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Clarifying the duties of the UK judiciary post-Brexit

Sara Drake* and Jo Hunt*

Abstract

The Court of Appeal's judgment in *Lipton and Anr. v. BA City Flyer Ltd* marks a new chapter in UK constitutional law. It provides the first judicial interpretation of section 29 of the European Union (Future Relationship) Act 2020. This general implementation clause aims to ensure the timely incorporation of the EU-UK Trade and Co-operation Agreement 2020 (TCA) into domestic law, by requiring 'existing domestic law' to have effect 'with such modifications as are required for the purposes of implementing' the TCA. This case note examines the conceptualisation of the legal obligation in section 29, as reflected in Green LJ's opinion. We also argue that the judgment makes a welcome attempt to promote legal certainty providing a clear sequencing of the steps to be taken by the UK judiciary when interpreting EU retained law post-Brexit, but nevertheless introduces some elements of potential confusion that require clarifying.

Key words: Brexit, EU-UK Trade and Co-operation Act 2020, section 29 of the European Union (Future Relationship) Act 2020, EU retained law, Air Passenger Rights

INTRODUCTION:

The United Kingdom (UK) finally departed from the European Union (EU) on 31st December 2020, with the coming to an end of the Implementation Period foreseen under the EU-UK Withdrawal Agreement 2020.¹ This brings a new complex legal regime into effect from 1st

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¹ Withdrawal Agreement 2020, Article 126.

January 2021 consisting of a range of inter-dependent legal instruments² designed to give effect to the UK's (staged) withdrawal from the EU³ and its new trading and security relationship set out in the EU-UK Trade and Co-operation Agreement 2020 (TCA).⁴ The UK's dualist approach to international law means the TCA only takes effect within the UK legal order on the back of a domestic legal act. This is achieved through the EU (Future Relationship) Act 2020 (EU (FR) Act), which also provided for a derogation from the standard process of Treaty ratification under the Constitutional Reform and Governance Act 2010. The pressure to conclude these legal instruments by the deadline of the end of the Implementation Period has generated the prospect of legal uncertainty due to reliance on sub-optimal legal solutions. Section 29 brings this into sharp relief. Whilst certain provisions of the TCA are transposed into domestic law by the EU (Future Relationship) Act, a sizable proportion are to be implemented under the delegated powers contained in that Act. Ahead of the completion of that regulatory task, section 29 provides for the read-in of the TCA into domestic law declaring that,

existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Co-operation Agreement or the Security of Classified Information Agreement so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.

² For accounts of this legislative pot pourri, see e.g. P. Eleftheriadis, 'Eleven Types of post-Brexit EU law', Oxford Business Law Blog, 8 Jan 2021 [Eleven Types of post-Brexit EU Law | Oxford Law Faculty](#) (last visited 26th July 2021).

³ The EU (Withdrawal) Act 2018; EU (Withdrawal Agreement) Act 2020; Protocol on Northern Ireland and the EU (Withdrawal) Act 2018 Exit Day Regulations 2019

⁴ The TCA was agreed between the parties on Christmas Eve 2020 and avoided the prospect of a future relationship on WTO terms ('no-deal' Brexit). There is provision for the Agreement to be reviewed every five years. It is accompanied by a Nuclear Co-operation Agreement (NCA) and a Security of Classified Information Agreement (SCIA).

Section 29 places the judiciary at the forefront of forging the new relationship between domestic law, international law and former EU law.⁵ The legal effect and constitutional nature of the provision had been met with consternation and immediately became subject of academic debate, being referred to as ‘remarkable’,⁶ ‘quite extraordinary’⁷ and ‘unusually open-ended’.⁸ Prior to any judicial pronouncement it was conceptualised by a number of commentators as establishing ‘some kind of *direct effect* for the TCA’.⁹ Direct effect is of course understood as a central concept of EU constitutional law, first introduced by the European Union’s Court of Justice (CJEU) in the seminal case of *Van Gend en Loos* in 1963.¹⁰ Direct effect ‘fills the gaps’ where EU law has not been transposed into national law or transposed incorrectly. It is the ability of a binding EU provision to be *invoked and relied upon* by an individual before a national court. Individual rights are created if the provision is sufficiently clear and precise and unconditional.¹¹ This EU law interpretation of direct effect is expressly excluded by Article 5 (1) of the TCA which states,

⁵ A. Bates and J. Williams have coined the term ‘EU Relations Law’ for this new genre arguing that it is distinct from ‘EU law’ and more positive and forward looking than ‘post-Brexit issues’: A. Bates and J. Williams, ‘What is EU Relations Law?’ (2020) EU Relations Law <https://eurelationslaw.com/about#:~:text=%20There%20are%20four%20components%20of%20EU%20Relations,the%20need%20to%20repatriate%20and%20exercise...%20More%20> (last visited 26th July 2021).

