Hilary Term

[2014] UKSC 15

On appeal from: [2012] EWCA Civ 66

JUDGMENT

Stott (Appellant) v Thomas Cook Tour Operators Limited (Respondent)

before

Lord Neuberger, President

Lady Hale, Deputy President

Lord Reed

Lord Hughes

Lord Toulson

JUDGMENT GIVEN ON

5 March 2014

Heard on 20 November 2013

Appellant	Respondent
Robin Allen QC	John Kimbell
Martin Chamberlain QC	Tom Bird
(Instructed by Equality & Human Rights Commission)	(Instructed by JMC Legal Services Department)

Intervener (Secretary of State for Transport)

Daniel Beard QC

Kassie Smith QC

(Instructed by Treasury Solicitors)

LORD TOULSON, (with whom Lord Neuberger, Lady Hale, Lord Reed and Lord Hughes agree)

Introduction

1.
This appeal arises from a sorry case of a serious failure by an air tour operator to see that proper provision was made for the needs of a disabled passenger, contrary to the requirements of the Civil

Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007 (SI 2007/1895) ("the UK Disability Regulations").

2.
The UK Disability Regulations implement Regulation (EC) No 1107/2006 of the European Parliament and the Council concerning the rights of disabled persons and persons with reduced mobility when travelling by air ("the EC Disability Regulation").

3.
The issue is whether a court may award damages for a claimant's discomfort and injury to feelings caused by a breach of the UK Disability Regulations. The conclusion of the courts below was that any such award is precluded by the Montreal Convention, as adopted in the EU by the Montreal Regulation (or, to use its full title, "Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, as amended by Parliament and Council Regulation (EC) No 889/2002").

4.
The appeal has been brought with the backing of the Equality and Human Rights Commission and it has the additional support of the Secretary of State for Transport as an intervener.

The parties

5.
Mr Christopher Stott is paralysed from the shoulders down and is a permanent wheel chair user. He has double incontinence and uses a catheter. When travelling by air, he depends on his wife to manage his incontinence since he cannot move round the aircraft. He also relies on her to help him to eat and to change his sitting position.

6.
Thomas Cook Tour Operators Ltd is a well known tour operator which provides overseas package holidays and flights to many destinations. It is an air carrier with an operating licence granted by a Member State of the EU and therefore subject to the obligations imposed on Community air carriers by the EC Disability Regulation.

The facts

7.
I take the following summary of the facts from the judgment of the trial judge, Recorder Atherton, delivered on 19 January 2011 in the Manchester County Court:

"4. On 12 September 2008 Mr Stott booked with the defendant to fly from East Midlands Airport to Zante, departing 22 September and returning 29 September 2008. Soon after making the booking on the internet he telephoned the defendant's helpline to advise that he had booked and paid to be seated next to his wife on both flights. He called the helpline again on 19 September and was assured that he and his wife would be seated together.

5. The outward flight went reasonably according to plan but sadly the return journey did not. Mr and Mrs Stott encountered many difficulties at the airport in Zante. At check-in they were told they would not be seated together. In response to their protestations the supervisor eventually told them that their problem would be sorted out at the departure gate. When they arrived at the departure gate their expectations were unfulfilled. They were told that other passengers had already boarded and the seat allocations could not be changed.

6. When boarding the aircraft from an ambulift, matters got much worse. As he entered the aircraft, Mr Stott's wheelchair overturned and he fell to the cabin floor. Those present appeared not to know how to deal with the situation. Mr Stott felt extremely embarrassed, humiliated and angry and his wife, who had recently suffered serious ill-health herself, was also very distressed at the chaotic scenes.

7. Eventually Mr Stott was assisted into his aisle seat in the front row and his wife was seated behind him. This arrangement caused them considerable difficulties in that it was difficult for Mrs Stott to assist her husband with his catheterisation, catheter bags, food and movement during the three hour twenty minute flight.

8. The defendant's cabin crew apparently made no attempt to ease their difficulties. They made no requests of other passengers to enable Mr and Mrs Stott to sit together. From time to time during the flight she had to kneel or crouch in the aisle to attend to her husband's personal needs and inevitably she obstructed the cabin crew and other passengers as they made their way up and down the aisle. It was, therefore, a very unhappy experience for them."

The claim

8.
Mr Stott brought a claim under the UK Disability Regulations for a declaration that the respondent's treatment of him was in breach of its duty under the EC Disability Regulation, in that it had failed to make all reasonable efforts to give his wife a seat next to him, together with damages including aggravated damages. The recorder made such a declaration, and there has been no appeal against it. He found that Mr Stott had suffered injury to his feelings, for which he said that he would have awarded £2,500 as compensation (taking into account the duration of the flight), if it had been open to him to do so. However, he concluded that he had no power to make such an award, by reason of the Montreal Convention.

