European Aviation Safety Agency

DECISION
OF
THE EASA BOARD OF APPEAL
OF
30 April 2013[1]

In appeal case AP/03/2012/LUCK lodged by

Stephen Luck
73 Earls Barton Rd
Great Doddington, Northamptonshire,
NN 29 7TA, UK
(hereinafter: the Appellant)

against

The European Aviation Safety Agency
(hereinafter: the Agency)

THE EASA BOARD OF APPEAL

composed of

Peter Dyrberg (Chairman),
Klaus Koplin (Member and Rapporteur),
Arne Axelsson (Member),

Registrar: José Luis Penedo del Rio

gives, on 30 April 2013, the following decision:

The appeal against the European Aviation Safety Agency's communications of 17 April 2012 and of 18 September 2012 concerning classification of CEA DR315 as an aircraft type falling under Annex II of Regulation EC No.216/2008 is dismissed.

[1] Language of the proceedings: English

BACKGROUND

1 On 8 November 2011 the Appellant contacted the Agency. He stated that his aircraft, a CEA DR315 registered G-BLHH, should be included on the list of aircraft falling within the scope of Annex II of Regulation (EC) No 216/2008 (also referred to as the Regulation or the Basic Regulation). Annex II delimits the aircraft to which the Regulation does not apply.

2 Subsequently there was e-mail communication between the Appellant and the Agency.

3 On 17 April 2012 the Agency addressed a letter to the Appellant. The letter reads:

"We would like to thank you again for contacting EASA as regards the classification of your CEA DR 315 (serial number 324) as an aircraft type falling under Annex II of Regulation (EC) No. 216/2008. Further to our previous e-mail correspondence, we hereby would like to provide you with a summary of our position on this matter.

Firstly, we would like to point out that it is primarily for the EU Member States to apply Regulation (EC) 216/2008 and its Implementing Rules. This also includes the responsibility for the classification of a certain aircraft type to be considered as Annex II aircraft or not. Nevertheless, the Agency can provide its technical view on this issue, which we would herby like to communicate to you.

According to Annex II (a)(i) of Regulation (EC) No.216/2008, there are ***two conditions*** *which have to be met* ***cumulatively*** *in order for an aircraft to be classified as historic aircraft falling under Annex II of the said regulation, namely:*

a) historic aircraft meeting the criteria below:
i) non-complex aircraft whose:
- initial design was established before 1 January 1955,
- production has been stopped before 1 January 1975;

In our view, your aircraft CEA DR 315 does not fulfill these criteria since...

We fully understand the arguments you have brought. These could be applied to many aircraft types, since 'new' types are frequently developed from an earlier design. However, as you acknowledge, the intent of the regulation is not to apply Annex II and try to exclude as many aircraft as possible from the responsibilities of EASA. With the exception of a few, most of the Annex II criteria are intended to be applied to 'type designs', not to groups of Models or even individual aircraft.

As you may be aware, the DR 250 (original DGAC France TCDS Nr.100 issued May 1965), DR 220 and DR 221 (DGAC France TCDS Nr.111 issued June 1966) and DR 253 (DGAC France TCDS Nr. 115 issued July 1967) also do not meet the criteria of Annex II (a)(i) of Regulation (EC) 216/2008.

Even though you are probably correct that no DR 200 or DR 300 aircraft were manufactured after 1975, the designs were approved well after 1955. As far as 'design' aspects are concerned, as you will be aware, the DR 100 and DR 200 series were all 'tail draggers', while the DR 300 and later DR 400 series have a nose wheel, which is a substantial design change (weight and balance, flight and landing characteristics) and reduces the commonality between DR 200 and DR 300. This single fact (apart from other changes, improvements, etc.) was enough to designate the DR 300 / DR 400 as a 'new design' in 1968.

The classification of an aircraft type as Annex II is proposed by the NAA holding originally the design oversight responsibility and agreed / not agreed by EASA.

In some cases the NAA of registry of the airplane can decide to have one or more specific serial numbers classified as Annex II aircraft. This is typically done in case of state aircraft or aircraft for scientific investigations, but not for regular aircraft.

As a result, in our view, your CEA DR 315 (serial number 324) does not fall under Annex II of Regulation (EC) No. 216/2008."