⁶ S. Whittaker, ‘Retaining European Union Law in the United Kingdom’ (2021) 137 *Law Quarterly Review* 477-502 at 489.

⁷ J. Williams, ‘Route Map for EU retained law: new Court of Appeal judgment’, EU Relations Law, (31st March 2021) <https://eurelationslaw.com/blog/route-map-for-retained-eu-law-new-court-of-appeal-judgment> (last visited 26th July 2021).

⁸ P. Eleftheriadis, n. 2 above.

⁹ P. Eekhout, ‘Brexit After the Negotiation of the Trade and Cooperation Agreement: Who Takes Back Control of What?’ (2021) 68 *Revista de Derecho Comunitario Europeo* 11-22.

¹⁰ Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.

¹¹ In other words, it must be possible for a national judge to discern from the provision clear rights and obligations conferred on individuals. It should leave no discretion for the national executive or legislature to take any further implementing measures to ensure the measure takes effect.

Without prejudice to Article SSC.67 of the Protocol of Social Security Coordination and with the exception, with regard to the Union, of Part Three [Law enforcement and judicial cooperation], nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal system of the Parties.

This explicit exclusion of direct effect sits in apparent tension with any suggestion that section 29 fills the gaps in a comparable way. What though is the nature of the gap filling, and its consequences? The Court of Appeal judgment in *Lipton and Anr. v. BA City Flyer Ltd*, delivered on 30th March 2021, is the first judgment delivered by a UK court post-Brexit that explicitly undertakes to clarify how EU retained law should be interpreted and applied in conjunction with the TCA and the EU (FR) Act.¹² The Court observes that section 29 will be called upon where existing law (including EU retained law) is not in compliance with the TCA. The judgment suggests the nature of the section 29 obligation is distinct from both direct effect, as well as from indirect effect, which places national courts under a duty to interpret domestic law ‘as far as possible’ in conformity with EU law. Instead, section 29 confers a form of direct applicability on the provisions of the TCA.¹³ In *Lipton*, the Court was faced with determining whether EU retained law on air passenger rights complied with consumer protection commitments in the TCA, or whether these would need to be brought in through section 29.

FACTUAL AND JURISDICTIONAL BACKGROUND

¹² [2021] EWCA Civ 454. See also *Polakowski & others v Westminster Magistrates’ Court* [2021] EWHC 53 (Admin), 20 January 2021, which saw the first judicial interpretation of the EU (Withdrawal Agreement) Act 2020 and the EU (Future Relationship) Act 2020 in in the context of extradition proceedings and *TuneIn Inc v. Warner Music UK Ltd and Sony Music Entertainment UK Ltd* [2021] EWCA Civ 441, 26 March 2021, which considered for the first time the power of the Court of Appeal to depart from EU retained case law.

¹³ See for an early contribution to this debate e.g. A.J.Easson ‘The “Direct Effect” of EEC Directives’ (1979) 28 *International and Comparative Law Quarterly* 319-353.

The dispute arose from a claim for compensation made by an air passenger against an airline because their flight had been cancelled. EU Regulation 261/2004,¹⁴ the Flight Compensation Regulation, confers air passengers with a right to compensation where their flight is cancelled without sufficient notice or if re-routing does not take place within a certain time threshold.¹⁵ The airline contested the claim on the grounds that the flight had been cancelled as the captain had become unwell and deemed unfit to fly while he was off-duty. It argued successfully before the lower courts that since the captain's illness arose while he was off-duty, it fell within the scope of the defence of 'extraordinary circumstances,'¹⁶ a type of *force majeure* clause, and exempted it from liability to pay compensation. The air passenger appealed and challenged this broad interpretation of the defence of extraordinary circumstances.