9.
The Court of Appeal upheld the recorder's decision in a judgment delivered by Maurice Kay LJ, with which Sullivan LJ and Dame Janet Smith agreed ([2012] EWCA Civ 66). Both courts expressed their sympathy for Mr Stott but they considered that the law was clear.

UK Disability Regulations

10.
The UK Disability Regulations were made by the Secretary of State for Transport under section 2(2) of the European Communities Act 1972. As the explanatory note states, they provide for the enforcement of the rights set out in the EC Disability Regulation.

11.
The UK Disability Regulations are short.

12.
Regulation 3 makes it an offence for an air carrier, an agent of an air carrier or a tour operator to contravene an obligation imposed by any of a number of articles of the EC Disability Regulation, and regulation 4 provides penalties for such offences. In the present case the respondent has not been prosecuted, but on the recorder's finding it was guilty of an offence carrying a potential fine not exceeding level 5 on the standard scale. The maximum level 5 fine on summary conviction is currently

£5,000: Criminal Justice Act 1982, as amended, section 37. There will be no maximum limit when the Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 85, comes into effect.

13.
Regulation 9 is headed “Compensation claims by disabled persons etc.” It provides:

“(1) A claim by a disabled person or a person with reduced mobility for an infringement of any of his rights under the EC Regulation may be made the subject of civil proceedings in the same way as any other claim in tort or (in Scotland) in reparation for breach of statutory duty.

(2) For the avoidance of doubt, any damages awarded in respect of any infringement of the EC Regulation may include compensation for injury to feelings whether or not they include compensation under any other head.

(3) Proceedings in England, Wales or Northern Ireland may be brought only in a county court.

(4) Proceedings in Scotland may be brought only in a sheriff court.

(5) The remedies available in such proceedings are those which are available in the High Court or (as the case may be) the Court of Session.”

EC Disability Regulation

14.
The general purpose of the EC Disability Regulation is apparent from the following paragraphs of the preamble:

“(1) The single market for air services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor, should have opportunities for air travel comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same right as all other citizens to free movement, freedom of choice and non-discrimination. This applies to air travel as to other areas of life.

…

(4) In order to give disabled persons and persons with reduced mobility opportunities for air travel comparable to those of other citizens, assistance to meet their particular needs should be provided at the airport as well as on board aircraft, by employing the necessary staff and equipment. In the interests of social inclusion, the persons concerned should receive this assistance without additional charge.

…

(15) Member States should supervise and ensure compliance with this Regulation and designate an appropriate body to carry out enforcement tasks. This supervision does not affect the rights of disabled persons and persons with reduced mobility to seek legal redress from courts under national law.

…

(18) Member States should lay down penalties applicable to infringements of this Regulation and ensure that those penalties are applied. The penalties, which could include ordering the payment of compensation to the person concerned, should be effective, proportionate and dissuasive.”

15.
Article 1 provides:

“1. This Regulation establishes rules for the protection of and provision of assistance to disabled persons and persons with reduced mobility travelling by air, both to protect them against discrimination and to ensure that they receive assistance.

2. The provisions of this Regulation shall apply to disabled persons and persons with reduced mobility, using or intending to use commercial passenger air services on departure from, on transit through, or on arrival at an airport, when the airport is situated in the territory of a Member State to which the Treaty applies.”

16.
Article 7 provides:

“1. When a disabled person or person with reduced mobility arrives at an airport for travel by air, the managing body of the airport shall be responsible for ensuring the provision of the assistance specified in Annex I in such a way that the person is able to take the flight for which he or she holds a reservation, provided that the notification of the person's particular needs for such assistance has been made to the air carrier or its agent or the tour operator concerned at least 48 hours before the published time of departure of the flight. This notification shall also cover a return flight, if the outward flight and the return flight have been contracted with the same air carrier.

2. Where use of a recognised assistance dog is required, this shall be accommodated provided that notification of the same is made to the air carrier or its agent or the tour operator in accordance with applicable national rules covering the carriage of assistance dogs on board aircraft, where such rules exist.

3. If no notification is made in accordance with paragraph 1, the managing body shall make all reasonable efforts to provide the assistance specified in Annex I in such a way that the person concerned is able to take the flight for which he or she holds a reservation.

