



AVIATION (CONSUMERS) (AMENDMENT) REGULATIONS 2023

UK261 GOES ON TO THE UK STATUTE BOOK – BUSINESS AS USUAL?

The UK government has legislated to codify certain principles of case law relating to the interpretation of UK 261. This article explains why they have done so, and what it means for both consumers and carriers.

The *Retained EU Law (Revocation and Reform) Act 2023* (the **REUL Act**) came into force on 1 January 2024. The REUL Act contains a schedule of EU laws that were retained following Brexit but have now been withdrawn. Simply put, if a piece of legislation is not on the list, it now remains in force as fully-fledged UK legislation, re-named “Assimilated Law” from 1 January 2024.

In summary:

- The REUL Act abolishes any EU law that the UK chose not to retain and converts those retained EU laws into “Assimilated Law”.
- Assimilated Law can be amended in future by the normal parliamentary process.
- European Court of Justice (CJEU) case law dating from before 1 January 2021 must still be applied by lower UK courts when interpreting Assimilated Law. However this case law can be overruled by the Court of Appeal or above.
- The REUL act introduces an expedited process for referring points of law to the Court of Appeal before a first instance judgment has been handed down.

The future of Air Passenger Rights in the UK?

EU261 provides the mechanism for compensating passengers for delays and cancellations. EU 261 was reborn as the *Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment) (EU Exit) Regulations 2019 (UK 261)* in January 2021 (after the end of the Brexit Transition Period). UK261 is now Assimilated Law and continues to apply to claims against UK airlines or non-UK airlines departing the UK.

EU261 is very much a product of the CJEU, who in numerous decisions have “interpreted” the Regulation to a point that the original wording and intention can no longer be made out. There was a glimmer of hope that following Brexit, the questionable decisions of the CJEU might receive some scrutiny from the Court of Appeal. However, we are disappointed to report that the *Aviation (Consumers) (Amendment) Regulations 2023 (ACAR)* appear to extinguish such hopes.

ACAR, which came into force on 14 December 2023, is an initiative by the UK Department of Transport to ensure that the level of protection

afforded to consumers remains the same after the REUL Act.

The regulations codify certain key CJEU case law into UK law, specifically in 2009 with *Sturgeon and Others v Condor [C-402/07 and C-432/07]* (the chief offender), which introduced the concept of fixed financial compensation for delays, despite this not being specified in the text of EU261. For good measure, there is also confirmation that liability under ACAR is to be treated as distinct right of action from The Montreal Convention 1999.

In addition to the above, ACAR also incorporates the following:

Extraordinary circumstances

ACAR retains the extraordinary circumstances defence and applies the often-quoted definition from the CJEU decision in *Wallentin-Hermann v. Alitalia [C-549/07]*, namely:

‘(a) that— (i) by their nature or origin are not inherent in the normal exercise of the activity of the air carrier, (ii) are beyond the actual control of the air carrier, and (iii) the air carrier has taken all reasonable measures in relation to but was unable to avoid.’

Helpfully, ACAR does codify that where delays or cancellations arose from the impact of an air traffic management decision, these will be regarded as having been caused by extraordinary circumstances.

Time of arrival

The CJEU definition of arrival time, namely, the time passengers are permitted to exit the aircraft upon reaching the final destination.

Connecting flights

Multiple legs purchased as a single reservation, will be treated as a single unit for UK261 liability purposes.

Limitation Period

As we know, the Montreal Convention contains an exclusivity provision (found at Article 29) which limits actions for damages. Following several cases in

the CJEU it was established that this provision does not apply to Article 7 of EU261. ACAR sets out that the UK’s six-year limitation period applies under section 9 of the *Limitation Act 1980*.

Conclusion - does ACAR alter the position of air passenger rights in the UK?

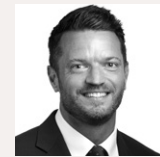
In short, ACAR does not change the current position for airlines or consumers regarding claims for compensation or the protection afforded under EU261/UK261. However, by codifying some of the CJEU caselaw, it does increase clarity for UK courts and closes the door on any further legal challenges to certain key aspects of the compensation regime.

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