4 On 25 April 2012 the Appellant requested the Agency to review its 17 April 2012 letter (hereinafter: the 17 April letter).

5 On 18 September 2012 the Appellant reminded the Agency of the issue. The Agency replied by e-mail on the same day. The reply reads:

"Thank you for your letter of 25 April 2012.
I have read your letter carefully and have consulted with DGAC France.
I see no reason to change the response I sent to you on 17 April."

PROCEDURE

6 On 11 October 2012 the Appellant lodged the appeal. The appeal stated that the contested decision was of 18 September 2012.

7 In order to be able to identify the contested decision, the Board asked, on 31 October 2012, the Appellant to provide further details of that decision. The Appellant replied to that request by e-mail on 3 November 2012. He identified the contested decision as the 17 April letter mentioned above.

8 On 6 November 2012 the Board informed the Appellant that the appeal appeared inadmissible. Before proceeding further with the appeal, the Board therefore invited the Appellant to comment on the issue of admissibility. The Board also drew the Appellant's attention to the fact that the lodging of an appeal is subject to an appeal fee. The Appellant replied by e-mail of 9 November 2012. He stated that he had made two requests to the Agency, the first being the one of 8 November 2011, the second being of 25 April 2012; the reply of the Agency to the latter, of 18 September 2012, was the contested decision.

9 On 21 November 2012 the Board informed the Appellant that it had proceeded to registering the appeal and that within the appeal procedure, it would address the issue of admissibility. The same date the Board submitted the appeal for interlocutory revision to the Agency.

10 On 10 December 2012 the Agency handed down its interlocutory revision, concluding that the appeal was inadmissible.

11 The interlocutory revision further found "*no reason to rectify the contested decision*".

12 On 21 December 2012 the Board asked the Appellant for his comments on the interlocutory revision. The Appellant replied by e-mail on 5 March 2013. He contended that the Agency has infringed Article 18 letter d) and Article 38 letter e) of the Regulation.

13 On 7 March 2013 the Board was informed that the appeal fee had been settled by the Appellant.

14 On 25 March 2013 the Board asked the Appellant whether he wished an oral hearing to be held, in accordance with Article 48(2) of the Regulation. In reply to a query from the Appellant the Board informed him, on 26 March 2013, that it did not hold a hearing necessary. On the same date the Appellant informed the Board that he did not wish an oral hearing.

THE MAIN PROVISIONS AT ISSUE

15 Article 44 of the Regulation is entitled "Decisions subject to appeal" and provides as far as material:

"An appeal may be brought against decisions of the Agency taken pursuant to Articles 20, 21, 22, 22a, 22b, 23, 55 and 64."

16 Article 45 of the Regulation is entitled "Persons entitled to appeal" and provides:

"Any natural or legal person may appeal against a decision addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former. The parties to proceedings may be party to the appeal proceedings."

17 Article 46 of the Regulation is entitled "Time limit and form" and provides:

"The appeal, together with the statement of grounds thereof, shall be filed in writing at the Agency within two months of the notification of the measure to the person concerned, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

18 Article 4(1) of the Regulation provides:

"Aircraft, including any installed product, part and appliance, which are:

a) designed or manufactured by an organisation for which the Agency or a Member State ensures safety oversight; or

b) registered in a Member State, unless their regulatory safety oversight has been delegated to a third country and they are not used by a Community operator; or

c) registered in a third country and used by an operator for which any Member State ensures oversight of operations or used into, within or out of the Community by an operator established or residing in the Community; or

d) registered in a third country, or registered in a Member State which has delegated their regulatory safety oversight to a third country, and used by a third-country operator into, within or out of the Community

shall comply with this Regulation."

19 Article 4(4) of the Regulation provides:

"Paragraph 1 shall not apply to aircraft referred to in Annex II."

20 The relevant provisions of Annex II provide:

"Article 4(1), (2) and (3) do not apply to aircraft falling in one or more of the categories set out

below:

a) *historic aircraft meeting the criteria below:*

(i) non complex aircraft whose:

- initial design was established before 1 January 1955, and

- production has been stopped before 1 January 1975"

SUBMISSIONS OF THE PARTIES

21 The Appellant submits:

22 The decision to exclude aircraft type CEA DR315 from Annex II of the Regulation has been based on incorrect information concerning the initial design date and facts which are not relevant under the Regulation.

