



“UK261”? PASSENGER RIGHTS AFTER THE BREXIT TRANSITION PERIOD

Although the UK formally left the European Union a year ago, air carriers will know that European Union Regulation (EC) 261/2004 on denied boarding, cancellation and long delay (EU261) has continued to have force in the UK throughout 2020 as though Brexit had never happened. This is because the UK has been in a transition period agreed with the EU as part of the terms of withdrawal, during which EU law has continued to apply.

At 11:00pm GMT on 31 December 2020, that transition period came to an end. So, does this mean things have now changed? Not as much as you might think.

Flight length	Original Euro amount	New Sterling amount
1,500 km or less	EUR 250	GBP 220
Between 1,500 km and 3,500 km	EUR 400	GBP 350
Greater than 3,500 km	EUR 600	GBP 520

Figure 1

Retained EU law

In preparation for life after Brexit, the UK Parliament passed the European Union (Withdrawal) Act 2018, by which directly applicable EU legislation like EU261 would be incorporated into UK law after the end of the transition period, creating a new type of UK legislation known as “retained EU law”. EU261 therefore continues, for the foreseeable future, to give passengers the same rights that they had previously. This includes rights created by past EU case law (such as the right to compensation for delay created in the controversial *Sturgeon* case), which will continue to bind lower UK courts.

A small number of changes have been made to the wording of EU261 as it applies in the UK in order to ensure that it operates effectively despite the UK no longer being an EU Member State. These were implemented by the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment) (EU Exit) Regulations 2019, bringing into force what is effectively “UK261”.

One such change is the replacement of the Euro value of the compensation payable under Article 7 of EU261 with new Sterling amounts (see figure 1)

Scope of UK261

“UK261” applies:

- to passengers departing from a UK airport; and
- to passengers departing from an airport located in a

country other than the UK to an airport situated in:

- the UK if the operating air carrier of the flight concerned is either an EU/EEA carrier or a UK air carrier; or
- the EU/EEA if the operating air carrier of the flight concerned is a UK air carrier.

Passengers therefore enjoy the same coverage between the UK and EU regimes as they had enjoyed under the previous unified regime.

From now on, any claim brought in the UK arising out of a qualifying delay or cancellation must be brought under UK261 regardless of the date of the flight in question. EU261 claims can still be made against UK carriers, but only in EU Member States. On certain routes there will be overlapping coverage of both the UK and the EU regimes and passengers will be entitled to decide which they prefer to use.

Looking further ahead, the UK could in theory amend the substance of UK261 by following due legislative process in exactly the same way that it would with any other legislation. However, in doing so, it may be constrained by the terms of the EU-UK Trade and Cooperation Agreement (TCA) unveiled in late December, which requires ongoing EU-UK cooperation and consultation on aviation policy with the shared objective of achieving a high level of consumer protection.

CJEU case law

All case law of the Court of Justice of the European Union (CJEU) made on or before 31 December 2020 in relation to EU261 will be retained indefinitely in the UK and will be binding on the English county and high courts and their Scottish and Northern Irish equivalents. The UK Supreme Court and the English Court of Appeal and its equivalents will have the power to depart from past case law, but only in very limited circumstances, applying the same test that the Supreme Court uses to depart from its own past decisions.

On the other hand, CJEU judgments made *after* 31 December 2020 will not be binding on any UK court. That means that, over time, the case law in the UK is likely to diverge from the rest of the EU, with grey areas and conflicts almost certainly emerging. Airlines should bear in mind, however, that UK courts may still have regard to future judgments of the CJEU and may well consider them to be persuasive.

As explained above, some claimants will have a choice as to whether they bring their claim in the UK under UK261 or in the EU under EU261 and it is likely that “forum shopping” will emerge as rights diverge.

HFW will monitor the development of both English and EU case law in order to help you navigate this evolving regulatory and claims environment.

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