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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2018

Before :

MRS JUSTICE LAMBERT

- -

Between :

R (OMAR and others)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr Michael Fordham QC, Mr David Chirico and **Mr Stephen Knight** (instructed by **Duncan Lewis**) for the Claimants
Mr Alan Payne (instructed by **Government Legal Department**) for the Defendant

Hearing date: 1st and 2nd February 2018

Judgment Approved

Mrs Justice Lambert:

1. The six Claimants in this application for judicial review have each challenged the lawfulness of the Defendant's decision (i) to remove them to another EU member state for the purposes of examining their asylum claims and (ii) to detain them for the purposes of their removal. Each also includes a challenge to the lawfulness of the Transfer for Determination of an Application for International Protection (Detention) (Significant Risk of Absconding Criteria) Regulations 2017 ("the 2017 Regulations"). By his Order of 27th September 2017, Lavender J directed that the challenge to the 2017 Regulations be considered at a "rolled-up" hearing confined to that issue and that the other grounds relied upon by the Claimants be stayed.

2. The single issue for me is therefore the lawfulness of the 2017 Regulations. The background facts of each of the six individual claims are not in the circumstances material, save to note two points. First, all six Claimants were detained by the

Defendant after the 2017 Regulations came into force. Secondly, the immigration history of each of the Claimants demonstrates features typical of migrants subject to the procedures set out in Regulation EU No 604/2013 ("the Dublin III Regulation"). All are irregular migrants seeking international protection; they have each travelled to the UK from his/her country of origin via various different EU states where they have come into contact with the immigration authorities.

3. At the hearing before me, Mr Michael Fordham QC led on behalf of the Claimants and Mr Alan Payne represented the Defendant.

Introduction

4. The 2017 Regulations were made at 11.18 on 15th March 2017. They came into force at 12 noon and were laid before Parliament at 4pm that day. The reason for their urgent implementation was the handing down (earlier on 15th March) of the judgment of the Court of Justice of the European Union in the case of *Policie CR v Al Chodor* (C-528/15; [2017] 4WLR 125 ("*Al Chodor*") which concerned the interpretation of the provisions of article 28 in conjunction with article 2(n) of the Dublin III Regulation. The CJEU held in *Al Chodor* that the objective criteria referred to in article 2(n), to be applied for the purpose of determining the risk of absconding of a person subject to the Dublin III procedures, must be set out in legislation, and that settled case law confirming a consistent administrative practice was not sufficient. The 2017 Regulations were intended to give effect to this requirement. Hence the urgency of their enactment and implementation.

5. The Claimants submit that the 2017 Regulations are flawed. The objective criteria should be comprehensive, exhaustive and mandatory. As to their substance, the objective criteria should identify the existence of the risk of absconding. The 2017 Regulations fail in each respect. They are no more than a non-exhaustive list of optional relevant considerations or factors. Some of the criteria listed are not linked, or sufficiently linked, to the risk of absconding. As currently drafted, the 2017 Regulations do not confer upon those subject to the Dublin III procedures the enhanced level of detention from arbitrary protection which was to be provided by the Dublin III Regulation.

6. The Claimants argue that the flaws in the 2017 Regulations are not surprising given the Defendant's starting point. As made clear in the Explanatory Note to the 2017 Regulations, their origin was the existing criteria in current use by the Defendant to assess the existence of a significant risk of absconding in a Dublin III Regulation case. Those criteria were in turn derived from the "Reasons for Detention" listed in the Defendant's Enforcement Instructions and Guidance ("EIG"). Those reasons for detention were of general application and had not been refined to reflect the enhanced level of protection afforded to those subject to Dublin III. Having started from the wrong place, the Claimants submit, inevitably and unsurprisingly, the 2017 Regulations are deficient. They are unlawful. The Claimants seek a Declaration to that effect.

7. The Defendant's short answer to the claim is that neither Dublin III nor *Al Chodor* prescribe or define the content of the objective criteria which Member States are required to use to determine the risk of absconding. What goes into the criteria is a matter for the Member State. It is not necessary for the Member State to craft new criteria for the purposes of the Dublin III Regulation unless the existing criteria are inconsistent with the Dublin III obligations. Following *Al Chodor* the requirement is for objective criteria which form the basis of a decision concerning the absconding risk to be implemented in domestic legislation. The 2017 Regulations, both

individually and collectively, provide a workable set of criteria which, when applied, will provide a reasoned conclusion as to the existence or otherwise of an abscond risk.

