Neutral Citation Number: [2021] EWCA Civ 1953

Case No: B2/2021/0373

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PORTSMOUTH COUNTY COURT

HHJ BERKLEY

F26YY457

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 21 December 2021

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS

LORD JUSTICE COULSON

and

LORD JUSTICE STUART-SMITH

- -

Between :

Ms Kanaka Durga Chelluri **Appellan**

- and -

Air India Ltd **Respond**

- -

- -

Harry Gillow (instructed by **Haywood Baker Solicitors**) for the **Appellant**

Jacob Turner (instructed by **Zaiwalla & Co**) for the **Respondent**

Hearing Date : 16 November 2021

- -

Approved Judgment

LORD JUSTICE COULSON :

1 INTRODUCTION

1.
The issue raised on this appeal is whether an air passenger with a single booking, departing from one country outside the EU/UK [1], and arriving at another country outside the EU/UK, can rely on the

relevant Regulation dealing with compensation for flight delays, in circumstances where the third of the four legs that made up that single reservation was late leaving Heathrow. In his judgment dated 22 January 2021, HHJ Berkley ("the judge") allowed an appeal against the decision of the district judge, and rejected that claim.

2.
The appeal, for which I gave permission on 25 May 2021, raises two grounds. Ground 1 argues that the judge was wrong to conclude that the CJEU decision in Case-537/17 Wegener v Royal Air Maroc SA [2018] Bus LR 1366 ("Wegener") obliged him to hold that the appellant could not make a claim because she had made a single booking departing from Kansas City, Missouri, and could not therefore rely on the constituent parts of that booking for the purposes of compensation. Ground 2 argues that, if the proper interpretation of Wegener was as set out by the judge, then Wegener was wrongly decided and/or this court should not follow it.

3.
Although these points are relatively short, and the sums at stake are modest, the written and oral arguments have extended far and wide. This may well be because, like other flight delay appeals, there are many hundreds of other cases awaiting the result. Certainly it is possible to imagine that, if the relevant Regulation applied to individual stages of much longer overall flights starting outside the EU/UK, there might be a significant increase in the volume of such claims.

2 THE FACTS

4.
The appellant, Ms Kanaka Durga Chelluri, travelled by air from the United States of America to India. She booked her ticket to depart from Kansas City, Missouri with a destination of Bengaluru.

5.
That booking had four legs. As scheduled, those legs were:

i)
Kansas City, Missouri, USA, to Detroit USA, departing Kansas City at 13.49 (local time) on 27 May 2019;

ii)
Detroit to London Heathrow, departing at 18:00 (local time) on 27 May 2019;

iii)
London Heathrow to Chhatrapati Shivaji Maharaj airport, Mumbai, India, departing at 13:15 (local time) on 28 May 2019;

iv)
Mumbai to Bengaluru, also in India, departing at 18:00 (local time) on 29 May 2019.

6.
Delta Airlines was the air carrier for legs (i) and (ii). The respondent, Air India, was the carrier for legs (iii) and (iv). Both Delta Airlines and the respondent are non-EU carriers.

7.
Leg (iii), namely the flight from London Heathrow to Mumbai, was delayed by approximately 48 hours. It did not depart until 14:09 (local time) on 30 May 2019. The appellant did not arrive in Mumbai until 01:30 (local time) on 31 May 2019. The arrival delay was 46 hours and 45 minutes. Consequently the

appellant was very late (and certainly delayed by much more than the 4 hours otherwise required to trigger a claim under the Regulation) in arriving at her final destination at Bengaluru.

3. THE JUDGMENTS BELOW

8.
In consequence, the appellant brought a claim under EU Regulation 261/04 ("the Regulation") which provides a compensation mechanism for delayed and cancelled flights. On 9 September 2020, District Judge Sanderson allowed the appellant's claim on the basis that the flights operated by the respondent were entirely separate from the flights operated by Delta. As a result he said that the appellant's journey was therefore not to be treated as a single flight for the purposes of the Regulation. The respondent appealed.

9.
In an ex tempore judgment given on 22 January 2021, the judge allowed the appeal. In short, the judge found that, as a result of the decision in Wegener, what mattered was the overall journey that had been booked, from Kansas City to Bengaluru, not its component parts. He said that he was bound by Wegener and the subsequent authorities and that, because the overall journey had started and finished outside the EU, the appeal would be allowed and the claim dismissed.

