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Case No: QB 2019 000131

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 28/01/2019

Before :

MR JUSTICE EDIS

Between :

**THE BRITISH BROADCASTING
CORPORATION
THE PRESS ASSOCIATION**

Claimants

- and -

**(1) THE SECRETARY OF STATE FOR
TRANSPORT
(2) THE BRITISH AIRLINE PILOTS
ASSOCIATION**

Defendants

Jane Phillips (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimants**
David Manknell (instructed by **Government and Legal Department**) for the **First Defendant**
Martin Chamberlain QC (instructed by **Reynolds Dawson Solicitors**) for the **Second Defendant**

Hearing dates: 14th and 23rd January 2019

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr. Justice Edis :

1. This is a claim by the BBC and the Press Association for an order under the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2018, SI 2018 No. 321 (“the 2018 Regulations”). The Defendants are (1) the Secretary of State for Transport in his role as the minister responsible for the Air Accidents Investigation Branch (AAIB), and (2) the British Airline Pilots Association (BALPA) which applied for and was granted leave to become party to the claim. If granted, it would enable the Crown Prosecution Service (CPS) to deal with the air cockpit footage taken during the final flight of the Hawker Hunter T7 G-BXFI on 22nd August 2015 in accordance with the rules which apply in the Crown Court. Those rules are set out in *CrimPD I General Matters paragraph 5B: Access To Information Held By The Court*, and the protocols there referred to. It is at that second stage that privacy rights and other similar considerations fall to be considered. At this stage I am concerned only to make a decision under the 2018 Regulations.
2. The CPS and the Chief Constable of Sussex Police (CCS) were concerned about whether footage recorded from cameras in the cockpit of the crashed aircraft can lawfully be released to the press after it has been played to the jury. In addition to the parties to the claim, I have also received submissions from the CCS, and from counsel for the prosecution and the defence in the criminal proceedings. On the first hearing, which took place on the 14th January 2019, I made limited disclosure orders. The substantive hearing took place on 23rd January 2019. I had given leave to all interested parties to serve evidence by close of business on 22nd January and heard submissions on 23rd. The trial is continuing and cannot be delayed while this is resolved. The court could not sit with the jury for other reasons on 23rd January 2019 and thus the issue came on quickly and with minimal formality. This decision also is required urgently because if there is to be disclosure it should occur before the experts give evidence which starts next week. The entitlement of the press is to report proceedings fairly and contemporaneously, and if the footage is required for the purposes of accurate reporting of the evidence it is most clearly required for accurately reporting the expert evidence. The judgment cannot recite all the arguments and evidence, but will seek to give and explain my decision. It would have been far better if this issue had been anticipated in advance of the start of the trial, and the claim determined in a less pressured way although, I accept that the Claimants only knew that the footage would be shown in open court, shortly before making their Application . In the end, I am required to answer a narrow question which is

“Am I satisfied that disclosure of the Go-Pro cockpit film to the media will produce benefits which outweigh the adverse domestic and international impact which it might have on any future safety investigation? In answering that question, I must take into account the fact that the film is being used in a public court as evidence in support of 11 manslaughter allegations and has already been played to the jury in open court. It is therefore the additional adverse impact of disclosure to the media which I am required to weigh against the benefits of disclosure.”