4. The provisions of paragraph 1 shall apply on condition that:

(a) the person presents himself or herself for check-in:

(i) at the time stipulated in advance and in writing (including by electronic means) by the air carrier or its agent or the tour operator, or

(ii) if no time is stipulated, not later than one hour before the published departure time, or

(b) the person arrives at a point within the airport boundary designated in accordance with article 5:

(i) at the time stipulated in advance and in writing (including by electronic means) by the air carrier or its agent or the tour operator, or

(ii) if no time is stipulated, not later than two hours before the published departure time.”

17.
Article 10 provides:

“An air carrier shall provide the assistance specified in Annex II without additional charge to a disabled person or person with reduced mobility departing from, arriving at or transiting through an

airport to which this Regulation applies provided that the person in question fulfils the conditions set out in article 7(1), (2) and (4).”

18.
The assistance specified in Annex II includes:

“Where a disabled person or person with reduced mobility is assisted by an accompanying person, the air carrier will make all reasonable efforts to give such person a seat next to the disabled person or person with reduced mobility.”

19.
This was the obligation which the respondent breached.

20.
Article 12 provides:

“Where wheelchairs or other mobility equipment or assistive devices are lost or damaged whilst being handled at the airport or transported on board aircraft, the passenger to whom the equipment belongs shall be compensated, in accordance with rules of international, Community and national law.”

21.
Although article 12 is not applicable in the present case, since Mr Stott’s wheelchair was not damaged, it has a broader relevance inasmuch as the reference to compensation in accordance with rules of international law clearly embraces the Montreal Convention.

22.
Articles 14 to 16 provide for three methods of enforcement. Article 14 provides for each Member State to designate an enforcement body or bodies. In the UK the designated body is the Civil Aviation Authority. Article 15 provides for the establishment of complaints procedures. Article 16 provides:

“The Member States shall lay down rules on penalties applicable to infringements of this Regulation and shall take all the measures necessary to ensure that those rules are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission and shall notify it without delay of any subsequent amendment affecting them.”

Montreal Convention

23.
The full title of the Montreal Convention is the Convention for the Unification of Certain Rules for International Carriage by Air. It was agreed at Montreal on 28 May 1999. The EU is a signatory.

24.
The predecessor of the Montreal Convention was signed at Warsaw on 12 October 1929 (“the Warsaw Convention”). It was amended in 1955 at the Hague, but the amended Convention continued to be known by its original name. The Montreal Convention replaced the Warsaw Convention but followed its general structure. Its purpose according to the preamble was “to modernize and consolidate the Warsaw Convention and related instruments”.

25.

There is no material difference in their scope of application, as defined in each case in article 1. Each begins by stating that the Convention applies to “all international carriage of persons, baggage or cargo performed by aircraft for reward”.

26.
Chapter III of the Warsaw Convention was headed “Liability of the carrier”. The heading of the same chapter in the Montreal Convention has the additional words “and extent of compensation for damage”. In chapter III of the Warsaw Convention, article 17 dealt with liability for death or injury to passengers as a result of an accident sustained on board the aircraft or in the course of embarkation or disembarkation, and article 18 dealt with liability for damage to or loss of any registered luggage or goods. In chapter III of the Montreal Convention liability for death or bodily injury is dealt with in article 17.1 in materially identical terms to article 17 of the Warsaw Convention. Loss of or damage to a passenger’s baggage is dealt with in article 17.2 to 17.4, and loss of or damage to cargo are dealt with in article 18, but the differences are matters of detail.

27.
There are also broadly parallel provisions for liability for damage occasioned by delay in the carriage of passengers, baggage or cargo.

28.
Two features of the Conventions are of critical relevance. First, there are limits to the type of injury or damage which is compensable and the amount of compensation recoverable. Bodily injury (or lésion corporelle) has been held not to include mental injury, such as post-traumatic stress disorder or depression (Morris v KLM Royal Dutch Airlines [2002] UKHL 7; [2002] 2 AC 628). The same would apply to injury to feelings. Secondly, there is an exclusivity provision.

29.
The exclusivity provision in the Warsaw Convention was contained in article 24:

“1. In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

2. In the cases covered by article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.”

30.
The effect of this provision was considered by the House of Lords in Sidhu v British Airways plc [1997] AC 430, to which I will refer in more detail.

31.
In the Montreal Convention the exclusivity provision is contained in article 29:

“In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.”

The effect is the same as that of article 24 of the Warsaw Convention, except for the addition of the sentence specifically excluding punitive, exemplary or other non-compensatory damages.