4 THE LAW

4.1 The Regulation

10.
For present purposes, the relevant parts of the Regulation are Article 3 and Article 7. Article 3 in its unamended form provides as follows:

"**Scope**

1. 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.

…

5. This Regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 & 2. Where an operating air carrier that has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger."

11.
Article 3 therefore provides that jurisdiction under the Regulation can arise in two separate sets of circumstances. The first, under Article 3(1)(a), arises if the relevant departure is from an EU/UK airport. That is sometimes called the territorial gateway. The second, under Article 3(1)(b), arises if

the air carrier is an EU/UK carrier and the flight lands in the EU/UK. That is sometimes called the carrier gateway. The carrier gateway does not arise here; this appeal is concerned solely with the territorial gateway under Article 3(1)(a).

12.
Article 7 in its unamended form provides as follows:

"**Right to compensation**

1. Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1500 kilometres or less;

(b) EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 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.

2. 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

(a) by two hours, in respect of all flights of 1500 kilometres or less; or

(b) by three hours, in respect of all intra-Community flights of more than 1500 kilometres and for all other flights between 1500 and 3500 kilometres; or

(c) by four hours, in respect of all flights not falling under (a) or (b), the operating air carrier may reduce the compensation provided for in paragraph 1 by 50 %.

3. The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

4. The distances given in paragraphs 1 and 2 shall be measured by the great circle route method."

13.
Other parts of the Regulation to which we were taken during argument included Article 2, which defines "final destination" 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; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected…"

14.
The principal way in which an air carrier can avoid paying compensation for delays or cancellations which would otherwise fall within Article 3 is by demonstrating "exceptional circumstances" under Article 5(3), as discussed in in two recent decisions of this court: Blanche v Easy Jet Airline Company Ltd[2019] EWCA Civ 69; [2019] BUS LR 1258 ("Blanche"), where a decision to close a route as a result of an air traffic control decision was held to be an extraordinary circumstance; and Lipton and another v BA City Flyer Ltd [2021] EWCA Civ 454; [2021] 1 WLR 2545 ("Lipton"), where the captain's

illness was held not to be an extraordinary circumstance. Article 15 does not arise directly on this appeal.

15.
Following the withdrawal of the UK from the EU, the wording of Articles 3 and 7 has been amended insofar as they relate to the UK. Those amendments were affected by the Air Passenger Regulations 2019, and summarised by Green LJ in Lipton at [72], as follows:

“(4) In Article 3 (scope)—

(a) in paragraph 1, in point (a), for “the territory of a Member State to which the Treaty applies” substitute “the United Kingdom”;

(b) for point (b) substitute—

“(b) to passengers departing from an airport located in a country other than the United Kingdom to an airport situated in—

(i) the United Kingdom if the operating air carrier of the flight concerned is a Community carrier or a UK air carrier; or

(ii) the territory of a Member State to which the Treaty applies if the operating air carrier of the flight concerned is a UK air carrier, unless the passengers received benefits or compensation and were given assistance in that other country.”;

(c) in paragraph 6, for “Directive 90/314/EEC” substitute “the Package Travel and Linked Travel Arrangements Regulations 2018”.

…

(6) In Article 7 (right to compensation)—

(a) for paragraph 1 substitute—

“1. Where reference is made to this Article, passengers shall receive compensation amounting to—

(a) £220 for all flights of 1500 kilometres or less;

(b) £350 for all flights between 1500 and 3500 kilometres;

(c) £520 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.”;

(b) in paragraph 2, in point (b), omit “intra-Community flights of more than 1500 kilometres and for all other”.

16.
Following Green LJ’s summary in Lipton, in Marjolyn Varano v Air Canada[2021] EWHC 1336 (QB) (“Varano”), Geraint Webb QC (sitting as a Deputy High Court Judge) held that it was the amended Regulation which fell to be applied, even to pending claims which were commenced prior to 31 December 2020. Neither counsel in the present case expressly disagreed with that approach, although I would not want to approve it without having heard full argument on the point. In any event, both accepted that the amendments made no substantive difference to this appeal.

4.2 The Authorities

17.
It is perhaps helpful to identify the relevant authorities in their chronological order. This assists in demonstrating the development of the law in this area, and also serves to illuminate where Wegener fits into the overall picture.