Legal Framework

8. The Dublin III Regulation is one of the components of the Common European Asylum Policy. It came into force on 1st January 2014. It sets out the criteria and the mechanisms for identifying which Member State is responsible for determining an application for international protection by a third country national and provides for the transfer of the asylum seeker to the Member State identified as responsible for processing the application. Its major objective in this regard is the prevention of multiple asylum claims.

9. The initial draft of the Dublin III Regulation had been introduced by the Commission in 2008 and the Explanatory Memorandum which accompanied it stated the underlying objective to be two-fold: to increase the efficiency of the Dublin system generally and to ensure higher standards of protection for those subject to its procedures. The Commission proposed methods for streamlining and time-limiting the various stages of the Dublin process. It recalled and emphasised the underlying principle that a person falling under the Dublin procedure should not be held in detention for the sole reason that he/she is seeking international protection and proposed limited specific grounds for detention "*in order to ensure that the detention of asylum seekers is not arbitrary"*.

10. The Recital to the Dublin III Regulation states its objectives to be the improvement of the effectiveness of the Dublin system and the protection granted to applicants under the system (recital 9). It proposed a clear and workable method for determining the Member State responsible for the examination of an asylum claim "*based on objective fair criteria both for the Member States and the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of rapid processing of applications for international protection."* (Recital 5).

11. In respect of the detention of applicants specifically, Recital 20 states that:

> "the detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection. Detention should be for as short a period as possible and subject to the principles of necessity and proportionality. The procedures provided for under this Regulation in respect of a detained person should be applied as a matter of priority, within the shortest possible deadlines".

12. Article 28 concerns detention of persons subject to the Dublin III process for the purpose of transfer and provides that:

    1. "Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation.

    2. When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures, on the basis of individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.

3. Detention shall be for as short a period as possible and shall be for no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until transfer can be carried out". This provision then sets out a series of time-limits for the various elements of the process.

4. As regards detention conditions and the guarantees applicable to persons detained, in order to secure the transfer procedures to the Member State responsible, Articles 9, 10 and 11 of Directive 2013/33/EU shall apply.

13. Article 2 of the Dublin III Regulation sets out definitions, including the definition of "risk of absconding" at Article 2(n). Risk of absconding is there stated to mean:

"the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third country national or stateless person who is subject to a transfer procedure may abscond".

14. During the course of the argument before me, the definition of "risk of absconding" in Article 2(n) was scrutinised. Mr Fordham argued that the objective criteria enacted by Member States must "define the existence of the risk of absconding"; Mr Payne that the objective criteria should provide the basis for a finding that a risk of absconding exists. I will return to this difference between the parties later. However, both parties looked to the CJEU judgment in *Al Chodor* for support of their respective positions.

15. The question which was referred for consideration by the CJEU in *Al Chodor* was whether article 2(n) read in conjunction with article 28(2) of the Dublin III Regulation must be interpreted as requiring Member States to establish, in national law, the objective criteria referred to in article 2(n) and whether the absence of those criteria in national law leads to the inapplicability of article 28(2). This question involved the Court in the limited question of construing what was meant in article 2(n) by "defined by law". The Court, having concluded that a purely textual analysis did not provide the answer to the question, examined the underlying objective of the general scheme of the rules in the Dublin III Regulation.

16. The Court observed the higher level of protection to be extended to those who were detained. This protection was to be provided in part by the prescribing of only limited circumstances in which a Dublin III applicant could, lawfully, be detained (the "significant risk" threshold and the requirement of necessity and proportionality). It noted that the authorisation of detention was a limitation on the exercise of the fundamental right to liberty contained in article 6 of the Charter; that the limitation on the exercise of that right must be provided for by law which must respect the essence of the right and be subject to the principle of proportionality; and that the minimum threshold of protection was that provided by article 5 ECHR. Protection from arbitrary decisions required that the detention of applicants (constituting a serious interference with those applicants' right to liberty) should therefore be subject to compliance with "*strict safeguards*". Those safeguards were the existence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.

17. Against this background the Court concluded that the existence of the risk of absconding must be exercised within a framework of predetermined limits set out in a binding legal instrument which would be foreseeable in its application; settled case law confirming a consistent administrative practice would not be sufficient.