At the time of the flight cancellation¹⁷ and the first instance decision,¹⁸ the UK was still a member of the European Union. At the time of the decision of the appeal before Portsmouth Combined Court, the UK was in the transitional period where EU law still applied. The appellants appealed to the Court of Appeal and by the time of the hearing on the 2 March 2021, the UK had exited the European Union. The domestic constitutional basis for Regulation 262/2004 having legal effect in UK had switched from the European Communities Act 1972 to the EU (Withdrawal) Act 2018.¹⁹ It was agreed by Counsel and later determined by the Court that the applicable law was Regulation 261/2004, as amended by domestic regulations from

¹⁴ Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004

establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or delay of flights and repealing Regulation (EEC) No 295/91 (Text with EEA relevance); OJ L 46/1 17.2.2004.

¹⁵ Regulation 261/2004, Article 5 (1) (c) and Article 7.

¹⁶ Regulation 261/2004, Article 5 (3) 'An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.'

¹⁷ 30th January 2018.

¹⁸ District Court, 26 June 2019 (unreported).

¹⁹ Equally, and from an external perspective, the Treaties would no longer apply in the UK in accordance with Article 50 TEU.

2019.²⁰ There remains some doubt over this point however. As the material facts occurred before the end of the Implementation Period, the applicable law might be seen as being the retained EU Regulation in its original form, and not the amended version. This point was argued in the subsequent case *Varano v Air Canada*,²¹ though judge Geraint Webb QC considered the Court bound to follow the approach of the Court of Appeal in *Lipton*. Whilst there was no material difference in the two forms of the Regulations as applying to the facts in *Lipton*, this will not always be the case for this, or other areas of amended retained law. Future appellate courts may be expected to be invited to revisit this point.

JUDGMENT OF THE COURT OF APPEAL

The Court of Appeal unanimously allowed the appeal. Over-turning the decision of the lower courts, the Court ordered the air carrier to pay compensation. Coulson LJ's judgment determined the substantive issue through a purposive interpretation of Regulation 261/2004 (as amended), concerning the defence of extraordinary circumstances, relying heavily on the jurisprudence of the CJEU which pre-dated the UK's withdrawal. Green LJ meanwhile examined the constitutional issues including the status of Regulation 261/2004 post-Brexit as EU retained law, the legal effect and constitutional nature of section 29, and how the judiciary should interpret EU retained law in compliance with the TCA (and other international commitments).

Judgment of Lord Justice Coulson

Lipton is the first post-Brexit interpretation by the Court of Appeal of Regulation 261/2004 and specifically Article 5 (3) which sets out the defence of 'extraordinary circumstances.' Since 1 January 2021, Regulation 261/2004 has the status of EU retained law. It has been recast as domestic law²² and retains primacy over any conflicting domestic law adopted prior to the end of the Implementation Period.²³ As mentioned above, some amendments have been made to its

²⁰ Air Passenger Rights and Air Travel Organisers' Licencing (Amendment) (EU Exit) Regulations 2019.

²¹ [2021] EWHC 1336 (QB), at para 73.

²² EU (Withdrawal) Act 2018, section 3 (1) and (2).

²³ EU (Withdrawal) Act 2018, section 5 (2).

provisions under the Air Passenger Rights and Air Travel Organisers' Licencing (Amendment) (EU Exit) Regulations 2019.²⁴ These changes do not affect the substance of the rights and obligations in this case.

The task facing the Court of Appeal was to determine whether the captain's illness which arose while he was off-duty and which meant that he was not available to fly the aircraft in question fell within the scope of the defence of extraordinary circumstances. There is no definition of 'extraordinary circumstances' in the Regulation itself and its meaning has been developed by the CJEU through its jurisprudence. CJEU jurisprudence now has the status of 'EU retained case law',²⁵ which should be followed when determining the meaning or effect of EU retained law. However, the Court of Appeal, like the Supreme Court, but unlike lower courts, is permitted to depart from this case law when it considers it right to do so,²⁶ unless it has become bound by post-transition application or modification of that case law through a judgment of a Court with precedence.²⁷

According to the CJEU, to successfully rely on the defence an air carrier must demonstrate that: (i) the disruptive event is not 'inherent in the normal exercise of the activity of the air carrier concerned' and (ii) it must be 'beyond the actual control of that carrier on account of its nature and origin.'²⁸ Despite extensive case law in which the test has been applied to a range of unexpected events, there is no authority on the issue before the Court of Appeal in *Lipton* either from the CJEU or in UK law. The lower courts had ruled that the illness of the captain which first arose while he was off-duty was not inherent in the normal exercise of the activity of the air carrier and amounted to external event and outside the control of the air carrier. Such a view is not inconsistent with one particular strand of CJEU case law, which includes in the scope of the defence unexpected events that are deemed to be external to the operations of the

²⁴ For details of the changes, see section 8.