18.
The first relevant decision is R (on the application of International Air Transport Association (IATA)& Anr) v Department for Transport (Case C-344/04) [2006] 2 C.M.L.R. 20 at 557 ("IATA"). That was a challenge by low budget airlines to Articles 5, 6 and 7 of the Regulation, who unsuccessfully argued that they should not be liable in the same way and in the same amount as the major airlines. In the judgment of the CJEC (as it then was), the court reiterated the importance of passenger protection. It said:

"82 In assessing whether the measures in question are necessary, it should be noted that the immediate objective pursued by the Community legislature, as apparent from the first four recitals in the preamble to Regulation 261/2004, is to strengthen protection for passengers who suffer cancellation of, or long delays too, flights, by redressing, in an immediate and standardised manner, certain damage caused to passengers placed in such circumstances."

19.
In Emirates Airlines-Direktion v FUR Deutschland Schenkel (Case-C173/07) [2008] 3 C.M.L.R. 20 at 644 ("Schenkel") the court had the benefit of an opinion from AG Sharpston. She noted that the relevant Regulation in German referred to the word "flight" which rendered the relevant phrase as "passengers who embark on a flight at airports…", whilst the English version (and most other versions) used the phrase "passengers departing from an airport". However at AG 8, she said that the difference did not alter the actual sense of the provision. She explained:

"Embarkation on a flight is the normal preliminary to departure. When passengers depart from an airport, it is understood and obvious that they do so by embarking on a flight."

20.
In that case the claimant had booked an outward and return journey from Dusseldorf to Manila via Dubai. The return flight from Manila was cancelled so the claimant arrived in Dusseldorf two days late. He claimed compensation. He submitted that the outward and the return flights were non-independent parts of a single flight. Since the point of departure of that single flight was Dusseldorf, he said he was the passenger "departing from an airport located in the territory of a Member State" within the meaning of Article 3(1)(a). The air carrier said the outward and return flights were to be regarded as two separate flights. The claim was not against an EU carrier, so the claimant could not rely on Article 3(1)(b) (the carrier gateway) to claim compensation for the delay.

21.
In its judgment, the court agreed with the Advocate General that the divergence between the various language versions had no effect on the actual meaning to be given to the provisions concerned, which determined the scope of the Regulation: see [24]-[25].

22.
On the substantive issue, the court said at [35] that to regard a 'flight' within the meaning of Article 3(1)(a) as an outward and return journey would be contrary to its objective of ensuring a high level of

protection for passengers. The reason for this was not further explained. It also said that to treat an outward and return journey as a single flight would result in treating passengers on the same flight differently because (translating the rather opaque language at [37]-[38]) it would mean that passengers simply flying one way from Manila would not be protected by the Regulation, whilst passengers flying from Manila on their return flight to the EU would be protected.

23.
The court then went on to say:

“40 In the light of all the above considerations, the concept of ‘flight’ within the meaning of Regulation 261/2004 must be interpreted as consisting essentially in an air transport operation, being as it were a ‘unit’ of such transport, performed by an air carrier which fixes its itinerary.

41 By contrast, the concept of ‘journey’ attaches to the person of the passenger, who chooses his destination and makes his way there by means of flights operated by air carriers. A journey, which normally comprises of ‘outward’ and ‘return’ legs, is determined above all by the personal and individual purpose of travelling. Since the term ‘journey’ does not appear in the wording of Article 3(1)(a) of Regulation 261/2004, it has in principle no effect on the interpretation of that provision…

47 It follows from [32] to [41] above that a journey out and back cannot be regarded as a single flight. Consequently, Article 3(1)(a) of Regulation 261/2004 cannot apply to the case of an outward and return journey such as that at issue in the main proceedings, in which passengers who have originally departed from an airport located in the territory of a Member State travel back to that airport on a flight departing from an airport located in a non-member country.”

24.
In Sturgeon v Condor-Flugdienst GmbH & Anr (Joined Cases C-402/07 & C-432/07) [2010] 2 C.M.L.R. 12(“Sturgeon”) the claimant family booked return flights from Frankfurt to Toronto with a German carrier. When they checked in for the return flight they were informed that their flight was cancelled. They flew home with another airline and arrived back 25 hours late. The primary issues in the case were unconnected to the present appeal, because they were concerned with whether a long delay was the equivalent of cancellation and the proper interpretation of ‘exceptional circumstances’ in Article 15. Unlike in Schenkel, this claim was against an EU carrier under Article 3(1)(b), so the distinction between the outward and return legs did not matter.