18. The content of the objective criteria referred to in article 2(n) is not defined in the Dublin III Regulation or in any other EU Act; nor did the Court in *Al Chodor* express a view upon what should be included (or excluded) in the objective criteria or how those criteria should be framed. The elaboration of the objective criteria in the context of the Dublin III Regulation was left as a matter for each Member State. In referring to the objective criteria however, the Court variously referred to "*objective criteria defining the existence of a risk of absconding*" [28]; "*the criteria which define the existence of the risk*" [42]; and "*the objective criteria underlying the reasons for believing that an applicant may abscond*" [45]

19. The 2017 Regulations enacted within a few hours of the judgment in *Al Chodor* set out the objective criteria to be considered when determining risk of absconding at regulation 4:

> "4. When determining whether P poses a significant risk of absconding for the purposes of Article 28(2) of the Dublin III Regulation, the Secretary of State must consider the following criteria:
>
> (a) whether P has previously absconded from another participating State prior to a decision being made by that participating State on an application for international protection made by P, or following a refusal of such an application;
>
> (b) whether P has previously withdrawn an application for international protection in another participating State and subsequently made a claim for asylum in the United Kingdom;
>
> (c) whether there are reasonable grounds to believe that P is likely to fail to comply with any conditions attached to a grant of temporary admission or release or immigration bail;
>
> (d) whether P has previously failed to comply with any conditions attached to a grant of temporary admission or release, immigration bail, or leave to enter or leave to remain in the United Kingdom granted under the Immigration Act 1971, including remaining beyond any time limited by that leave;
>
> (e) whether there are reasonable grounds to believe that P is unlikely to return voluntarily to any other participating State determined to be responsible for consideration of their application for international protection under the Dublin III Regulation;
>
> (f) whether P has previously participated in any activity with the intention of breaching or avoiding the controls relating to entry and stay set out in the Immigration Act 1971;
>
> (g) P's ties with the United Kingdom, including any network of family or friends present;
>
> (h) when transfer from the United Kingdom is likely to take place;
>
> (i) whether P has previously used or attempted to use deception in relation to any immigration application or claim for asylum;

(j) whether P is able to produce satisfactory evidence of identity, nationality or lawful basis of entry to the UK;

(k) whether there are reasonable grounds to consider that P has failed to give satisfactory or reliable answers to enquiries regarding P's immigration status."

20. The explanatory note to the 2017 Regulations sets out that: -

> "Under article 28 of the Dublin III Regulation, a person who has made an application for international protection may only be detained where they present a significant risk of absconding. Article 2(n) provides that "risk of absconding" means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that the individual who is subject to a transfer procedure may abscond. These regulations set out the objective criteria which will be considered to determine whether a person who has claimed asylum in the UK, but whose application is subject to the Dublin III Regulation procedure, presents a significant risk of absconding for the purpose of considering whether they should be detained."

21. Finally, I turn to the Explanatory Memorandum to the Regulations. The document stated:

i) that the purpose of the 2017 Regulations was to "*place on the face of legislation, objective criteria for determining when an individual poses a risk of absconding with reference to the provisions in .. the Dublin III Regulation;*"

ii) that the urgency arose from the handing down of the ruling by the CJEU in *Al Chodor*; given the terms of the ruling, the urgency could not be avoided "*due to the adverse impact of delay on the ability of the Secretary of State to detain third-country nationals or stateless person in order to transfer them;*"

iii) having considered the implications of the ruling the Home Office is making these Regulations in order to reflect in legislation "*the current policy and administrative practice as to the criteria which should be considered to determine whether an individual who is subject to the Dublin III procedures poses a significant risk of absconding*."

The Claimants' Submissions

22. The Claimants advanced a number of closely related arguments. Each had a common foundation: the enhanced level of protection which the Dublin III Regulation is intended to confer upon migrants subject to that procedure. Mr Fordham drew upon the statements in the Commission Report introducing the first draft of the Dublin III Regulation; the various parts of the Recital which refer to the protected status of Dublin III migrants and the CJEU reasoning in *Al Chodor*. The necessary safeguards of clarity, predictability, accessibility and protection from arbitrary acts which required the objective criteria in article 2(n) to be implemented in domestic legislation, applied equally to their form and content. The Defendant failed to appreciate the need for additional safeguards against arbitrary acts of detention which is clearly demonstrated by what he describes as the "transplant" process whereby the factors which were to be considered for detention purposes in EIG were simply transposed into the 2017 Regulations. Mr Fordham points to the absence of any

documentation disclosed by the Defendant which demonstrates the Defendant having grappled with the design and content of the objective criteria. As he puts it, the cupboard is completely bare. This absence only underscores what is obviously a legally erroneous approach to the drafting of the Regulations.