²⁵ EU (Withdrawal) Act 2018, section 6 (7) defines 'EU retained case law' as 'any principles laid down by, and any decision of, the European Court, as they have effect in EU law immediately before exit day...'.

²⁶ As per the 1966 Practice Statement [1996] 3 All ER 77.

²⁷ European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, section 4 (1) and 4(2).

²⁸ C-549/07 *Wallentin-Hermann v. Alitalia* (2008) ECLI: EU:C:2008:771 at para. 23.

aircraft.²⁹ Thus, a collision between a bird and an aircraft (even if no damage is caused) amounts to extraordinary circumstances because unlike a technical defect,³⁰ a bird strike is not ‘intrinsically linked’ to the operating system of the aircraft, it is therefore not by its nature and origin inherent in the normal exercise of the activity of the air carrier concerned and is outside its actual control. The CJEU considered that this interpretation upholds a high level of consumer protection as it ‘...means that air carriers must not be encouraged to refrain from taking measures necessitated by such an incident by prioritising the maintaining and punctuality of their flights over the objective of safety.’³¹

Coulson LJ rejected this approach. What was critical to the Court in this appeal is not the externality of the captain’s illness while he was off-duty to the operation of the flight, but the indispensability of the captain to the operation of the flight and the notion that staff illness is not an ‘extraordinary’ event but ‘commonplace.’³² The availability of the captain is part of the operations of an air carrier for which the employer should have contingency plans. Neither did he consider it to be a rare or infrequent event.³³ Coulson LJ’s reasoning is supported by another, different strand of case law of the CJEU in respect of staff absences, where a narrower reading of the defence of unexpected circumstances has been adopted.³⁴ Coulson LJ remarked

²⁹ C-315/15 *Pěšková & Pěška v. Travel Service a.s* ECLI: EU:C:2017:341. See also C-501/17 *Germanwings GmbH v. Wolfgang Pauels* (damage to tyre caused by foreign object on runway) ECLI:EU:C:2019:288. C-159/18 *André Moens v. Ryanair Ltd* (petrol spillage on runway by unknown third party) ECLI:EU:C:2019:535 C-74/19 *LE v. Transportes Aéreos Portugueses (TAP) SA* (unruly passenger) ECLI:EU:C:2020:460.

³⁰ C-549/07 *Wallentin-Hermann v. Alitalia* ECLI: EU:C:2008:771; Case C-257/14 *C. van der Lans v Koninklijke Luchtvaart Maatschappij NV (KLM)* ECLI:EU:C:2015:618.

³¹ *Pěšková*, para. 25.

³² *Lipton*, para. 30.

³³ *Lipton*, paras. 38-40.

³⁴ Joined Cases C-195/17 et al *Krüsemann and Others v. TUIfly GmbH* EU:C:2018:258. The Court of Appeal could have referred to the notion of *foreseeability* of staff absence due to illness for airline management to support its reasoning following a CJEU judgment delivered a week before *Lipton* in C-28/20 *Airhelp Ltd v. Scandinavian Airlines System Denmark-Norway* ECLI:EU:C:2021:226, para. 32.

that his approach also takes into account the consumer protection rationale which underpins the Regulation and that in accordance with the well-established case law of the CJEU, any derogation in EU law should be interpreted narrowly.³⁵ He deduces that the effect of the CJEU's previous authorities requires the Regulation to be examined from the perspective of the air passenger rather than the air carrier.³⁶ Coulson LJ concluded that 'the non-attendance of the captain due to illness was an inherent part of the respondent's activity and operations as an air carrier and could in no way be categorised as extraordinary'.³⁷ Haddon-Cave LJ and Green LJ concurred.