25.
The judgment reiterated that one of the principal objectives of the Regulation was to “ensure a high level of protection for air passengers regardless of whether they are denied boarding or whether their flight is cancelled or delayed, since they are all caused similar trouble and inconvenience connected with air transport”. The court said that provisions conferring rights on passengers, including those conferring a right to compensation, must be interpreted broadly: see [44]-[45] of Sturgeon, repeating similar observations to the same effect in Wallentin-Hermann v Alitalia-Linee Aeree Italiane SpA (C-549/07) [2009] 2 C.M.L.R. 9 at [17]-[18]. That said, the court stressed at [67-68] that the Regulation also sought “to strike a balance between the interests of air passengers and those of air carriers”. It said that the principal way in which that balance was achieved was through Article 15 and the provisions concerned with “exceptional circumstances”.

26.

In Air France v Folkerts & Anr (KC-11-11) [2013] ALL E.R. (EC) 1133 (“Folkerts”), the issue concerned the calculation of the delay. At [32]-[38] the court concluded that the delay was to be calculated by reference to the time of arrival at the final destination. They said:

“35 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 of Regulation No 261/2004.”

The court also said expressly at [46] that the case law showed that the importance of the objective of consumer protection “may justify even substantial negative economic consequences for certain economic operators”.

27.
Also, as to the calculation of delay, the CJEU in Bossen and Others v Brussels Airlines SA/NV (Case C-559/16) [2018] Bus L.R. 486 (“Bossen”) held that the concept of ‘distance’ for the purposes of Article 7(1), for air routes with connecting flights, related to the distance calculated between the point of departure and the final destination. The court said at [29]:

“Therefore, when determining the amount of compensation, account should be taken of the distance between the first point of departure and the final destination, excluding any connecting flights.” (Emphasis supplied)

28.
The first relevant case in this jurisdiction is Gahan v Emirates (Civil Aviation Authority and another intervening)[2017] EWCA Civ 1530; [2018] 1 W.L.R 2287 (“Gahan”). The appeal was concerned with a claim under the Regulation in respect of non-EU carriers, where the claimants’ flight from Manchester to Dubai was delayed. This caused the claimants to miss their connecting flights which resulted in a delayed arrival at their final destination outside the EU. Arden LJ expressly noted at the outset of her judgment that the different flights were all part of “a single booking”: see [8].

29.
The defendant’s primary submission (recorded at [33]) was that it was only the original flight out of EU airspace which was relevant for the purposes of calculating a delay. The argument therefore depended on separating out the single booking into its constituent parts, so as to submit that it was only the first leg which was within the scope of the Regulation, and not the flight which was delayed outside the territory of the EU. Arden LJ rejected that submission. She said:

“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.

…

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)(a) requires…”

30.
In a passage that followed on logically from this critical part of her judgment, Arden LJ predicted the risk that a passenger who booked a flight which began outside the EU and had several legs may not be able to recover compensation if one of those legs was delayed. She said:

“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.”

31.
The following year, the CJEU dealt head-on with the point about delays to connecting flights outside the EU in Wegener. In the first paragraph of their judgment they made plain that the ruling concerned the interpretation of Article 3(1)(a). Ms Wegener flew from Berlin to Agadir in Morocco with a scheduled stopover at Casablanca and a change of aircraft. The flight was booked as a single unit. It was the delay after the first flight had landed in Casablanca that was the relevant delay for the purposes of the claim. The air carrier, who was a non-EU carrier and the same for both flights, argued that because the delay occurred outside the EU, the claim fell outside Article 3.

32.
The referring court’s question again referred to the word “flight” which is unique to the German version. As in Schenkel, the CJEU in Wegener was anxious to address the underlying issue, because it would affect all versions of the Regulation, so they reframed the question they had been asked as follows:

“11. That being the case, it should be considered that, by its question, the referring court is asking, in essence, 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 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.”

33.
The court then set out the facts at [12]-[14], including the fact that there were two flights and that the arrival of the second flight was four hours late. The court then went on to identify the choice it had to make at [15]:

“15. In those circumstances, it should be noted 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."

34.
The court held that the answer was the second option. It said:

"17. 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 (judgment of 26 February 2013, Folkerts, C 11/11, EU:C:2013:106, paragraphs 34 and 35).