23. The criteria should be exhaustive. The decision maker must be limited to the application of only those criteria listed and no other. Their application must be mandatory: the application of the criteria is not optional. Unless the list of criteria is exhaustive and mandatory, then the requirements of clarity and predictability, accessibility and protection from arbitrary acts of detention are not satisfied.

24. Mr Fordham points to the absence in the 2017 Regulations of any statement that the decision making must be confined to those 11 criteria which are set out in regulation 4 and no other. He points to the introduction to the criteria in regulation 4 which invites the decision maker only to "consider" the criteria, rather than to "apply" the criteria. The Regulations are, he submits, no more than a non-exhaustive list of optional "relevancies" and a far cry from the exhaustive list of mandatory criteria which are essential safeguards against arbitrary detention.

25. Mr Fordham also challenges the substance of the 11 criteria. He points to the absence of a sufficient rational link between the criteria and the risk of absconding. He argues that the meaning of absconding is contextual and, when used in article 28 of the Dublin III Regulation, bears the specific focussed meaning of "absconding for the purpose of frustrating transfer". The criteria must be directed at the identification of such a risk of absconding and, relying on the judgment in *Al Chodor,* he argues that the criteria must "define the existence of the risk of absconding for the purpose of frustrating a Dublin transfer". Factors which may have a peripheral bearing upon, or a marginal relevance to, the existence or otherwise of the risk are unlawful.

26. He highlights the breadth and imprecision of the criteria in the 2017 Regulations: some of the criteria are too wide and imprecise to constitute objective, limited, specific and legally defined criteria forming the basis for the reasoned conclusion that there is a significant risk of the individual absconding. Several of the criteria are so widely drawn that many, if not all, of those who are subject to the Dublin transfer processes would be caught by them. This is wholly inconsistent with the enhanced protection which it is intended to be afforded to Dublin III migrants.

27. He makes the following specific criticisms of the individual criteria:

    i) Regulation 4(a): (previous absconding from a participating State before an application for asylum has been considered or following a refusal by the participating State of such an application). This provision would apply to all, or virtually, all of those subject to the Dublin procedures. The criterion is too expansive. It undermines the high level of protection as required by Dublin III.

    ii) Regulation 4(b): (previous withdrawal of an application for asylum in another participating state and subsequent claim for asylum in the UK). This provision is again too broad. Anyone who enters the UK unlawfully will be caught by this criterion; this will include the vast majority of people subject to the Dublin III procedure.

    iii) Regulation 4(c) and (d): (reasonable grounds to believe that P is "likely to fail to comply with any conditions attached to a grant of temporary admission or release or immigration bail" and "failed to comply with such conditions previously". Mr Fordham argues that there is a wide range of conditions and a wide range of ways in which a person may fail or have failed to comply with a

condition. Such conditions might for example relate to employment or study which have no relationship or bearing upon whether the person poses a risk of absconding. The only conditions which it would be appropriate to take into account if breached would be those which provide objective grounds for believing that the individual will act non-compliantly so as to frustrate transfer. The Regulation makes no allowance for reasonable excuse for non-compliance. Non-compliance with a reasonable excuse could not demonstrate a significant risk of absconding.

iv) Regulation 4(e): (reasonable grounds to believe that P is unlikely to return voluntarily to any other participating State). The criterion is irrelevant and insufficiently linked to the risk of absconding. The fact that a person does not choose to leave the UK does not mean that he/she will abscond to avoid being required to leave.

v) Regulation 4(f): (previous participation in an activity with the intention of breaching entry and stay controls). Many Dublin III migrants would fall within this category. It is too broad in scope.

vi) Regulation 4(g): (ties with the UK). This criterion is too expansive. It does not explain whether or how existence of ties in the UK increases or decreases the prospect of a person absconding so as to make transfer impossible.