Judgment of Lord Justice Green

Interpreting Retained EU Law post-Brexit

Green LJ's judgment is notable as it considers systematically the approach to be followed by the judiciary when interpreting retained EU law, and when ensuring compliance of domestic law with the EU-UK TCA. The first step³⁸ set out by Green LJ is to identify the relevant retained EU law provision (in this case Regulation 261/2004, a species of direct EU legislation given domestic legal force by the EU (Withdrawal Act)), and checking whether it has been amended by any domestic regulations (as previously noted, domestic amending regulations from 2019, designed to come into effect at the end of the IP, were treated as the applicable regime despite the facts taking place before the end of 2020). Green LJ next stated that this law, as amended, should be given a purposive construction which takes into account its recitals, and including any provision of international law that has been incorporated into the Regulation by reference. Reference should also be made to the case law of the CJEU made prior to the end of transition to determine the measure's meaning and scope, and any relevant general principles of EU law recognised in the CJEU's case law. A reference to the Charter as a *source* of these principles ('General principles of EU Law from case law and *as derived from the Charter of Fundamental Rights...*³⁹) provides an unexpected and inconsistent mis-step in the judgment

³⁵ *Lipton*, para. 31.

³⁶ *Lipton*, para. 12 citing Joined Cases C-402/07 *Sturgeon* and C-432/07 *Bock* ECLI: EU:C:2009:716.

³⁷ *Lipton*, para. 29.

³⁸ See *Lipton*, para. 83 for the step-by-step 'summary of basic principles.'

³⁹ *Lipton*, para. 83, point vi.

here - the EU (Withdrawal Act) 2018 having made it explicitly clear that the Charter does not form part of retained EU law.⁴⁰ That aside, both retained EU case law and general principles can be departed from by appellate courts if they consider it right to do so. So far, these elements were clear under the EU (Withdrawal) Act 2018, along with a recognition of the standard method of interpretation for international law into domestic law, which will be increasingly relevant as more new treaties are entered into by the UK.

Green LJ next turns to the significance of the TCA and the EU (FR) Act 2020. Green LJ explains that if there are relevant provisions of the TCA, it should be checked whether these have already been implemented into domestic law. If so, there is no need for any further transposition in order to achieve the requisite effect. However, if domestic law does not already reflect the substance of the TCA, then domestic law takes effect with such modifications as are required. This is the ‘automatic modification’ power of section 29, through which otherwise unimplemented provisions of the TCA become part of domestic law. Of relevance in *Lipton* is a provision in the TCA covering air transport, AIRTRN.22 (now Article 438), which recognises a shared objective of achieving a high level of consumer protection, and requiring the parties to ensure ‘effective and non-discriminatory measures’ to protect air transport passengers’ consumer rights, including where they are subject to denied boarding, cancellation or delays. For Green LJ, the rationale for the inclusion of this consumer protection provision in the TCA is not clear, but he views this inclusion as having ‘something of relevance to say about the subject matter of the present dispute...[which may affect] the task of this court in construing and applying Regulation 261/2004.’⁴¹

The significance of section 29 of the EU (Future Relationship) Act 2020

Green LJ presents a valuable analysis of the process and scope of the ‘automatic modification’ of existing domestic law under section 29. He highlights that section 29 imposes an ‘obligation of result’ on national courts, as ‘Parliament has mandated a test based upon the result or effect...[which] ...occurs without the need for further intervention by Parliament’.⁴² Cross-

⁴⁰ Green LJ at para 63 explicitly acknowledges that the EU Charter is not part of domestic law, as per EU (Withdrawal Act) 2018, section 5(4).

⁴¹ *Lipton*, para. 74.

⁴² *Lipton*, para. 78.

referring to the interpretation section (section 37 (1)) of the EU(FR) Act, he states that ‘existing enactments’ in domestic law that may need to be read as giving effect to unimplemented provisions of the TCA are defined broadly to include all forms of primary and subordinate measure, instruments, orders, regulations, rules, schemes, warrants, by-laws or other instrument made under an Act of Parliament, and Orders in Council made in the exercise of the Royal Prerogative.⁴³ The same section provides that modification of this law might include ‘amendment, repeal or revocation.’ He further highlights two statutory clarifications in section 29 which limit its scope. First, the modification applies only so far as necessary - it does not modify a domestic law that, otherwise, is already consistent with the TCA. Second, it covers modifications ‘necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement,’ which include instruments beyond the TCA itself.⁴⁴