18. 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 purposes of the right to compensation for passengers provided for in Regulation No 261/2004, like the connecting flight at issue in the case giving rise to the judgment of 26 February 2013, Folkerts (C 11/11, EU:C:2013:106, paragraphs 17 and 18).

19. That is the case when two or more flights were booked as a single unit, as in the case giving rise to the judgment of 26 February 2013, Folkerts (C 11/11, EU:C:2013:106, paragraph 16).

20. Consequently, a transport operation such as that at issue in the main proceedings must be considered as a connecting flight, such as that at issue in the case giving rise to the judgment of 26 February 2013, Folkerts (C 11/11, EU:C:2013:106, paragraphs 35 and 38).

…

24. Therefore, a transport such [as] that at issue in the main proceedings must be regarded, taken as a whole, as a connecting flight. It follows that it must come within the scope of Article 3(1)(a) of Regulation No 261/2004.

25. Taking account of all the aforementioned considerations, 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."

35.
Wegener has been considered and followed in a number of subsequent cases. In CS and others v České Aerolinie AS (C-502/18)[2019] Bus. L.R. 1893 ("CS"), the flight was from Prague to Bangkok via Abu Dhabi. Again, the significant delay occurred in the second leg of the journey outside the EU. The air carrier said that, because that second leg was operated by a non-EU carrier, there was no liability. The CJEU disagreed, finding that, because the flight had been booked as a single reservation from an EU airport, the operating air carrier was liable for the delay. They said:

"16 As a preliminary point, it will be recalled in the first place, 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 provided for in Regulation number 261/2004 … implying that the applicability of Regulation number 261/2004 is to be assessed with regard to the place of the flight's initial departure and the place of its final destination … Wegener's case, paragraph 23.

17 Under article 3(1)(a) of Regulation 261/2004, that Regulation is applicable to, in particular, passengers departing from an airport located in the territory of a member state to which the Treaty applies…

27 … flights with one or more connections that are the subject of a single reservation must be regarded as a single unit, which implies that, in the context of such flights, an operating air carrier that has operated the first flight cannot take refuge behind a claim that the performance of a subsequent flight operated by another air carrier was imperfect." (All emphasis supplied)

36.
I should add for completeness that Mr Gillow said that CS was all about Article 3(5) – set out in paragraph 10 above – and that Wegener could also be described as a case under Article 3(5). This was part of his wider attempt to play down the court's approach to jurisdiction in Wegener. But his argument ignored the facts of CS and the wording of Article 3(5). CS was concerned with Article 3(5) because of the effect of a code-share agreement (an issue which did not arise in Wegener). In any event Article 3(5) expressly takes the reader straight back to the fundamental jurisdiction provisions of Article 3(1)(a) and (b).

37.
In OI v Air Nostrum Líneas Aéreas del Mediterráneo (C-191/19) SA [2020] Bus. L.R. 975 ("OI"),the passenger booked flights from Spain to Frankfurt via Madrid. The first leg, operated by the defendant, was more than four hours late. However, the passenger caught her connecting flight and arrived in Frankfurt on time. She made a claim because of the delay to the first flight. The CJEU rejected her claim. They said that the two legs were booked together and therefore had to be treated as a single booking which could not be sub-divided in a manner which would enable the passenger to recover compensation. They held at [26], again citing Wegener, that "it must be noted that a flight with one or more connections, booked as a single unit, constitutes a whole for the purposes of the right to compensation for passengers provided for by [the Regulation]".

38.
In Varano, the passenger booked with Air Canada to fly from London Heathrow to Austin, Texas via Toronto. The flight from Heathrow to Toronto was not delayed but the second flight was delayed by more than five hours. The airline argued that there was no right to compensation where a delay at the final destination arose because of the delay to the second flight from a non-EU airport, and where the contract was with a non-EU carrier. The judge rejected the air carrier's argument, concluding that, since the journey had undoubtedly begun in the EU/UK, on the principles set out in Wegener, the passenger was entitled to compensation. He said:

"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 WegenerandČeské 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".”

39.
Finally, for completeness, I should mention two further cases.

40.
The first was a decision of the Frankfurt Civil Chamber dated 7 May 2020 in an unnamed case where the passenger departed from Chile and flew to Madrid and then on to Frankfurt. The delay occurred at Madrid. It appears that the claim was allowed on the basis that Wegener was authority for the proposition that “successive flights are to be considered separately”. That is, of course, as I have said, not what Wegener decided. This error may have arisen from the fact that the decision only refers to that part of the judgment in Wegener which sets out the facts. It makes no reference to the reasoning and conclusions at [12]-[25] in Wegener which I have set out in paragraphs 33 and 34 above.