32.
Article 29 is the rock on which Mr Stott's claim for damages foundered.

Montreal Regulation

33.
The Montreal Convention has effect in the UK by different routes depending on whether the carrier is a Community air carrier. Generally the Montreal Convention has force in the UK by virtue of section 1 of the Carriage by Air Act 1961 as amended, but not in relation to Community air carriers to the extent that the Montreal Regulation has force in the UK: section 1(2) of the 1961 Act. The Montreal Regulation has direct effect in the UK by virtue of section 2 of the European Communities Act 1972. The Montreal Regulation followed the conclusion of the Montreal Convention. Its purpose, as stated in an explanatory memorandum issued by the Commission, was to ensure full alignment between the Montreal Convention and community law. To that end, article 3.1 states:

"The liability of a Community air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability."

The Montreal Convention therefore has effect in the UK in relation to Community air carriers through that article.

The exclusivity principle

34.
In Sidhu the House of Lords considered the question whether a passenger who sustained damage in the course of international carriage by air due to the fault of the carrier, but had no claim against the carrier under article 17 of the Warsaw Convention, was left without a remedy. It concluded that this was so. Lord Hope gave the only speech. He analysed the history, structure and text of the Convention, and he reviewed the domestic and international case law. He explained that the Convention was a package. It gave to passengers significant rights, easily enforceable, but it imposed limitations. He held that the whole purpose of article 17, read in its context, was to prescribe the circumstances – that is to say, the only circumstances – in which a carrier would be liable to the passenger for claims arising out of his international carriage by air. To permit exceptions, whereby the passenger could sue outside 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.

35.
This interpretation has been accepted and applied in many other jurisdictions.

36.
In the USA the leading authority is the decision of the Supreme Court in El Al Israel Airlines Ltd v Tseng 525 US 155 (1999). The plaintiff was subjected to an intrusive security search at John F Kennedy International Airport in New York before she boarded a flight to Tel Aviv. She sued the airline under New York tort law for damages for psychosomatic injury. The Supreme Court had previously held in Eastern Airlines Inc v Floyd 499 US 530 (1991) that mental or psychic injuries unaccompanied by physical injuries were not compensable under article 17, but the plaintiff argued that her claim in respect of the treatment which she suffered before embarkation was not within the reach of the

preemptive effect of the Convention. The Court of Appeals for the Second Circuit accepted that argument. In its judgment it expressed the fear that if the Convention had the preclusive effect for which the airline contended, it would follow, for example, that a passenger injured by a malfunctioning escalator in the airline's terminal would have no remedy against the airline even if it had recklessly disregarded its duty to maintain the escalator in proper repair. The Supreme Court reversed the decision of the Court of Appeals in an opinion delivered by Justice Ginsburg (Justice Stevens dissenting).

37.
Applying the principle that an international treaty must be interpreted not as if it were a domestic instrument, but so as to accord with the court's understanding of the shared expectations of the contracting parties, Justice Ginsburg referred to the French text of article 24 of the Warsaw Convention (the earlier equivalent of article 29 of the Montreal Convention):

"(1) Dans les cas prevus aux articles 18 et 19 toute action en responsabilite, a quelque titre que ce soit, ne peut etre exercee que dans les conditions et limites prevues par la presente Convention.

(2) Dans les cas prevus a l'article 17, s'appliquent egalement les dispositions de l'alinea precedent, sans prejudice de la determination des personnes qui ont le droit d'agir et de leurs droits respectifs."

38.
Tseng argued that "les cas prevus a l'article 17" meant those cases in which a passenger could actually maintain a case for relief under article 17. El Al argued, with the support of the US government as amicus curiae, that the expression referred generically to all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking. So read, article 24 would preclude a passenger from asserting any air transit personal injury claims under local law, including claims that failed to satisfy article 17's liability conditions (perhaps because the injury did not result from an "accident" or because the "accident" did not result in physical injury or manifestation of injury).

39.
The court judged that the government's interpretation of article 24 was more faithful to the Convention's text, purpose and overall structure. Its reasoning process accorded with that of the House of Lords in Sidhu, to which Justice Ginsburg referred, at pp 175-176:

"Decisions of the courts of other Convention signatories corroborate our understanding of the Convention's preemptive effect. In Sidhu, the British House of Lords considered and decided the very question we now face concerning the Convention's exclusivity when a passenger alleges psychological damages, but no physical injury, resulting from an occurrence that is not an 'accident' under Article 17. See [[1997] AC 430, 441, 447]. Reviewing the text, structure, and drafting history of the Convention, the Lords concluded that the Convention was designed 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.' Ibid. Courts of other nations bound by the Convention have also recognized the treaty's encompassing preemptive effect. The 'opinions of our sister signatories,' we have observed, are 'entitled to considerable weight.' [Air France v] Saks, 470 US at 404 (internal quotation marks omitted). The text, drafting history, and underlying purpose of the Convention, in sum, counsel us to adhere to a view of the treaty's exclusivity shared by our treaty partners."