Green LJ explains that the legal effect of Article AIRTRN.22 depends on how it has been implemented into domestic law. In the absence of specific implementation in the EU (FR) Act, he determines that such implementation would be brought about, if necessary, by the general ‘sweeping up mechanism’⁴⁵ of section 29. There are three steps to be taken when applying section 29. First, the relevant domestic law should be identified. Second, it is necessary to assess ‘whether the domestic law is the same as the corresponding provisions of the TCA.’⁴⁶ If this is the case, there is no requirement to apply the ‘automatic read-across’ contained in section 29.⁴⁷ If this is not the case, and there is ‘inconsistency, daylight or a lacuna then the inconsistent or incomplete provision is amended or replaced and the gap is plugged.’⁴⁸ In the context of Regulation 261/2004, Green LJ draws attention to the duty in the TCA to ‘ensure’ that ‘effective’ measures are taken to protect consumers in the field of transport and with ensuring efficient complaint handling procedures. Green LJ is of the view that Regulation 261/2004 as amended does already do this, provided that it is ‘construed purposively to achieve that requisite degree of consumer protection.’⁴⁹ In his view, Coulson LJ’s judgment achieves this

⁴³ *Lipton* at para. 79.

⁴⁴ *Lipton*, para. 80.

⁴⁵ *Lipton* para 77.

⁴⁶ *Lipton*, para. 82.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

goal. In the instant case then, Green LJ finds that the domestic law is the same as the corresponding provisions of the TCA, and requires no modification.

Clarifying the legal effect of section 29 of the EU (Future Relationship) Act 2020

How should the legal effect of section 29 be conceptualised? What is the nature of the judicial task undertaken by the Court in fulfilment of this obligation? One of the principal methods for implementing international law into domestic law is through statutory interpretation.⁵⁰ This might suggest section 29 should be seen as a new interpretative obligation on the national court similar to the EU law principle of indirect effect, also known as the principle of consistent interpretation or *Marleasing* principle in the UK courts. However, it is contended that section 29 clearly requires courts to go further than expected under indirect effect. This principle emerged as one of the predominant methods for giving effect to EU law before UK courts as advocated by the CJEU itself.⁵¹ A similar duty is contained in section 3 of the Human Rights Act (HRA) 1998 which requires national courts to interpret domestic law *as far as possible* in conformity with the European Convention of Human Rights (ECHR).⁵² Despite differences in their source, construction and operation, Underhill LJ in the Court of Appeal in *Jessemey v. Rowstock Ltd*⁵³ considered the *Marleasing* principle and section 3 HRA have been ‘assimilated’ by the then House of Lords in *Ghadain v. Godin-Mendoza*.⁵⁴ The UK courts have consistently

⁵⁰ Arden LJ in *IDT Card Services Ireland Ltd v. Customs and Excise Commissioners* [2006] EWCA Civ 29, at para. 75.

⁵¹ C-282/10 *Dominguez* ECLI:EU:C:2011:559.

⁵² Article 3 (1): So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. Article 3 (2): This section (a) applies to primary legislation and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

⁵³ [2014] 3 CMLR 24 at para, 40.

⁵⁴ [2004] UKHL 30.

refuted any arguments put forward by legal counsel to differentiate between the two methods of interpretation in terms of their scope.⁵⁵

Green LJ provides important clarification on whether section 29 can be classified as a type of statutory interpretation similar to the principle of indirect effect in EU law or the analogous section 3 of the Human Rights Act. Rejecting this conceptualisation, he states that,

section 29 does not lay down a principle of purposive interpretation (such as is found in section 3 Human Rights Act (HRA) but amounts of a generic mechanism to achieve full implementation. It transposes the TCA into domestic law, implicitly changing domestic law in the process. Applying section 29 to domestic law on a particular issue now means what the TCA says it means, regardless of the language used.⁵⁶

In the subsequent *Heathrow Airport* judgment, Green LJ reaffirmed the distinction, declaring that the section 29 requirement ‘*is more fundamental* and amounts to a blanket, generic, mechanism to achieve full implementation, without the need for any further parliamentary or other executive intervention’.⁵⁷ Importantly, section 29 has the potential to require the courts to go beyond a requirement of conform interpretation set out in the section 3 HRA or arising from the EU principle of indirect effect whereby the UK judiciary has refused to interpret EU/ECHR law in conformity with national law which ‘goes against the grain’ of the national legislation as intended by Parliament and/or demands the exercise of judicial interpretations ‘for which [the courts] may not be equipped or give[s] rise to important practical repercussions which the court is not equipped to evaluate.’⁵⁸ Instead, domestic law which does not comply with unimplemented provisions of the TCA will need to be treated as having been modified in line with those provisions.