vii) Regulation 4(h) (the timing of transfer from the UK). This factor is generic, neutral and imprecise. It does not establish imminence or any degree of imminence.

viii) Regulation 4(i): (previous use of deception in relation to any immigration application or claim for asylum). It is argued that this factor is too broadly drawn and does not allow for reasonable excuse.

ix) 4(j): (production of satisfactory evidence of identity, nationality or lawful basis of entry to the UK). This criterion is too broad. It would capture most Dublin III migrants. It does not permit for reasonable excuse.

x) 4(k): (failure to give satisfactory answers to enquiries concerning immigration status). This factor is too broad. It would capture most Dublin III migrants and permits for no reasonable excuse.

28. An illustrative and lawful approach was provided by Mr Fordham at my request. I set it out below:

> "A significant risk of absconding is present only where the following are satisfied:
>
> (1) There are reasonable grounds to believe that P is likely to fail to comply with any conditions attached to a grant of temporary admission or release on immigration bail so as to frustrate transfer from the United Kingdom to another participating State; and
>
> (2) Those grounds for belief arise on the basis that P has, without reasonable excuse:
>
> (a) Previously failed to comply with reporting or residence conditions; and/or

(b) Previously used or attempted to use deception in relation to an immigration application or claim for asylum; and/or

(c) Failed to give reliable answers to enquiries regarding P's immigration status."

29. The Claimants argue that this formulation demonstrates a set of criteria which are (a) mandatory and (b) exhaustive and (c) sufficiently and rationally linked to the risk of absconding that individually and collectively define the existence of the risk of absconding.

The Defendant's Submissions

30. Mr Payne seeks to inject a note of realism into the various propositions which were advanced on behalf of the Claimant.

31. He acknowledges and accepts that one of the purposes of the Dublin III Regulation is to increase the protection afforded to Dublin migrants in the various ways stated in article 28. The safeguards are introduced not by, or not simply by, the objective criteria which provide predictability and clarity to the risk assessment but by other strict safeguards: the threshold applicable to determining whether a person can be detained (the existence of a significant risk of absconding), by the limitation on the power to detain which is hedged by considerations of proportionality and necessity and by the introduction of maximum periods of detention and the requirement of a diligently conducted transfer process.

32. Those stated improvements are however improvements upon Dublin II (of which Dublin III was the recast version) and not the position in legislation in particular Member States. There is nothing in Dublin III or in *Al Chodor* which requires Member States to mint a new set of criteria provided that those in current use are not inconsistent with the obligations set out in Dublin III. He rejects the submission that the 2017 Regulations are merely a transplanted version of the factors set out in EIG Chapter 55. They represent a refinement and codification of those factors. More importantly he argues that the factors listed in Chapter 55 are not designed for a wholly different purpose as submitted by Mr Fordham; the factors which form the basis of a detention decision in EIG Chapter 55 and those listed in the 2017 Regulations share the common purpose of determining whether an individual who has no leave to remain in the UK might abscond to frustrate his or her removal from the UK. Absconding has no special meaning when applied to a Dublin III transferee; whether a person absconds to frustrate a transfer under those regulations or to avoid transfer under different machinery is irrelevant. What is required is a set of criteria which are objective, capable of providing reasons that a person may abscond and which are contained in a binding provision of law in the light of *Al Chodor*. Their origin does not matter.

33. He also reminds me that an additional central purpose of the Dublin III Regulations is to improve the efficiency of the transfer process. This was stated clearly in the Recital, particularly at 5 where the objective of a rapid processing of applications for protection was emphasised. He argues that the power to detain in article 28 must be considered in the context of a scheme which is, overall, intended to achieve a rapid allocation of responsibility and efficient and effective transfer procedures. This is, if not the "other side of the coin" to the enhanced protections afforded in Dublin III, then an important context in which to understand Dublin III.