41.
The second was an opinion of the Advocate General dated 6 October 2021 in a case called Airhelp Limited v Austrian Airlines AG (Case C-451/20), in which there is as yet no CJEU decision. The case concerned an EU carrier, with whom the claimant had booked a flight from Moldova to Bangkok via Vienna. The first stage of the flight was cancelled and the rerouting via Istanbul gave rise to a delay in Bangkok in excess of 2 hours. There was a variety of issues that are not relevant to this appeal.

42.
Whilst this court has respect for and regard to an AG’s opinion and for any decision of the CJEU following it, even after the departure of the UK from the EU, such opinions are not binding on it.

43.
As to the substance, I note that the AG’s opinion at [44]-[46] again only cites the early part of the judgment in Wegener, in which the facts are set out. It does not grapple with the reasoning which I have set out in full above. That may be because the focus of the opinion is the claim under the carrier gateway (Article 3(1)(b)), rather than the territorial gateway with which this appeal is concerned. The conclusions at [52] and [53] appear to suggest that the ‘single booking’ strand of authorities was not determinative because in Airhelp the flights were performed by an EU carrier.

44.
The two gateways are different: EU carriers caught by Article 3(1)(b) are subject to the EU internal market, with its rules and regulations, which have no direct application to the territorial gateway. The facts of Airhelp are therefore distinguishable from the present appeal.

5 GROUND 1: THE PROPER INTERPRETATION OF WEGENER

5.1 The Arguments

45.
On behalf of the appellant, Mr Gillow argued that Wegener was really concerned with Article 7 (compensation), and not Article 3 (jurisdiction). He said that any flight which left from an EU airport was caught by Article 3(1)(a) and that, whatever it actually said, that was how Wegener should be interpreted. He went on to emphasise that the Regulation had to be interpreted by reference to the two guiding principles behind this aspect of EU law, namely the high level of protection for passengers and the importance of equal treatment. As to Wegener itself, he said that the case was not authority for what was meant by “flight”; was concerned with a different factual situation to the

present appeal (because in Wegener the relevant delay happened outside the EU whereas here it happened within the EU); and that the judge had been wrong to conclude that what it said about one overall booking was binding on him and meant that the appellant had no claim.

46.
On behalf of the respondent, Mr Turner said that Wegener was plainly concerned with Article 3. Whilst he acknowledged the importance of the principles of the high protection for passengers and the need for equal treatment, he said that that could not mean that every claim by a delayed passenger had to be decided in his or her favour, regardless of the facts. And he submitted that Wegener clearly provided that a single booking could not be broken down into its constituent legs for the purposes of the Regulation. If in Wegener the air carrier could not avoid liability because the single booking (which departed from the EU) could not be broken down into its constituent parts, but had instead to be treated as a whole, so here the air carrier could not acquire liability simply because the single booking (which had not departed from the EU) had a leg within the EU where delay had occurred. That, he submitted, would be contrary to the principle of the single booking or reservation.

5.2 Is Wegener an Article 7 Case?

47.
I do not accept Mr Gillow's suggestion that Wegener was a case about compensation under Article 7. Wegener was concerned with jurisdiction under Article 3(1)(a): see for example [1], [4], [8], [9], [11], [24], and [25] of the judgment itself. Each of those paragraphs refers to Article 3(1)(a). There is no mention of compensation under Article 7.

48.
Furthermore, each of the subsequent CJEU cases to which I have referred above (such as CS and OI) treat Wegener as being a case concerned with jurisdiction and, in particular, a case that stated the importance of the single booking and treating it as a whole. The passenger recovered in CS but not in OI. Those cases were not separately concerned with Article 7 or compensation: they were concerned with whether there was a right to bring a claim at all.

5.3 Reading Down Wegener

49.
Mr Gillow's real argument on the Article 3/Article 7 point was not so much that Wegener was a caseunder Article 7, but that it should be 'read down' because the position under Article 3(1)(a) was entirely straightforward: any departure from an EU airport, no matter how it was booked, where it came from or where it was going, was caught by Article 3(1)(a).