23 Under Article 18 of the Regulation the Agency is the only body with power to make decisions concerning the certification of aircraft. In resigning from this responsibility the Agency is in breach of Article 4(4) and Article 18 letter d) by allowing a third party to make this decision. Under the latter provision the Agency shall take the appropriate decisions for the application of Articles 20, 21, 22, 22a, 22b, 23, 54 and 55 of the Regulation.

24 For the same reason the Executive Director has failed to ensure that the Agency operates in accordance with the Regulation, cf. Article 38(3) letter e) which provides that that the Executive Director shall take all necessary steps to ensure the functioning of the Agency.

25 The design approval date referred to by the Agency in its 17 April letter has no relevance as the Regulation refers to the date that the *initial* design was established.

26 In this context, 'initial' is understood to mean 'first of many' and 'established' to mean 'commenced/started'. 'Approval' refers to the final design being 'signed-off'.

27 The same letter also makes an irrelevant distinction between nose wheel and tail dragger undercarriage configurations as the Regulation does not establish any design parameters or place any limits on how a design can or should evolve.

28 Regarding the initial design date, as set out in Annex II, the initial design of the DR series was established prior to 1955. It has been accepted by the Agency that the design of the DR1050 type aircraft dates back to 1950 and the DR1050 has thus been accepted as an Annex II aircraft.

29 The DR250 introduced in 1965 replaced the DR1050 but was merely a modified and improved DR1050. The initial design of the DR315 can thus be traced back to 1950.

30 Regarding the production date, as set out in Annex II, records show that production of the DR300 series finished in 1972 when the DR400 series was introduced.

31 The DR300 series and DR200 series of aircraft thus meet all of the requirements of the Regulation for classification as Annex II type aircraft.

32 Regarding the Agency's competence in the matter, it can take action under the powers granted to it under Chapter III Section I of the Regulation.

33 The Agency submits:

34 The appeal is inadmissible. According to Article 44(1) of the Regulation an appeal can only be brought against a *decision* of the Agency.

35 According to general principles of European Union administrative law, a decision is an administrative act from a competent authority, capable of producing legal effect vis-à-vis a third party in an individual case.

36 The 17 April letter cannot be qualified as an administrative act emanating from a competent authority as the Agency is not the competent authority to deal with the classification of the aircraft in this case, a task falling primarily within the spheres of the Member States.

37 Neither does the letter produce *legal effects vis-à-vis a third party*, in this case the Appellant. The Agency explicitly stated in the letter that it would "*provide its technical view*" on the issue, notwithstanding its lack of implementing competence on the matter.

38 Thus, there is no decision regarding the classification of aircraft type CEA DR315 under Annex II of the Regulation.

39 Even if the contested letter would qualify as a decision, it would not be appealable under Article 44(1) of the Regulation, as the subject matter would not fall within the scope of Articles 20, 21, 22, 22a, 22b, 23, 55 or 64 of the Regulation.

40 Furthermore and notwithstanding the above, the appeal was not lodged within the time limit established by Article 46 of the Regulation, which provides that an appeal may be filed within two months of the notification of the measure to the person concerned, or in the absence thereof, of the day on which it came to the knowledge of the latter.

41 The contested letter is dated 17 April 2012 and the appeal notification form was received by the Agency on 11 October 2012. The deadline provided for in Article 46 of the Regulation is therefore exceeded and the appeal is inadmissible.

FINDINGS OF THE BOARD OF APPEAL

42 The Board has reached the conclusion that the appeal is inadmissible.

43 The Board shall first recall that Article 45 of the Regulation is mirrored on Article 263 of the Treaty on the Functioning of the European Union. The latter provision reads as far as material:

"Any natural or legal person may, ..., institute proceedings against an act addressed to that person or which is of direct and individual concern to them..."