What then of the suggestion that section 29 brings about a form of direct effect for the TCA? Green LJ points to the fact that the terms of the TCA itself preclude direct effect: nothing in it

⁵⁵ See further, S. Drake, ‘The UK Perspective on the Principle of Consistent Interpretation’ in C. N. K. Franklin (ed.), *The Effectiveness and Application of EU and EEA Law in National Courts: Principles of Consistent Interpretation*, (2018, Intersentia), pp. 213-256.

⁵⁶ *Lipton*, para. 78.

⁵⁷ *Heathrow Airport Limited* [2021] EWCA Civ 783 at para. 227, emphasis added.

⁵⁸ *Vodafone No. 2 v. Revenue and Customs Commissioners*, [2009] EWCA 446, para. 38.

permits it ‘to be directly invoked in the domestic legal systems of the Parties.’⁵⁹ As Eleftheriadis explains, the agreement creates legal obligations as between the contracting parties, but does not create enforceable rights for private parties against those contracting parties - ‘whatever obligations the EU now has not to impose tariff and quotas, these are owed to the UK government, not to individuals engaged in trading.’⁶⁰ This is the general rule for TCA law, though there are certain express exceptions, as Article COMPROV 16.1 (now Article 5) acknowledges. Though Article COMPROV 16.2 rules out incorporating rights of action against the *other* Party in national law, there is nothing precluding the choice by that domestic legal system to implement rules for use by private parties where there is a domestic breach of those rules. But the TCA itself and alone does not have this capacity. Nor though did the EU Treaties – it was a combination of the CJEU’s teleological interpretation of their provisions and national gateway implementing legislation (European Communities Act 1972) that achieved direct effect for EU law in the UK legal order during the UK’s membership. However, any suggestion that section 29 achieves this for the TCA should be seen as unfounded. The overwhelmingly State-to-State character of the TCA makes the concept of direct effect, with its express connection with private enforcement before courts an uneasy fit. Instead, the EU law variant of the concept of direct applicability appears more appropriate. Direct applicability is understood to mean that certain provisions of EU law including the EU Treaties and Regulations are automatically implemented as international law provisions (including EU primary or secondary legislation) into domestic law. No implementing measures need to be taken by the Member States, either through legislative or executive powers for the legal norm to take effect in the domestic legal order.⁶¹ As is apparent from the EU context, there is no necessary link between direct applicability and direct effect.⁶² EU instruments recognised as directly applicable and automatically part of the domestic legal order are not necessarily of a

⁵⁹ TCA, Part One: Common and Institutional Provisions (COMPROV).16: Private rights. The TCA has been renumbered and COMPROV.16 is now Article 5.

⁶⁰ Eleftheriadis, n. 2 above.

⁶¹ Easson, n. 13 above; N.Ghazaryan, ‘Who are the ‘Gatekeeper’s?’: In Continuation of the debate on direct applicability and direct effect of EU international agreements’ (2018) 37 (1) *Yearbook of European Law* 27-74.

⁶² The distinction between direct applicability and direct effect has been extensively debated in the literature.

For one of the first discussions of this problem, see J.A. Winter, ‘Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law’ (1972) *Common Market Law Review* 425-438.

nature to give rise to rights which can be invoked before domestic courts. That is not to say that direct applicability precludes an ability of a measure to be invoked before the courts, however, it is ‘the material content of a measure which determines its legal effect.’⁶³ Conversely, a provision of a directive may have direct effect and due to its nature be invoked by a private party before a national court, but is not directly applicable since it requires express incorporation into domestic law.⁶⁴

Thus, section 29 provides for otherwise unimplemented provisions of the TCA to be directly applicable in domestic UK law, but this does not necessarily mean that they create private rights which can be relied upon directly before the court. The version of direct applicability embodied in section 29 connotes no particular hierarchy of norms– it is only if it is fused with the EU law notion of primacy or supremacy that it achieves this.⁶⁵ In the context of the TCA and EU(FR)A however, there is no continuing principle of primacy for TCA law to be respected by domestic courts. The duty under section 29 extends to making modifications to domestic law as it existed at the point of the UK’s departure. Should later domestic law be adopted that conflicts with the provisions of the TCA brought in by section 29, there is nothing in either the EU (FR)A nor TCA to afford the TCA law priority within the domestic legal order.