40.
The court put to rest the Court of Appeals' fear that such a conclusion would mean that a passenger who had an accident in the terminal building through the negligence of the person responsible for its maintenance might be left without a remedy. Justice Ginsburg observed that the Convention's preemptive effect on local law extended no further than the Convention's own substantive scope, and that a carrier would be indisputably subject to liability under local law for injuries arising outside that scope, for example, for passenger injuries occurring before the operation of embarking.

41.
In King v American Airlines Inc 284 F 3d 352 (2002) the Court of Appeals for the Second Circuit considered the question whether discrimination claims could properly be regarded as generically outside the Convention's substantive scope, so that a claim for compensation under local law would not be affected by the Convention. The assumed facts were that the plaintiffs were bumped from an overbooked flight because of their race. Upholding an order for the dismissal of the claim, the court held that discrimination claims under local law which arose in the course of embarking on an aircraft were preempted by the Convention.

42.
The argument advanced unsuccessfully by the plaintiffs was that discrimination claims fell outside the scope of the Convention because of their qualitative nature. Sotomayor CJ (now Justice Sotomayor of the US Supreme Court), delivering the opinion of the court, emphasised that the preemptive scope of the Convention depends not on the qualitative nature of the act or omission giving rise to the claim but on when and where the salient event took place:

"Article 17 directs us to consider when and where an event takes place in evaluating whether a claim for an injury to a passenger is preempted. Expanding upon the hypothetical posed by the Tseng Court, a passenger injured on an escalator at the entrance to the airport terminal would fall outside the scope of the Convention, while a passenger who suffers identical injuries on an escalator while embarking or disembarking a plane would be subject to the Convention's limitations. Tseng, 525 US at 171. It is evident that these injuries are not qualitatively different simply because they have been suffered while embarking an aircraft, and yet article 17 plainly distinguishes between these two situations.' [Original emphasis]

...

The aim of the Warsaw Convention is to provide a single rule of carrier liability for all injuries suffered in the course of the international carriage of passengers and baggage. As Tseng makes clear, the scope of the Convention is not dependent on the legal theory pled nor on the nature of the harm suffered. See Tseng, 525 US at 171 (rejecting a construction of the Convention that would look to the type of harm suffered, because it would 'encourage artful pleading by plaintiffs seeking to opt out of the Convention's liability scheme when local law promised recovery in excess of that prescribed by the treaty'); Cruz v Am Airlines, 338 US App DC 246, 193 F3d 526, 531 (DC Cir 1999) (determining that fraud claim was preempted by Article 18, because the events that gave rise to the action were 'so closely related to the loss of [plaintiffs'] luggage . . . as to be, in a sense, indistinguishable from it')."

43.
The judge noted that in a number of cases US District Courts had addressed the issue whether discrimination claims were preempted by the Convention and had all reached a similar view. She concluded her judgment with some broader observations which have a resonance in the present case:

“Plaintiffs raise the specter that our decision will open the doors to blatant discrimination aboard international flights, invoking images of airline passengers segregated according to race and without legal recourse. They suggest that, despite Article 24's plain mandate that the Warsaw Convention preempts ‘any cause of action, however founded,’ we should nonetheless carve out an exception for civil rights actions as a matter of policy. This we decline to do. ‘It is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.’ Saks, 470 US at 399. It is not for the courts to rewrite the terms of a treaty between sovereign nations. Cf Turturro, 128 F Supp 2d at 181 (‘The Convention massively curtails damage awards for victims of horrible acts [of] terrorism; the fact that the Convention also abridges recovery for . . . discrimination should not surprise anyone.’).

Moreover, while private suits are an important vehicle for enforcing the anti-discrimination laws, they are hardly the only means of preventing discrimination on board aircraft. Federal law provides other remedies. Responsibility for oversight of the airline industry has been entrusted to the Secretary of Transportation. The Kings could, therefore, have filed a complaint with the Secretary. 49 USC § 46101. The FAA prohibits air carriers, including foreign air carriers, from subjecting a person to ‘unreasonable discrimination.’ Id § 41310(a). The Secretary has the authority to address violations of FAA provisions, including the power to file civil actions to enforce federal law. Id § 46106. It does not follow from the preemption of the Kings' private cause of action that air carriers will have free rein to discriminate against passengers during the course of an international flight.”