Summary of legal framework

3. The 2018 Regulations are the present form of Regulations made to govern the application in the UK of Regulation (EU) No 996/2010 on the investigation and prevention of accidents and incidents in civil aviation (“EU Regulation 996”). EU regulation 996 has direct effect in the UK and the 2018 Regulations supplement it and provide some machinery for its enforcement. Both provisions have as their origin Annex 13 (Aircraft Accident and Incident Investigation) to the Chicago Convention (“Annex 13”) and seek to enact the treaty obligations of EU member states and the UK in particular into EU and domestic law. Annex 13 is now in its eleventh edition, published July 2016, and contains an amendment on which some reliance was placed which has not caused an amendment to EU Regulation 996, and which did not find its way into the 2018 Regulations when they were brought into force on 9th April 2018. That is the insertion of paragraph 5.12.5 and Appendix 2 which I deal with below.
4. I am sitting as a Judge of the High Court in dealing with a Part 8 claim for an order under Regulation 25 of the 2018 Regulations and, at the same time, as the Trial Judge in the Crown Court exercising the jurisdiction of the Crown Court in relation to the trial on Indictment of Mr. Andrew Hill. This judgment relates solely to the application under the 2018 Regulations. Any consequences for the Crown Court jurisdiction will be dealt with separately.
5. The inhibition on disclosure of material which comes into the possession of the AAIB in the course of a safety investigation, or which is created by the AAIB in such an investigation is a matter of international importance. The 2018 Regulations, and EU Regulation 996 and Annex 13 which underlie them, are designed to enable people involved in air accidents to co-operate with the AAIB investigation freely and without fear and to encourage them thereby to provide accurate information promptly and without obfuscation. This is to enable those investigations to reach accurate conclusions about the causes of air accidents and incidents so that air safety in the future is achieved. The culture of openness is an essential part of a safe system of air travel. It is called “the just culture” in some of the evidence and I shall use that expression in this judgment. It is given a very high priority in the law. Regulation 25(4) says:-

Failure to protect sensitive safety information

25.—(1) Subject to paragraphs (3) and (4), any relevant person who knowingly contravenes any of the prohibitions in paragraphs 1 or 2 of Article 14 of Regulation 996/2010 also contravenes these Regulations.

(2) In paragraph (1) “relevant person” means—

- (a) an Inspector;
- (b) any other officer of the Secretary of State; or
- (c) any person to whom any relevant record has been made available by such an Inspector or other officer.

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(3) Paragraph (1) does not apply to information which is included in a final safety investigation report.

(4) Paragraph (1) does not apply where a relevant person makes a relevant record available to another person (“person A”) in the following circumstances—

(a) in a case where person A is a party to or otherwise entitled to appear at judicial proceedings and the relevant court has ordered that that record must be made available to person A for the purposes of those proceedings; or

(b) in any other case, where the relevant court has ordered that that record must be made available to person A for other specified purposes.

(5) The relevant court must not make an order under paragraph (4) unless it is satisfied that the benefits of the disclosure of the record concerned outweigh the adverse domestic and international impact which the disclosure might have on the safety investigation to which the record relates or any future safety investigation.

6. Annex 13 does not have direct effect, but is referred to in the preamble to EU Regulation 996 and in the text of the 2018 Regulations. It imposes international treaty obligations on the UK and I accept that there is a principle of construction which holds that instruments are to be construed wherever possible so that UK domestic law is compliant with the UK’s international treaty obligations. I accept that recital (5) of the preamble to EU Regulation 996 expressly imports this rule into the regime under consideration and applies it to “Annex 13 to the Chicago Convention and of its subsequent amendments”. I accept also that this is explicit in the 2018 Regulations which provide, for example:

“8. The sole objective of a safety investigation which is undertaken pursuant to Regulation 996/2010, Annex 13 or these Regulations is the prevention of accidents and incidents, without the apportionment of blame or liability.”

The Regulations define “Annex 13” in regulation 2 as meaning “Annex 13 (Aircraft Accident and Incident Investigation) to the Chicago Convention as that Annex has effect from time to time.” I have underlined two phrases in these instruments because I shall refer to them in particular at [8] and [19] below.

7. It is necessary to explain that Annex 13 provides for cockpit recordings in two places.

i) At paragraph 5.12, it says

“The State ...shall not make the following records available for purposes other than accident or incident investigation, unless the competent authority [the High Court in England and

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Wales]determines in accordance with national laws and subject to Appendix 2 and 5.12.5 that their disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or any future investigations:

Cockpit voice recordings and airborne image recordings and any transcripts from such recordings.....”