Of course, defining the process as one of affording direct applicability to the TCA does not make the task of interpreting when and what modifications to domestic law might be required any more straightforward. Green LJ also cautioned that the process is likely to become more complex as time moves on, particularly as the case law of the CJEU evolves making the differences between EU law and what the UK courts have to take into account ‘more accentuated.’⁶⁶

CONCLUDING REMARKS:

For a judiciary facing the monumental challenge of applying former EU law in a new complex and dynamic legal environment and complicated by a febrile political climate, senior judicial guidance on the operation of the core principles of the new legislative framework and the

⁶³ Easson, n.13 above.

⁶⁴ Winter, n.62 above at 437.

⁶⁵ See Winter, n. 62 above at 432.

⁶⁶ *Lipton*, para. 83.

application of EU retained law to be welcomed. Where UK and EU policies remain aligned, the judiciary's role is arguably more straightforward. The Court of Appeal's decision in *Lipton* confirms that Regulation 261/2004 (as amended) will continue to apply in full in the UK and requires the national courts to interpret the scope of its provisions purposively and from a consumer perspective. This reflects not only the underpinning rationale of the original EU legislation evident in its recitals and in the case law of the CJEU, but also the commitment to a high level of consumer protection agreed between the UK and the EU in the TCA. Admittedly, in this field courts face a delicate balancing act between protecting air passengers who have suffered 'serious inconvenience and trouble' and acknowledging that air carriers should not be financially punished for some unusual and unexpected event outside its control which has disrupted air travel. Adhering to the approach set out by Coulson LJ should ensure that the correct balance is struck. It should also put an end to the strand of case law emerging in the lower courts in the UK where unexpected events have been classified erroneously as 'external' to the air carrier's operations bringing them within the scope of the extraordinary circumstances defence.⁶⁷ More broadly, both Coulson LJ and Green LJ point to the unnecessary litigation in this field and for disputes to be resolved either through public enforcement (now explicitly incorporated in the TCA) or via the quicker and less costly Small Claims Track. It would have been helpful if they had also mentioned the option of extra-judicial redress and the two ADR bodies in the UK with the specific mandate of addressing disputes between air passengers and air carriers and which survive Brexit.⁶⁸

⁶⁷ In addition to the lower court decisions in *Lipton*, see also *Susana Rodrigues v. Ryanair* 11th February 2020 (unreported), Winchester County Court, delivered on the same date in which HHJ Iain Hughes QC held that a strike by the air carrier's crew amounted to extraordinary circumstances since the actions of a trade union including a call for its members to strike is external to the air carrier's operations. It should be noted that the CJEU has now itself ruled that a strike by employees organised by their trade union does not amount to extraordinary circumstances: *C-28/20 Airhelp Ltd v. Scandinavian Airlines System Denmark-Norway* ECLI:EU:C:2021:226.

⁶⁸ Aviation ADR and the Centre for Effective Dispute Resolution. See further S. Drake, 'Delays, cancellations and compensations: Why are air passengers still finding it difficult to enforce their EU rights under Regulation 261/2004?' (2020) 27 (2) *Maastricht Journal of European and Comparative Law* 230-249.

While Green LJ's guide seeks to provide clarity and a roadmap for the judiciary, the complexity of managing the post-Brexit statute book has been revealed – with doubts still remaining over the applicable substantive law, and imprecision over 'retained' sources of EU law such as the EU Charter of Fundamental Rights. What remains to be seen is whether this guide stands the test of time as EU law and domestic law diverge either as a result of new EU legislation and CJEU judgments as well as legislative changes at UK level in pursuit of a different policy direction or in response to the signing of new international agreements. The UK Government's proposals to conduct a review of the legal status of EU retained law and its substantive content point to considerable uncertainty ahead.⁶⁹

The judgment does provide a useful conceptualisation of section 29 as a process of 'automatic modification' rather than a duty of interpretation which provides some clarity to the national courts. How much work section 29 will have to do is as yet unknown. It can be viewed as a temporary gap-filling mechanism while more specific implementation of the TCA is being constructed which may eventually consign it to a minor constitutional footnote. There is also the possibility that as implementation of the TCA through specific measures may take some time, Parliament, through section 29 has (inadvertently) opened up the space for significant judicial creativity.

⁶⁹ See 'Statement of Lord Frost to the House of Lords on Brexit Opportunities,' 16 September 2021.