34. Mr Payne drew my attention to the CJEU decision in *Khir Amayry* (C- 60/15) which considered the time limits applicable to detention under article 28. At paragraph 31, the Court observed that the power under certain circumstances to detain a person seeks "*to secure transfer procedures by avoiding that person absconding and thus preventing a possible transfer decision made in respect of him from being carried out*". The Court considered that an interpretation of article 28(3) which appreciably limited the effectiveness of the transfer procedures risked undermining the ability of Dublin III to achieve its core objective of effecting rapid transfers and may encourage the person concerned to abscond in order to prevent transfer. This case supports an interpretation of Dublin III in such a way as to enable Member States to give effect to transfer decisions. In the context of the application before me, Mr Payne therefore urges an interpretation of article 2(n) which is consistent with the need to implement a transfer decision rapidly. In practical terms, he argues that this approach is consistent with the implementation into domestic law of a sufficient range of objective criteria to permit application to a potentially very wide and varied set of individual circumstances.

35. Mr Payne argues that the fact that the criteria may be drawn in such a way as to capture many if not the vast majority of the Dublin III transferees does not make their inclusion unlawful. The criteria must be relevant to the cohort of migrants in whom the risk of absconding is being assessed. The assessment is being made in relation to persons who have spent little or no time in the UK and so it is inevitable (and appropriate and lawful) that the objective criteria must enable Member States to consider for example conduct in reaching the UK and their compliance with asylum procedures in other countries.

36. Mr Payne argues that the application of the objective criteria in the 2017 Regulations is clearly mandatory (on the face of the Regulation and confirmed in the Explanatory Note) and they are clearly comprehensive and exhaustive (again, see the Regulation itself and the Explanatory Note).

37. As to the substance of the objective criteria, Mr Payne argues that I should consider whether individually or collectively the criteria are capable of forming the basis for a reasoned assessment of risk of absconding. He supports their breadth as being necessary to cover the broad range of individual circumstances. He has drawn my attention at some length to the various other criteria which have been adopted by other Member States which include such matters as provision of misleading or incorrect information (8 Member States); non-cooperation with the authorities (7 Member States) and previous disappearance (6 Member States).

Analysis

38. I start by clearing the decks of some of the points which have been argued before me which I do not consider to be relevant, or at least to be of central relevance, to the issues which I must decide.

39. The Claimants' focus upon the origin of the 2017 Regulation in Chapter 55 of EIG is one such distraction. The relevant question is not where the objective criteria in the 2017 Regulations come from, but their form and substance in the Regulations and whether they satisfy the requirements of the Dublin III Regulation. An analysis of whether for example the factors listed for relevant consideration in EIG chapter 55 are to be described as factors, considerations, relevancies or criteria or the question to which those factors were to be directed does not assist me in my judgment on the lawfulness of the criteria in the Regulations. Likewise, the absence of evidence of the Defendant "grappling" with what matters should, and should not, be included in the

criteria; a focus upon the process of development of the criteria does not help determine their lawfulness.

40. I also find that the analysis of the criteria which have been implemented by other Member States which Mr Payne invites me to take into account to be of limited value. A proper evaluation of those criteria in other Member States would engage a more detailed analysis of how the criteria were framed in the domestic legislation and the evidence available to justify their connection with an abscond risk. Even if such an examination had been, or could be, conducted, in reality Mr Payne is making a "jury point". My focus is on the UK criteria only and not those of other countries.

41. Mr Fordham argued that one of the effects of the broad nature of the criteria is that many, if not the vast majority, of Dublin III migrants, will be caught in the net of the Regulations. He argued that this effect was evidence that the 2017 Regulations were unlawful as it was inconsistent with his characterisation of Dublin Migrants as a protected class. I accept that the breadth of the criteria is a relevant consideration for my judgment. However, I do not accept that their effect (in terms of the proportion of Dublin III migrants who are caught) in itself points to the criteria being unlawful. I agree with Mr Payne's submission that there is no reason in principle why features which are common to many Dublin migrants cannot legitimately form the basis of objective criteria. Neither the Dublin III Regulation itself, nor *Al Chodor*, suggest that the criteria should be directed to, and apply to, only a small minority of Dublin asylum seekers. In my view, the objective criteria must be fashioned for the purpose they are intended to serve; namely a risk assessment of a particular cohort of migrants many of whom will share common immigration history features but who also will demonstrate a potentially huge range of other features, individual to their particular circumstances. It would be illogical in a risk assessment to exclude criteria which were otherwise properly directed at ascertaining the existence of a risk of absconding (and thus frustrating transfer) for the reason that that criteria would potentially capture a large number of Dublin III migrants.