50.
The difficulty with that interpretation, as I see it, is that it is not what the CJEU said in Wegener. If that had been the intended approach then it would have been unnecessary for the CJEU to go into detail about the single booking and treating the component flights "as a whole". That would not have mattered if the claim under Article 3(1)(a) had been as straightforward as Mr Gillow submitted. If the CJEU had approached Article 3(1)(a) in that way, it would have been bound to dismiss the claim in Wegener. The relevant delay occurred on a flight which was operated by a non-EU carrier, which took off and landed outside the EU. On that basis, neither Article 3(1)(a) nor Article 3(1)(b) was engaged. The air carrier was found liable only because of the 'single booking' principle. It is not possible to read down Wegener in a way that would mean that the case itself had been wrongly decided.

5.4 The Twin Principles

51.
The twin principles behind the objective of the Regulation, namely the provision of a high level of protection to passengers and the need to ensure equal treatment, are reiterated in a number of the authorities which I have identified above, including IATA, Schenkel, and Sturgeon.

52.
But neither of those principles can provide a remedy for a passenger in circumstances where, either because of the wording of the Regulation, or because of the authorities, no such remedy is permitted in law. Schenkel is a good example: the CJEU invoked both principles as reasons why the claimant could not recover.

53.
Further, the importance of passenger protection was the centrepiece of the passenger's argument in Blanche, but the recitals to the Regulation itself, Article 15 and the subsequent CJEU authorities dealing with air traffic control decisions generally, meant that in law there could be no claim. Similarly, in relation to the principle of equal treatment, the flight to Madrid in OI was seriously delayed. Many if not most of the passengers on board that flight would have had a claim under the Regulation. But the claimant did not have a claim, because she was flying on to another destination and her arrival there was not delayed. She was not therefore treated in the same way as other people on the same flight. Such anomalies may be inevitable in regulations like this, something Arden LJ expressly pointed out in Gahan.

5.5 Was Wegener simply providing a mechanism to allow the passenger to recover?

54.
During his oral submissions, Mr Gillow suggested that the decision in Wegener was simply providing a mechanism by which the CJEU allowed that particular passenger to recover. The suggestion was that this court should not regard Wegener as setting out any principle, and that it should not be regarded as an authority on which an air carrier can rely, if such reliance would mean that the passenger could not recover any compensation. There is at least an echo of that approach in the AG's opinion in Airhelp. Mr Gillow acknowledged that this allowed the passenger, as he put it, "to have her cake and eat it" but he maintained that was what the Regulation permitted.

55.
I cannot accept Mr Gillow's interpretation of the decision of the CJEU in Wegener. That is not how it has been treated in the subsequent cases.

56.
If an air carrier cannot differentiate between the different legs of a single booking in order to avoid paying compensation, a passenger cannot differentiate between the different legs so as to claim compensation which would not otherwise be due. The Regulation cannot mean different things and have different effects depending on whether it is being relied by the passenger or the air carrier.

5.6 Conclusion on Article 3(1)(a)

57.
Whilst I would normally be reluctant to do more than decide the case at hand, the parties have emphasised the importance of this case to a series of other airline delay claims in this jurisdiction. It

is, therefore, appropriate to draw two general conclusions from the case law that I have summarised above, as follows:

a)
For the purposes of the jurisdiction provision encapsulated in Article 3(1)(a), a flight from X to Y by air, which comprises more than one leg, is to be treated as a whole, provided that it was booked as a single unit: see Gahan, Wegener, CS, and OI. That does not extend to any return flight from Y back to X: see Schenkel.

b)
For the purposes of the jurisdiction provision encapsulated in Article 3(1)(a), such a flight from X to Y, regardless of the number of legs, departs from its initial place of departure: see Gahan, Wegener, and CS. (This is put in a number of different ways in the cases. Arden LJ in Gahan stressed that, if there were a number of legs, what mattered was “flight 1”; CS referred to “the place of the flight’s initial departure”).

58.
These conclusions dovetail appropriately with the approach taken by the CJEU to the calculation of delay and compensation: see Folkerts and Bossen. As Bossen makes clear, what matters for those purposes is “the first point of departure”.

5.7 Summary

59.
Accordingly, on the basis of the authorities, I consider that the judge was right as a matter of law to conclude that in this case, where there was a single booking covering the whole of the flight from Kansas City to Bengaluru, Article 3(1)(a) of the Regulation did not apply. That means that, subject to ground 2, the judge was right to refuse the appellant’s claim.