44.
Sidhu and Tseng have been followed by the Federal Court of Australia in South Pacific Air Motive Pty Ltd v Magnus 157 ALR 443 (1998), the Court of Appeal of Hong Kong in Ong 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 (Bundesgerichtshof), 15 March 2011, Urteil Az X ZR 99/10.

The arguments

45.
Mr Robin Allen QC submitted that since the Montreal Convention has effect within the EU via the Montreal Regulation, it is a question of European law whether the courts below were right to hold that Mr Stott’s claim for damages for breach of the UK Disability Regulations was incompatible with the Convention.

46.
He submitted that Mr Stott’s claim is unaffected by the Montreal Regulation because its subject matter was outside both the substantive scope and the temporal scope of the Regulation.

47.
The argument on the first point was summarised succinctly in the appellant’s written case as follows:

“Applying the Vienna Convention, the [Montreal Convention] is not in any sense concerned with giving access to air travel to disabled persons. Rights conferred in order to ensure equal access to air travel for disabled people (and remedies granted for breach of those rights) are simply not – to use Lord Hope’s language in Sidhu – ‘areas with which [the Convention] deals’. For this reason, it is submitted

that it would be a mistake to use the MC to limit the rights and obligations that Union legislation imposes in relation to such access."

48.
The argument on the second point was based on the recorder's finding that the airline's failure to make all reasonable efforts to seat Mr Stott next to his wife began prior to embarkation.

49.
In support of his argument Mr Allen relied on a number of European authorities. He accepted that none of them was conclusive in relation to the present case, but he submitted that the court ought to refer the following questions to the Court of Justice of the European Union ("CJEU"):

"(a) Whether the right to compensation for breach of duties to take reasonable steps to assist disabled persons in the context of air travel (which the Union legislator specifically contemplated in the EC Disability Regulation), like the rights to compensation conferred by Regulation 261/2004, should be regarded as falling within a 'different regulatory framework' from, or as 'complementary to,' the MC (rather than in conflict with it);

(b) Whether compensation awarded in respect of breaches of the duties imposed by the EC Disability Regulation both on board the aircraft and earlier, like compensation for delay awarded under Regulation 261/2004, 'simply operates at an earlier stage than the system which results from the Montreal Convention';

(c) Whether a member state which confers a right to compensation under its domestic law for failures by the providers of goods and services to take reasonable steps to accommodate the needs of disabled persons is obliged by the principles of equivalence and/or effectiveness, when implementing the EC Disability Regulation, to provide a similarly favourable remedy for similar failures in the context of air travel amounting to breaches of that Regulation;

(d) How that obligation to provide an effective remedy for breaches of the EC Disability Regulation is to be reconciled with the exclusivity principle contained in the MC in circumstances where:(a) the remedy is provided to give effect to the right to equal access to air travel, which is itself derived from the fundamental anti-discrimination rights conferred by the Charter and (b) the MC was never intended to, and does not, deal with the question of access to air travel."

50.
Mr Allen submitted that these questions are important and unresolved. The answers to them are not so obvious as to leave no scope for any reasonable doubt. Article 267 therefore requires a reference from this court, as the UK's final court of appeal, to the CJEU.

51.
Mr Daniel Beard QC, on behalf of the Secretary of State, concentrated on the temporal argument. He submitted that on the recorder's findings of fact, liability for breach of the UK Disability Regulations arose prior to embarkation, and therefore it was plain that Mr Stott's claim was not preempted by the Montreal Convention. In his submission, there was no need for a reference to the CJEU and the appeal should be allowed.

52.
Mr John Kimbell, on behalf of the respondent, pointed out that the particulars of injury to feelings pleaded in Mr Stott's particulars of claim related to his treatment during the process of embarkation and during the flight, which made him feel humiliated and for which he claimed damages. It was for

such injury to his feelings, occasioned during the embarkation and flight, that the recorder assessed the appropriate monetary compensation, subject to the question whether it was permissible.

53.
Mr Kimbell submitted that this was the gravamen of the claim, and that it fell within the temporal scope of the Montreal Convention. The claim for damages for such injury to feelings under the UK Disability Regulations was therefore preempted by article 29 of the Montreal Convention, as that article (or rather its predecessor) had been interpreted in Sidhu. He observed that the court was not being asked to reconsider the correctness of the decision in Sidhu, which has moreover received uniform international support. He submitted that the legal basis of Mr Stott's claim for damages under domestic law was irrelevant (as properly recognised, for example, in King v American Airlines). All that mattered was that it was a claim for damages referable to the treatment of Mr Stott in the course of his international carriage by air. Accordingly, he submitted that on the established authorities the decision of the Court of Appeal upholding the recorder was plainly right, and there was no cause for a reference to the CJEU.