- ii) 5.12.5, which was inserted in 2016 after the decision in the Divisional Court referred to at [9] below, but before the 2018 Regulations came into force, says

“States shall take measures to ensure that audio content of cockpit voice recordings as well as image and audio content of airborne image recordings are not disclosed to the public.”

8. In paragraph 5.12 the competent authority is permitted to strike a balance and to permit the disclosure and use of airborne image recordings, but in 5.12.5 there appears to be an absolute obligation on the UK to take measures to prevent disclosure to the public. Given the terms of those instruments underlined at [6] above and the principles of construction already identified, I am required to determine the meaning of Annex 13 as now amended and to construe UK law so far as possible so that it complies with the obligation thus created. I have not been assisted with any external aids to construction, and will proceed on the basis of the wording of Annex 13 alone.

The decision of the Divisional Court in 2016

9. The 2018 Regulations replaced the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 (SI 1996 No. 2798) “the 1996 Regulations”. When this case was at the investigative stage and before there were any criminal proceedings, an application was made to the High Court under the 1996 Regulations. As a result of the decision of the Divisional Court (Lord Thomas CJ and Singh J) on that application (see *Chief Constable of Sussex Police v. Secretary of State for Transport and British Airline Pilots Association* [2016] EWHC 2280 (QB)) the Secretary of State released film from two cockpit mounted cameras taken during the flight which culminated in the disaster when the Hawker Hunter T7 G-BXFI crashed on the 22nd August 2015. This release was subject to certain conditions which I shall set out from the sealed Order of the court and not as they appear in the judgment. There appears to have been some amendment of those conditions when the order of the court was drawn up. The numbering is mine:-

(1) The material set out in the Schedule attached herewith (“the material”) is to be disclosed to the CCS for the purposes of his criminal investigation into the circumstances surrounding the crash of the Hawker Hunter T7, G-BXFI piloted by Mr Andrew Hill;

(2) The CCS will retain overall responsibility for the material until its return to the AAIB;

(3) The material that is disclosed to the CCS shall not be further disclosed by him save that he may disclose the material to:

(i) Any other officer or civilian employee or contractor assigned by him to the Police investigation into the circumstances surrounding the crash of the Hawker Hunter, G-BXFI.

(ii) Any experts instructed by the Police in the furtherance of their investigation

(iii) The Crown Prosecution Service (“CPS”) for the purposes of advising him and pursuing a prosecution if that is the decision of the CPS and any Solicitor or Counsel engaged by them to act as their agents or representatives or any expert instructed by them

(iv) Mr Andrew Hill and any other Defendant prosecuted as a result of the investigation into the crash of the Hawker Hunter T7, G-BXFI and any Solicitor or Counsel engaged by them for the purposes of ensuring that he receives the required procedural safeguards by way of disclosure that are provided for in the case of an investigation and prosecution of a crime pursuant to the Criminal Procedures and Investigatory Powers Act 1996

(4) The results of any analysis and any subsequent opinion as a result of the expert consideration referred to in 3(i) above shall be treated on the same confidential basis as the rest of the material.

(5) In the event that it is decided that the film footage is to be produced in any criminal prosecution or in a fatal accident inquiry, it is to be redacted so as to ensure that information not relevant to the prosecution or inquiry, particularly information with a bearing on personal privacy, is not disclosed.

(6) The material in the Schedule shall be returned to the AAIB at the conclusion of any criminal proceedings.