44 The case law concerning Article 263 TFEU is thus relevant for the interpretation of Article 45 of the Regulation, included as concerns the question as to what acts can be considered as decisions and thus as challengeable acts. This makes good sense as there is no indication in the Regulation that the objective of instituting a Board of Appeal procedure has been to enlarge the field of challengeable acts that can ultimately be submitted to the review of the Union judicature. Article 45 of the Regulation must thus be interpreted in line with Article 263 TFEU.

45 It follows from settled case law that a decision is an act that is legally binding; the binding nature follows from the legal effects that the act entails; and this in turn means that the act must be capable of affecting the interests of the person by bringing about a distinct change in his/her legal position, cf. Case 133/79 *Sucrimex* v *Commission* [1980] ECR 1299, at paragraphs 12 – 19, Joined Cases 8-11/66 *Cementbedrijven and others* v *Commission* [1967] ECR 75, at paragraph 91, and Case 60/81 *IBM* v *Commission* [1981] ECR 2639, at paragraph 9. Case C-249/02 *Portugal* v *Commission* [2004] ECR I-10717, at paragraph 35; Case C-164/02 *Netherlands* v *Commission* [2004] ECR I-1177, at paragraph 18.

46 The Board has not been able to discern any legal effects in the act contested, be it the 18 September 2012 e-mail or the 17 April letter.

47 Next, the Board shall remark that the Union legislator has taken care to enumerate the decisions of the Agency for which there is an appeal to the Board. Article 44 of the Regulation states which decisions of the Agency may be subject to an appeal. The decisions are decisions under Articles 20, 21, 22, 22a, 22b, 23, 55 or 64 of the Regulation. There is no mention of Article 4 of the Regulation.

48 In that context it shall be noticed that the Regulation is a rather complex piece of legislation, under which several actors are called upon to act; the Commission, the Member States (typically in practice; the national aviation authorities) and the Agency, see for instance Articles 10 and 11 of the Regulation. All the provisions mentioned in Article 44 clearly indicate that it is for the Agency to act – the wording is that the "Agency shall..."; there is no such wording in Article 4 of the Regulation. Moreover, decisions of national authorities may be challenged before the respective national courts which, under Article 267 of the Treaty on the Functioning of the European Union, may request a preliminary ruling from the Court of Justice concerning European Union law, included the Regulation.

49 That being said, the Board shall remark that it cannot be excluded that when the Agency takes a decision under one of the provisions listed in Article 44 of the Regulation, it may have to take a stand on an Article 4 issue as a preliminary issue. In that case, that stand will form part of the challengeable decision issued under the relevant provision, enumerated by Article 44 of the Regulation.

50 However, that scenario is not the one that is present in this case. The request that the Appellant made to the Agency was a request for information. That the Agency replied to that request, in accordance with principles of good administration, does not render that reply a challengeable decision.

51 Finally, the Board shall remark that *even if a* challengeable act were present, the appeal would be outside the time limit laid down by Article 46 of the Regulation. The reasons are: The Agency's reply of 18 September 2012 would be nothing but a confirmatory act of the act originally adopted on 17 April 2012. It follows from case law that the appeal must be directed towards the original act and not the confirmatory act, cf. Case C-199/91 *Foyer Culturel du Sart-Tilman* v *Commission* [1993] ECR I-26677, paragraphs 23-24; or if directed against the confirmatory act, the appeal must be lodged within the time limit for appealing against the original decision, cf. Joined Cases C-193 and C-194/87 *Maurissen* v *Court of Auditors* [1990] ECR I-95, at paragraph 26. If not the time limits would be deprived of meaning, the addressee of a decision always being able to make a new time limit run by lodging a request with the authority to review the original act.

52 Against this background, the Board cannot but hold the appeal to be inadmissible.

CONCLUSION

53 As set out above, the appeal is inadmissible as there is no challengeable act.

54 Thus, the appeal is dismissed.

55 The decision is unanimous.

JUDICIAL REVIEW

56 This decision can be appealed to the General Court of the European Union, in accordance with Article 263 of the Treaty on the Functioning of the European Union in conjunction with Article 50 of the Basic Regulation. The appeal shall be made within two months of the notification of this decision to the Appellant.

Signatures of the Board of Appeal

Peter Dyrberg

Klaus Koplin

Arne Axelsson

Registrar:

José Luis Penedo del Rio