European case law

54.
Mr Allen relied on a line of cases in which the CJEU has considered the compatibility of the Montreal Regulation with the provisions of another EU Regulation, No 261/2004, requiring compensation and assistance to passengers in the event of denial of boarding, cancellation or long delays of flights. Article 5 concerns cancellation. Article 6 concerns delay. Each requires the passengers to be offered various forms of assistance, such as hotel accommodation where necessary, and to be paid compensation in accordance with article 7. The compensation payable under article 7 is at a standard rate (which varies according to the length of the flight), regardless of the personal circumstances of the passengers and the amount of any actual loss suffered by them individually.

55.
The most recent decision is that of the Grand Chamber in Nelson v Deutsche Lufthansa AG (Joined Cases C-581/10 and C-629/10), [2013] 1 CMLR 1191. Reiterating the court's reasoning in earlier cases beginning with R (IATA and ELFAA) v Department of Transport (Case C-344/04)[2006] ECR I-403, the court held that the scheme established by Regulation 261/2004 for standardised redress was a form of protection supplementary to, and not incompatible with, the Montreal Convention because it did not affect the right of a passenger to bring a claim for compensation for individual damage suffered by him or the limitations imposed by the Convention on the right to redress on an individual basis.

Analysis

56.
It is convenient to begin by clearing the ground. There is no dispute about the meaning of the EC Disability Regulation or its compatibility with the Montreal Convention, to which the EU is a party and which is incorporated into the Montreal Regulation. The EC Disability Regulation imposes obligations on air carriers and others who operate in the air services market to provide equal access to such services for disabled persons and others with reduced mobility for any reason. It leaves enforcement to the Member States. It requires Member States to lay down rules on penalties for infringement but it does not require such penalties to include financial compensation.

57.

There is similarly no dispute about the meaning of the UK Disability Regulations or their compatibility with the Montreal Convention. If the airline is right in its contention that Mr Stott's claim for damages is precluded by article 29 of the Montreal Convention, it follows that the wording of regulation 9(2) is misleading, because it states (supposedly for the avoidance of doubt) that any damages awarded in respect of any infringement of the EC Regulation may include compensation for injury to feelings. It has rightly not been argued that regulation 9(2) should be read as purporting to create a power to award such damages, if it would be inconsistent with article 29, for that would be ultra vires. The effect of regulation 9 is to make it clear that the Regulations are capable of giving rise to an action for breach of statutory duty, for which damages are unrestricted by the Regulation, but it does not (and could not) remove any limitation resulting from the Montreal Convention.

58.
The European case law does not assist Mr Stott. The question in the cases about Regulation (EC) 261/2004 was whether the scheme of standardised remedial measures was compatible with the Montreal Convention. The court recognised that any claim for damages on an individual basis would be subject to the limits of the Convention (IATA para 42). Mr Stott's claim is for damages on an individual basis.

59.
To summarise, this case 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.

60.
The temporal question can be answered by reference to the facts pleaded and found. The claim was for damages for the humiliation and distress which Mr Stott suffered in the course of embarkation and flight, as pleaded in his particulars of claim and set out in paras 6 to 8 of the recorder's judgment. The particulars of injury to Mr Stott's feelings and the particulars of aggravated damages related exclusively to events on the aircraft. In the course of argument it was suggested that Mr Stott had a complete cause of action before boarding the aircraft based on his poor treatment prior to that stage. If so, it would of course follow that such a pre-existing claim would not be barred by the Montreal Convention, but that was not the claim advanced. Mr Stott's subjection to humiliating and disgraceful maltreatment which formed the gravamen of his claim was squarely within the temporal scope of the Montreal Convention. It is no answer to the application of the Convention that the operative causes began prior to embarkation. To hold otherwise would encourage deft pleading in order to circumvent the purpose of the Convention. Many if not most accidents or mishaps on an aircraft are capable of being traced back to earlier operative causes and it would distort the broad purpose of the Convention explained by Lord Hope in Sidhu to hold that it does not apply to an accident or occurrence in the course of international carriage by air if its cause can be traced back to an antecedent fault.

61.

Should a claim for damages for ill treatment in breach of equality laws as a general class, or, more specifically, should a claim for damages for failure to provide properly for the needs of a disabled passenger, be regarded as outside the substantive scope of the Convention? As to the general question, my answer is no for the reasons given by Sotomayor CJ in King v American Airlines. I agree with her analysis that what matters is not the quality of the cause of action but the time and place of the accident or mishap. The Convention is intended to deal comprehensively with the carrier's liability for whatever may physically happen to passengers between embarkation and disembarkation. The answer to that general question also covers the more specific question.