10. Condition (5) appears in the Order but not in the judgment and it is not clear how it originated. The parties to the criminal prosecution which is now taking place were not before the Divisional Court. There is no supporting reasoning for it in the judgment. The parties to Crown Court proceedings, and the trial judge, are responsible for the presentation of evidence before the Crown Court and for dealing with what should be played to a jury. The trial judge has power to safeguard privacy rights and to balance those rights with the high imperative of open justice and accurate reporting of important criminal trials. I do not consider that the 1996 or the 2018 Regulations confer on the High Court a power to give a direction as to what evidence should be admitted in a criminal trial, and I do not read anything that the Divisional Court said as suggesting otherwise. Relevance is the first key to admissibility and irrelevant evidence is always inadmissible. Condition (5) therefore appears to be a direction to the CCS to redact material which is inadmissible from any footage which is “produced” in the “prosecution”. This can only be a direction to

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redact material which is either agreed by the parties or determined by the Crown Court to be irrelevant. There is, as yet, no such material, so far as I know. The only person shown on the footage with which I am concerned is Mr. Hill. He was filmed because he wanted to be. He set up the cameras to record his display for his own reasons. He was engaged in a “display” which is not generally an activity to which any particular privacy interest might attach. The terms of this condition are clearly designed to reflect Article 14(1)(g) of EU Regulation 996, but are largely theoretical in this case.

11. The conditions which were laid down were designed to protect the confidentiality of the material during the phase when evidence was being gathered by the Police, and when a charging decision was made. The police are also permitted to release the material to any defendant in order to give disclosure as required under CPIA 1996 if there is a prosecution. This is appropriate, because the control of unused material under that statutory regime is vested in the police. Control of evidence, on the other hand, is a matter for the party who adduces it and, once adduced, for the court. I read these conditions, perhaps with the exception of condition (5), as governing what the CCS (to whom disclosure is permitted) may do with the material. If the High Court has jurisdiction under the Regulations to regulate the way in which the Crown Court deals with material which was disclosed to the police under a prior order of the High Court under the 1996 Regulations, it was not, in this case, purporting to exercise it. It imposed no restrictions on what should be done with the material by the CPS, or Mr. Hill, or the Crown Court in the event that a trial eventuated. The restrictions are imposed only on the police.
12. There is no scheme in the Divisional Court order addressing the restrictions on disclosure of the material if it is used as evidence once proceedings have started. Understandably, the parties to the criminal proceedings (having much to do apart from consider the ramifications of the Chicago Convention) have proceeded on the footing that they have implied authority to make disclosure of this material as required for the proper conduct of the prosecution or defence cases. For the reasons given above, I am not certain that this is strictly right. The Regulations create a criminal offence and clarity is always desirable. Therefore, I gave an *ex tempore* decision in the High Court after these proceedings had started on 14th January permitting disclosure:-
 - i) By Mr. Hill and his legal team to defence experts. This had already happened but I felt it should have the sanction of the court even if retrospectively.
 - ii) By the CPS to the families of the victims prior to trial and to the legal teams of the BBC and the Press Association so that discussions can take place about what material should be disclosed to the media under the protocol. I did not give a final decision on the continuing reach of the 2018 Regulations but indicated a provisional view that the “chilling effect” on future safety investigations of the disclosure had already happened as an inevitable consequence of the order of the Divisional Court. What creates the “chill”, I said, is handing the evidence to the police and a high-profile prosecution ensuing. This has happened. I said that there was little therefore to put in the balance against the benefit to the system of criminal justice of the usual rules applying to this material. That was a provisional view, and I have since received further substantial evidence and legal submissions on behalf of the

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Secretary of State and BALPA. I have reconsidered the question afresh in the light of those materials.

- iii) By the CPS to the jury, and others in the courtroom, in a public trial. It was and is accepted by the Secretary of State and BALPA (who oppose the disclosure of the footage to the press) that this step was a necessary consequence of the order of the Divisional Court, if the investigation resulted in a trial in which the footage was admissible.

The evidence

13. I have written statements from

- i) Nicola Cain, who is the legal representative of the BBC and the Press Association. The position she takes is supported by a very significant number of national and local media organisations who have written letters of support.
- ii) Julian Firth, who is a Principal Inspector of the AAIB.
- iii) Dr. Robert Hunter, Mr. Derek Whatling, Mr. John Coward, Mr. Martin Chalk, Mr. Andrew Gillett, Captain Peter Burkill, and Mr. Richard Toomer. The first five of these witnesses are or have been members of BALPA and are pilots. Captain Burkill is also a pilot but is not a member of BALPA and Mr. Toomer is employed by BALPA as its Head of Communications and External Relations.
- iv) Relatives of those who died. Their views have been collated into a document by the Police Family Liaison Team and presented with supporting submissions by counsel for the prosecution. They are concerned that intrusive footage should not be disclosed to the media, and fear being exposed to continual reminders of the crash which has caused them such loss and trauma.

