

Secretary and Legal Adviser's Office

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Dear Duncan

ARTICLE 115 OF THE AIR NAVIGATION ORDER 2000 AND PAID PILOTS

Background

As briefly discussed, I have been telephoned by Ian Clark (an aviation lawyer who advises AOPA). He has heard from AOPA that the CAA considers a payment to a pilot to fly the aircraft makes the flight aerial work. Ian Clark claims that he had never heard this suggested before and that he thought it must be incorrect.

I noted that article 130(1)(a) of the Air Navigation Order 2000 provides that a flight will be aerial work if valuable consideration is given or promised in respect of the flight or the purpose of the flight. In my view, it is clear that a payment to a pilot to fly an aircraft on a particular flight is a payment in respect of the flight. Ian Clark said that this would have "enormous consequences".

I pointed out that article 130(1)(b) expressly disregarded payment to a pilot for the purposes of Part III of the Order. The clear implication of this was that without such an express disregard, payment to a pilot would indeed render the flight aerial work for all other purposes of the Order. I noted that article 115 of the Order was to be found not in Part III but in Part XI.

I also noted that the only consequence of the flight being aerial work in the case of UK registered aircraft was related to the airworthiness requirements. Accordingly the effect of the disregard at article 130(1)(b) was that payment to a pilot in respect of a UK registered aircraft was of no consequence (beyond the need for the pilot to have an appropriate professional licence). It is only if using a foreign registered aircraft that there would be any regulatory consequence, namely the need for an article 115 permission.

I said that whilst accepting that the CAA had to interpret article 115 and was responsible for enforcing it the policy behind article 115 was owned by the DfT.

Ian Clark said he would arrange for AOPA to write to me seeking a formal statement of the position. I said I would be quite happy to listen to any argument that he wished to put forward to the effect that payment to a pilot would not make a flight aerial work.

The position under the Chicago Convention

Article 5 of the Chicago Convention requires that aircraft not engaged in scheduled international air services “shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across” the territory of every Member State. One of the terms of the Convention to which that right is subject is Article 36. This entitles each Contracting State to prohibit or regulate the use of photographic apparatus in aircraft over its territory.

The position under the Air Navigation Order

It seems likely that it was on the basis of Article 36 of the Convention that a provision was included in the Air Navigation Order prohibiting foreign aircraft from flying over the United Kingdom *“for the purpose of aerial photography or aerial survey except with the permission of the Secretary of State”*. Upto and including the ANO 1985 that was as far as the prohibition went. But it was extended by the Air Navigation (Amendment) Order 1986 by inserting after the words “aerial survey”, *“or for the purpose of any other form of aerial work”*.

I do not have any information about why that change was made and do not know what consideration would have been given to the obligations of Article 5 of the Convention.

The definition of aerial work in force at the time was in substance the same as it is today (meaning any purpose (other than public transport) for which an aircraft is flown if hire or reward is given or promised in respect of the flight or the purpose of the flight). Apart from the fact that valuable consideration has since been substituted for hire and reward, the only change since then has been to provide that a flight will remain private for airworthiness purposes if the only valuable consideration is remuneration to the pilot (see discussion below).

On this basis, it appears that operators of foreign registered aircraft flying in the UK with a pilot being paid to undertake the flight should have been applying to the DfT for permission to operate since 27 January 1987, that being the date on which the above ANO amendment came into force.

Discussion

As noted above article 130(1)(b) of the Air Navigation Order 2000 expressly disregards remuneration for the services of a pilot for the purposes of Part III of the Order. It appears that one purpose of this provision was so that an aircraft with a private category certificate of airworthiness could be flown by a paid “chauffeur”. A company could thus own a corporate aircraft and have a company pilot (who would need an appropriate professional licence) but the aircraft would not need a public transport certificate of airworthiness. (There are no longer categories of certificate of airworthiness under EASA rules although some differences remain between the maintenance requirements for private use as against those for public transport aircraft.)

What is not clear is whether article 115 was intended to inhibit foreign registered aircraft exercising freedom of international air navigation under the terms of the Chicago Convention simply because they have paid pilots.

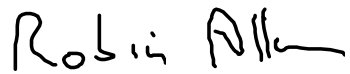
Options

If it were to be decided that flights in respect of which the only valuable consideration is the remuneration of the pilot his services as such ought not to come within the requirement for a permission under article 115 this could be achieved with quite a simple change. Article 130(1)(b) could be amended to provide “If the only such valuable consideration consists of remuneration for the services of the pilot the flight shall be deemed to be a private flight for for all puposes other than Part IV [ie pilot licensing] of this Order.”

Conclusions

Whether or not to make this or any other change affecting the ambit of article 115 of the Air Navigation Order 2000 is I believe a matter for the DfT. Please let me know how you would wish to pursue this matter.

Yours sincerely

A handwritten signature in black ink that reads "Robin Allan". The signature is written in a cursive style with a long horizontal stroke at the end.

R J Allan
Deputy Secretary & Legal Adviser