the Montreal Convention by the CJEU. In other words, the Supreme Court took the view that where a question of international law arose incidentally to determining the meaning of an international agreement, it was for the CJEU to determine that matter (see, in particular, the fourth sentence of paragraph 59 of the judgment of Lord Toulson).

88. I can see that there are concerns about the way in which the CJEU arrived at its decision in *Nelson*. The CJEU apparently decided the meaning of damage for the purpose of the Montreal Convention without any reference to the international jurisprudence on the point, including the decisions of the House of Lords and Supreme Court. There is also force in the argument that in those circumstances it would be open to a national court to ask the CJEU whether its decision is to be treated as holding that compensation under Article 7 is not damage for the purposes of the Montreal Convention if it were demonstrated that customary international law or the greater body of international judicial opinion on the Montreal Convention (apparently not cited to the CJEU) indicated that the contrary was the case, especially where the competence under the relevant agreement is shared, as here. On the other hand, both the UK government and IATA could have raised this point in previous cases, which they have not done.

89. Furthermore, if the incidental question of international law falls outside the competence of the CJEU, the question would arise whether the decision in question falls within sections 2 and 3 of the European Communities Act 1972. If it falls outside the competence of the CJEU, it is not binding on the member states. The Supreme Court has already considered some aspects of this question in other contexts but there is as I understand no decision on this point.

90. Mr Pomfret submits that the CJEU's interpretation of the Montreal Convention is correct under domestic law but that point is not open to him in this Court in the light of *Sidhu*. While that case precedes Regulation 261, it represents the interpretation by the highest court in the land on Article 19 of the Warsaw Convention and, following *Stott*, we are bound by it so far as the Montreal Convention is concerned when that question falls to be considered as a matter of domestic law. In *Stott*, Lord Toulson summarised the CJEU's jurisprudence in *Sturgeon* and *Nelson* but he did not, as I read his judgment, necessarily approve them. He emphatically said that the case was not about the interpretation of an

EU regulation ([59]).

Conclusion

91. I would allow Ms Gahan's appeal and dismiss that of Emirates.

LORD JUSTICE LEWISON

92. I agree.

LORD JUSTICE McCOMBE

93. I also agree.