14. I accept that there is a strong presumption in the criminal courts in favour of open justice, and that release of material produced in evidence to the media for the purposes of fair reporting is an essential part of that. I accept that the media organisations genuinely want to explain to their viewers, listeners and readers what the evidence in the trial has been. I accept that in doing so, they are subject to regulatory codes which should give the court confidence that disclosed material will be properly dealt with. I have made a ruling in relation to bystander footage that it should be released with parts removed which would show victims just before their deaths. That was not a ruling under the present regime, because this footage was not part of the AAIB investigation. It was a ruling under the *CrimPD I General Matters paragraph 5B: Access To Information Held By The Court* which governs media access to prosecution materials and which is generally governed by the “Protocol for working together: Chief Police Officers, Chief Crown Prosecutors and the Media”¹. I accept that this regime, rather than the 2018 Regulations is the forum where issues of privacy and humanity are to be addressed. The 2018 Regulations require an objective judgment about whether or not the benefits of the disclosure of the record concerned outweigh the adverse domestic and international impact which the disclosure might

¹ Available at: <https://www.cps.gov.uk/publication/publicity-and-criminal-justice-system>

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have on the safety investigation to which the record relates or any future safety investigation.

15. On that issue, the evidence of BALPA and AAIB on the “adverse domestic and international impact” is obviously critical. I have been taken through it by Mr. Manknell, on behalf of AAIB, Mr. Chamberlain QC on behalf of BALPA and Ms. Phillips on behalf of the media organisations. Time does not permit extensive citations from the evidence and those submissions, but I should record that I have read the evidence and reminded myself of the submissions with care when preparing this judgment. I shall set out my conclusions:-

- i) I do not agree with Ms. Phillips that I should attach little weight to the BALPA evidence because the witnesses were not properly briefed. The evidence was assembled in haste because of the timetable I set, and does sometimes extend rather more widely than the present narrow question identified at [2] above requires. I shall ignore that part of the evidence, which is irrelevant. However, the statements collectively and individually do address that narrow question and, in so far as they do, the evidence is relevant and I shall take it into account.
- ii) There are three aspects to the adverse impact explained in this evidence.
 - a) The first is damage to the “just culture” of air investigation in which pilots are willing to co-operate, and which produces a safe system of global air travel. This is about the attitude of pilots (among others), nationally and internationally, to air accident investigation generally and the AAIB in particular.
 - b) The second is a particular consequence which some of the pilots fear, namely that in future pilots may be less likely to take cockpit footage. This Go-Pro footage is not “black box” material, but was created voluntarily by Mr. Hill.
 - c) The third is a diminution in the standing of the AAIB among international air accident investigators with which it co-operates. That standing is high, it is said, not least because international equivalents rely on the AAIB to adhere to the terms and principles of Annex 13.
- iii) There is a danger that in the present circumstances witnesses may overstate the potential additional harm of disclosure of material which is already partly in the public domain to the media. Some of the language in the pilots’ statements is a little intemperate and suggests to me that the witnesses may have succumbed to this temptation. I have read with care the 2016 evidence which addresses the impact of criminal prosecution generally on air accident investigation, but consider that our criminal law does have a role in ensuring that criminal behaviour (which is unsafe in this context) is deterred. Open justice is an important aspect of this, which none of these witnesses appears to understand. I need therefore to strip out the bias, and to concentrate on the reliable material as to adverse impact. In doing that, I should not forget that the issue concerns, to an extent, the attitude and behaviour of pilots. I accept that there is substance in the first concern. It is important to the maintenance

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of effective air safety investigation that pilots understand that material they supply to the AAIB will remain with the AAIB, and that there is likely to be a strong reaction among pilots to this material being played on television and newspaper websites and thereafter available forever on the internet. This is an adverse impact which needs to be weighed against the benefit of open justice.