42. In resolving the various arguments, I have also found it helpful to bear in mind a number of connected points which have tended to become obscured in the detailed arguments before me. These points concern the process of the risk assessment which is produced by article 28 in conjunction with article 2(n) and the important, but nonetheless limited, purpose served by the objective criteria within that process.

43. The first stage of the risk assessment, based on the individual assessment, will answer the question of whether the migrant poses a "risk of absconding". This involves the decision-maker examining, on a case by case basis, all the individual specific circumstances which characterise the applicant's situation and applying the objective criteria defined by law, and only those criteria. As framed by the Advocate General in *Al Chodor*, the risk of absconding comprises a subjective fact-based aspect and an objective general aspect [AG59]. The definition in article 2(n) expresses two cumulative requirements: "*the competent authorities – namely the administrative or judicial authorities are required to examine on a case-by-case basis all the individual, specific, circumstances which characterise each applicant's situation, while ensuring that that examination is based on objective criteria defined generally and in the abstract*" [AG60].

44. The purpose of the criteria is to limit the basis upon which the determination of risk may be made; their existence provides sufficient guarantee in terms of legal certainty and ensures that the discretion enjoyed by the individual authorities responsible for applying the criteria for assessing the abscond risk is exercised within a framework of certain pre-determined markers.

45. It does not follow however that, if all or any of the criteria do apply in an individual case, there is, or must be assumed to be, a risk that the person will abscond. There may be other reasons why in that particular case, although the criteria are met, the person is judged not to pose a risk. The objective criteria do not serve this further examination which must be undertaken by the decision maker and which is a matter of judgment based on an evaluation of all of the facts revealed on the individual assessment. Nor do the objective criteria serve the function of determining whether, if a risk does exist, that risk is significant; nor whether if a significant risk exists the person should be detained. These further, logically sequential, elements of the assessment involve the decision maker forming a series of further judgments, each based on the history and circumstances of the person as revealed on individual assessment, as to the size of the risk; whether a less coercive measure than detention could be employed to avoid the transfer procedures being frustrated and whether detention is proportional.

46. I find this focus on the process, and the role within the process which is served by the objective criteria, to be relevant to some of the objections to the lawfulness of the 2017 Regulations which are made on the Claimants' behalf and which I can also usefully deal with at this stage.

i) *Dublin III migrants*

47. I have already set out my findings in respect of Mr Fordham's argument that the Regulations are unlawful because they potentially capture a large number of Dublin III migrants. His criticism is further met however by acknowledging that the objective criteria are only relevant to the first stage of the assessment: the existence of a risk, although it may follow that the application of the criteria may lead to reasons to believe that a risk of absconding exists in a large number of Dublin III migrants. Whether that person is detained however is a distinct question to be determined by an evaluation of (a) whether if the criteria are fulfilled the person nonetheless presents a risk of absconding; (b) the significance of the risk and (c) the effectiveness of other alternative measures (necessity and proportionality). Even if therefore a large number of Dublin III migrants are caught in the net of the objective criteria, many of them, it must be assumed, will not be judged to pose a risk let alone a significant risk. For many others of those caught, less coercive, measures may be effective.

ii) Absence of allowance for reasonable excuse

48. My analysis of the decision-making process and the role of the objective criteria also addresses Mr Fordham's concern that a number of the criteria do not allow for the person to advance a "reasonable excuse" or "reasonable explanation" for any acts or failures to act which are referred to in the criteria. The purpose of the objective criteria is to limit the basis upon which the determination of risk assessment may be conducted by the Member States. The application of those criteria to the subjective fact-based aspect of the assessment permits the decision-maker taking into account evidence of "reasonable excuse" or "reasonable explanation" in determining the existence of a risk even though some or all of the criteria are met. The existence of a reasonable excuse or explanation may also be relevant to the question of the significance of the risk and whether detention is necessary and proportional which are questions of judgment for the decision maker in respect of which the objective criteria play no part. I am not therefore persuaded that the absence of reference within the criteria to the existence or absence of a reasonable excuse or explanation leads to them being unlawful.