62.
Mr Allen submitted that the consequences were unfair, because if Mr Stott and his wife had not been misled at the check-in desk into believing that their seating problem would be sorted out at the departure gate, they would never have proceeded and they would have been able to recover damages for their loss. The complaint is just, but that is not a sufficient reason to reinterpret the Convention.

63.
The underlying problem is that the Warsaw Convention long pre-dated equality laws which are common today. There is much to be said for the argument that it is time for the Montreal Convention to be amended to take account of the development of equality rights, whether in relation to race (as in King v American Airlines) or in relation to access for the disabled, but any amendment would be a matter for the contracting parties. It seems unfair that a person who suffers ill-treatment of the kind suffered by Mr Stott should be denied any compensation.

64.
Under the law as it stands, a declaration that the carrier was in breach of the UK Regulations is likely to be small comfort to a passenger who has had Mr Stott's experience, but I draw attention, as did Sotomayor CJ at the end of her opinion in King v American Airlines, to the fact that there are other possible means of enforcement. It is for the Civil Aviation Authority to decide what other methods of enforcement should be used, including possible criminal proceedings.

Conclusion

65.
The embarrassment and humiliation which Mr Stott suffered were exactly what the EC and UK Disability Regulations were intended to prevent. I share the regret of the lower courts that damages are not available as recompense for his ill-treatment and echo their sympathy for him, but I agree with the reasoning of their judgments and would dismiss this appeal.

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.

LADY HALE

67.
Mr and Mrs Stott have both been treated disgracefully by Thomas Cook and it is hardly less disgraceful that, for the reasons given by Lord Toulson, the law gives them no redress against the airline. The apparently adamant exclusion, in article 29 of the Montreal Convention, of any liability for

damages other than that specifically provided for in the Convention, while perhaps unsurprising in a trade treaty, is more surprising when the fundamental rights of individuals are involved. Some treaties make express exception for anything which conflicts with the fundamental rights protected within a member state, but the Montreal Convention does not. Whatever may be the case for private carriers, can it really be the case that a State airline is absolved from any liability in damages for violating the fundamental human rights of the passengers it carries?

68.
The most obvious example is an airline which requires black or female passengers to sit at the back of the plane while white or male passengers sit at the front (and thus nearer to the exit). This would be unconstitutional in most civilised countries. Indeed, there is a respectable argument that race (but not sex) discrimination is not only contrary to customary international law, as well as to many international human rights instruments, but also contravenes a peremptory norm of international law which is binding on all states (see R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening) [2004] UKHL 55, [2005] 2 AC 1, per Lord Steyn at para 46). If it were, then any treaty conflicting with that norm at the time of its conclusion would be void, at least to that extent, by virtue of article 53 of the Vienna Convention on the Law of Treaties; and if a new peremptory norm of international law emerges, then any existing treaty which is in conflict with that norm becomes void and terminates, at least to that extent, by virtue of article 64 of the Vienna Convention.

69.
More important still, it might be thought, is the prohibition of torture. This is indeed a peremptory norm. There is a respectable case to be made that what happened to Mr Stott on board the plane amounted to inhuman or degrading treatment within the meaning of article 3 of the European Convention on Human Rights (see, for example, the case of Price v United Kingdom (2002) 34 EHRR 1285, concerning the conditions in which a severely disabled woman was held in police custody). It seems extraordinary that a State should be able to subject a passenger to such treatment with impunity. However, it may well be that the prohibition of cruel, inhuman and degrading treatment has not yet reached the status of a peremptory norm in general international law, even though torture in the narrower sense defined in the Torture Convention of 1984 has done so.

70.
None of this was ventilated before us, no doubt for the good reason that Thomas Cook is not a State airline. The extent to which international law imposes positive obligations upon States to protect individuals against violations of their fundamental rights by non-state actors is controversial. There may or may not be something in the issues I have raised. But the question of whether there are indeed any limits to the apparently adamant exclusion in article 29 of the Montreal Convention may well require ventilation in another case or another place. At the very least, as Lord Toulson says, the unfairness of the present position ought to be addressed by the parties to the Convention. Small comfort though it may be to them, both Mr and Mrs Stott, with the support not only of the Equality and Human Rights Commission but also of the responsible department of the United Kingdom government, have done us all a service by exposing a grave injustice to which the international community should now be turning its attention.