- iv) I attach no weight to Dr. Hunter's suggestion that "BALPA has so far refrained from advising pilots not to produce such footage. BALPA is considering revising its guidance to members of the Court orders disclosure if this footage to the press." I accept, as a matter of fact, that such reconsideration may be occurring, but cannot predict its outcome, any more than Dr. Hunter purports to be able to do. At another point in his statement he says that GoPro cameras help pilots to "become safer pilots". He says "It follows that the installation of GoPros is, in my view, in the public interest". I do not feel confident that any reconsideration by BALPA of its guidance would result in any new guidance encouraging pilots not to "become safer pilots".
- v) Moreover, in 2016 Dr. Hunter made a statement which suggested that if image recordings made by pilots of their own volition were to be disclosed to the police they may be disinclined to carry such equipment. The Divisional Court nevertheless ordered such disclosure, saying

"49. Furthermore, in my judgment, what is significant in the present case is that the cameras concerned were installed not only on a voluntary basis but for leisure and private commercial reasons. Indeed, on the evidence before this Court, it would appear that the intention was to use the film footage obtained during the air show in this way as part of a broadcast. I am, therefore, not persuaded that pilots would be deterred in the future from installing such equipment on a voluntary basis, since they would do so for their own private, and potentially commercial, reasons."
- vi) There is empirical evidence that Dr. Hunter's fears in 2016 were not well-founded and that the Divisional Court was right. Paragraph 7 of his statement, made in January 2019, says "The practice of pilots installing GoPro cameras and similar filming devices is growing." I shall take the same approach to the second suggested adverse effect of disclosure as the Divisional Court did.
- vii) The evidence concerning the national and international "just culture" and the international standing of the AAIB is much more persuasive. I accept that this is an important consideration and refer back to the words of Regulation 25(5) which refers to adverse "international impact" in express language. Air accidents commonly involve events which may have taken place across several national borders and effective international co-operation is obviously vital.
- viii) It is also important that the reputation of the AAIB is maintained internationally so that its services may be sought by countries with less

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effective domestic air accident investigation services. Lessons should be learned from accidents wherever they took place.

- ix) I consider that the evidence does show that widely published disclosure of this footage would probably have an adverse impact of the third kind.

Discussion and conclusion

16. Once disclosure for this purpose has been ordered, at least where a prosecution is under way, the balance to be struck between air safety on the one hand and the usual conduct of criminal prosecutions on the other necessarily changes. The potential prosecution has become a reality, because the High Court has decided that the material should be disclosed for use in an investigation. A significant chilling effect on future investigations may now happen, whatever happens to the material once it has been played in court. There is actually no evidence that this has happened over the two years since the first disclosure, but it remains possible that it will. As I record above, my provisional view was that this meant that the balance required by Regulation 25 would fall in favour of disclosure. If that chilling effect has occurred already, then it may be reduced rather than exacerbated by accurate and informed reporting, rather than the sort of ignorant speculation which the pilots in their witness statements fear.
17. However, I have reconsidered that provisional view in the light of the evidence from AAIB and BALPA, and in the light of the legal submissions I have received.
18. The first consideration is paragraph 5.12.5 of Annex 13, and Appendix 2. The power of the competent authority to order disclosure remains in place in paragraph 5.12(a) and is therefore clearly not abrogated by paragraph 5.12.5. What paragraph 5.12.5 taken with Appendix 2 adds is a distinction between disclosure for such purposes as to the competent authority may authorise, and disclosure to the public. Appendix 2 at paragraph 2.3 gives examples of measures which the state may take to ensure that this does not take place and the list includes “protective orders” and “closed proceedings”. That is clear support in an international convention to which the UK is a party for the concerns expressed by BALPA and AAIB about the adverse impact of disclosure to the public. It is to be noted that unlike paragraph 5.12(a), the paragraph 5.12.5 prohibition does not include transcripts of audio and image recordings, but only the audio content of the recordings themselves. There is no requirement on the state to take measures to ensure that transcripts of audio recordings are not disclosed to the public. They may be disclosed, but only if the competent authority so orders. It seems that the Convention recognises that public access to the actual recording (or a copy of it) is particularly damaging and should not be possible.
19. In exercising my function under Regulation 25 of the 2018 Regulations and in applying the direct effect of EU Regulation 996, I am required to take account of Annex 13 as it now is. That is the effect of the words underlined at [6] above. I consider that this means that I should consider whether a protective order should be made, as envisaged by Appendix 2, paragraph 2.3(b). Refusal of this claim could be so described. I do not consider that the material should be played in camera because possession of the recording can be retained even if it is played and discussed in evidence in open court. In our jurisdiction the recording of what happens in court is