6. GROUND 2: CAN/SHOULD THIS COURT DECIDE THAT WEGENER IS WRONG?

6.1 The Arguments

60.
Mr Gillow was plainly aware that he might be stuck with the reasoning in Wegener. He therefore sought to argue that this court should conclude that Wegener was wrong and/or should not be followed in any event. He acknowledged the well-known principle that the doctrine of precedent is fundamental (as set out in Willers v Joyce No 2 [2018] AC 84) but he maintained, echoing his submissions on ground 1, that Wegener should be departed from because it was incompatible with the principles of passenger protection and equal treatment. He relied on what Green LJ said in Lipton at [83] to the effect that this court can depart from any retained CJEU case law if it considers it right to do so.

61.
In response, Mr Turner relied on what this court said recently in Tunein Inc v Warner Music UK Ltd[2021] EWCA Civ 441, namely that although both the House of Lords and the Supreme Court have the power to depart from CJEU case law, they can only do so on the same basis that the Supreme Court can depart from one of its own precedents: see Tunein at [74]. It has been consistently held that such a power must “be exercised with great caution”. As Lord Bingham put it in Horton v Sadler[2007] 1 AC 307, at [29], the power should be exercised “rarely and sparingly”. In Tunein, the absence of any changes in domestic or international law meant that there was no reason to depart

from the existing case law. Mr Turner said that the position was exactly analogous here. He also submitted that, on analysis, there was no compelling reason to depart from Wegener in this case, and that, to the contrary, there were principled and pragmatic reasons for not doing so.

6.2 Not Following Wegener

62.
I can see no principled basis to depart from the decision in Wegener. There has been no change in any relevant piece of legislation, and no recent authority, which could justify the separate treatment of the component legs of a single booking for the purposes of article 3(1)(a). Moreover, Wegener has been repeatedly followed and referred to in the CJEU's subsequent cases.

63.
I accept that, absent the CJEU case law, Mr Gillow's argument about the plain meaning of Article 3(1)(a) could not be said to be fanciful. But we are not starting from scratch. Moreover, if we were to depart from Wegener and the subsequent cases, the consequences might be profound. On one view, every flight that comes into the UK from the Americas or Asia for an onward destination anywhere in the world would be liable to claims brought under Article 3(1)(a). In my view, it is both unnecessary and undesirable to depart from Wegener to bring about such consequences without express consideration of the point by the legislature. That is sufficient to refuse ground 2 of this appeal.

6.3 The Other Arguments

64.
There was much debate about the potential difference between "flight" on the one hand, and "passenger transport" or "air transport operation" on the other. I regard those arguments as sterile. What matters is the actual wording of Article 3(1)(a) and, in particular, the reference to the "passengers departing from an airport". That meaning has been settled by Wegener and the subsequent CJEU cases.

65.
In addition, there was much debate in argument about the difference between "layovers" and "stopovers" and what happens if either is extended for one reason or another. The approach adopted by Wegener seems to me to eliminate that debate. It also does away with at least some of the complications surrounding "connecting flights". Where, as here, stopovers are arranged for the convenience of the air carriers, not the passengers, who have no say in the location or extent of the stopover, then the passengers are simply to be regarded as being en route from their places of initial departure to their destinations. It also makes for coherence. EU/UK carriers are caught because of Article 3(1)(b). Non-EU/UK carriers are caught under Article 3(1)(a) if the single booking initially departs from the EU/UK, no matter where the journey ends. If, however, the single booking with a non-EU/UK carrier departs from outside the EU/UK, it is not covered by the Regulation, wherever it lands along the way.

66.
Accordingly, the Wegener approach, of treating a single booking as a whole, irrespective of its constituent legs, may be said to be in accordance with common sense.

67.

Mr Gillow again made much of the twin principles of the high protection of passengers and the need for equal treatment in this connection. As I have said, however, these policy considerations cannot of themselves allow the court to depart from authority.

7 CONCLUSION

68.
For these reasons I would reject both grounds of appeal.

LORD JUSTICE STUART-SMITH

69.
I agree.

THE MASTER OF THE ROLLS

70.
I also agree.

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[1] I use the expression “EU/UK” as a shorthand to convey that, prior to the UK leaving the EU, what mattered was flights from the EU, whilst now what matters are flights from the UK.