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carefully controlled and copies cannot be made simply because a film is played. This appears to me to be an important consideration.

20. It is at least possible that Annex 13 now seeks to prevent disclosure of actual footage to the public because of the internet. Any film or audio recording disclosed to the public can now be captured and made available to the whole world at no cost in perpetuity. I do not accept Ms. Phillips's submission that Mr. Hill, as copyright owner, could take action to prevent his films from being treated in this way. He might be able to do that, while at any rate he is still alive, in respect of postings of which he happens to become aware, but he cannot be expected to keep the whole internet under constant review. In any event, the prevention of disclosure to the public in Annex 13 is the responsibility of the State and not Mr. Hill. I think that the wide dissemination potential of the film after its release to the media does add to the concerns of pilots and therefore has a potential adversely to affect their behaviour in future safety investigations. The avoidance of that adverse impact is not to be delegated to Mr. Hill for enforcement by his private legal rights, even if (which there is not) there were any reason to think he could do it effectively.
21. I have identified two sources of adverse impact which were established by the evidence. Does the benefit of disclosure of the recording to the media outweigh those? In my judgment it cannot be shown that it does. I have already acknowledged the very great importance of open justice in a public court. It is at the heart of our justice system. The position was extensively analysed and explained by the Court Martial Appeal Court and Divisional Court in *R v. Marine A and others*, etc. [2013] EWCA Crim 2367 and I have in mind in particular paragraph [49], [55], [67] and [80].
22. I am not concerned with striking the balance between privacy rights and other third party interests and the principle of open justice and journalistic freedom of expression. I am only concerned now with the balance required by Regulation 25. The purpose of citing *Marine A* is simply to emphasise how important the benefits which flow from open justice and proper reporting of criminal proceedings are. That is the benefit which must outweigh the adverse impacts I have identified before disclosure can be permitted. Here, it is right to say that all the evidence will be given in open court, and there is no reporting restriction on any of it. I accept that responsible reporting, including use of the footage, probably would make the case clearer than it will be without it, but not by very much. Use of the footage is likely to give a news report more impact than it will otherwise have, and I do not dismiss this benefit as "sensationalism" as some of the BALPA evidence does. Open justice and proper reporting of criminal proceedings is a mere slogan unless people view or read the reports. It is a legitimate part of the media's job to try to ensure that their product attracts attention. Against that, however, is the fact that there is a lot of footage already available of this disaster which creates abundant impact when viewed. It is not difficult to attract and retain the attention of the viewer when reporting this trial.
23. For these reasons, on the facts of this case, I am not satisfied that the benefit of disclosure to the media outweighs the adverse impact on future safety investigations it will have. It is a matter of real importance that the international air investigation world accepts that the UK complies with its obligations under Annex 13, and treats those obligations seriously. For these reasons, I refuse the Press Association and BBC Part 8 claim for disclosure under Regulation 25(5) of the 2018 Regulations.