49. Having cleared the decks therefore, I find that the issues which I must consider in deciding whether the 2017 Regulations are lawful can be distilled into the following two issues, as follow:

i) Whether the objective criteria listed in domestic legislation must be (a) mandatory and (b) exhaustive. If so, whether the 2017 Regulations satisfy these requirements.

ii) Whether the substance of each of the criteria is sufficiently and rationally connected with the risk of absconding and the linked issue of whether the criteria are too broad and imprecise. This underlies the different formulations of the nature of the objective criteria proposed by Mr Fordham and Mr Payne. Mr Fordham described the need to implement into domestic law a set of criteria which "define the existence of the risk of absconding, or significant risk of absconding". Mr Payne preferred the formulation that the criteria should "form the basis of a decision as to the risk of absconding." The difference between them is directed at the connection between the substance of the criteria and the risk of absconding. On Mr Fordham's formulation, the criteria and the risk of absconding must be directly linked. On Mr Payne's formulation, factors which are relevant to the abscond risk, but not so directly linked are still lawful provided that when applied they form the basis for a reasoned risk assessment.

Conclusions

50. Before setting out my findings on the points which I list above, the first issue which I am invited to resolve is the test which I should apply when considering the lawfulness of the 2017 Regulations. Mr Fordham argued (in his oral submissions and in a very short "aide memoire" which followed the hearing) that the test for compliant criteria is twofold. The first hurdle is one of prescription: whether the criteria define the existence of the risk of absconding. He argues that the criteria fail that test and that I need go no further. If I am against him on this point, he argues that I should ask myself whether the contents of the criteria are necessary for identifying a significant risk of absconding, which he submits is the applicable standard of proportionality as to content (relying here upon article 52(1) of the Charter of Fundamental Rights of the European Union: "*subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"*). Mr Payne submitted that the appropriate test was whether the Regulations were "manifestly excessive" or "manifestly disproportionate" to achieving the stated objective. Both parties took me albeit briefly to *R (Lumsden) v Legal Services Board* (SC (E)) [2016] AC 697 where the Supreme Court described different approaches to the application of the principle of proportionality in different contexts. Mr Payne submitted that the test was that suitable for the review of a national measure implementing EU measures, such as when a member state is applying EU measures such as Directives; Mr Fordham that the appropriate test for review was that appropriate for national measures derogating from fundamental freedoms.

51. For the purpose of my conclusions on the lawfulness of the 2017 Regulations, I adopt Mr Fordham's test. I do so with some hesitation and without expressing a final view on the correctness of this approach. The Supreme Court in *Lumsden* was concerned with the standard of review to be adopted when reviewing whether any interference with one of the four fundamental freedoms in the Treaty is disproportionate, rather than interferences with the EU Charter of Fundamental Rights. Moreover, the 2017 Regulations provide the criteria which EU law requires national law to provide if

article 28 is to be applied: what derogates from an individual's liberty is not the national law as to when a risk of absconding exists but the decision to detain under article 28 if there is judged to exist a significant risk of absconding. Oral submissions on the topic of the relevant test were limited; and Mr Fordham's written submissions on the point (in the form of the aide memoire which he provided after the hearing at my request) were brief. However, I am prepared to adopt Mr Fordham's two-fold test by, first, asking myself whether the objective criteria fulfil the purpose of the Dublin III Regulation and secondly, if so, whether the criteria are necessary for the purpose of identifying a risk of absconding.

52. I deal now with Mr Fordham's argument that the 2017 Regulations are unlawful because they are (a) not exhaustive and (b) not stated to be mandatory.

53. It was, in effect, common ground between Mr Fordham and Mr Payne that, to be lawful, the criteria in the 2017 Regulations must be both mandatory and exhaustive, otherwise the necessary protections of certainty, predictability and accessibility would not be conferred, nor the protection against arbitrariness.

54. I find that the 2017 Regulations are both mandatory and exhaustive in their application. The introduction provides that the criteria are "*to be considered*" and "*must*" be considered. The mandatory nature of the criteria is clear. There is no reference, either explicitly or implicitly, of the existence of a discretion as to whether to consider the 11 listed criteria or not. Nothing turns upon Mr Fordham's point that the word "considered" is used, rather than (his formulation) "applied": I see no practical difference between the processes of "considering" or "applying" criteria. Nor am I persuaded that the criteria are to be judged to be anything other than exhaustive. Again, there is nothing in the 2017 Regulation which suggests that the decision-maker has the latitude to consider criteria other than those prescribed. As the explanatory note makes clear: "*these regulations set out the objective criteria which will be considered*..". If, as Mr Payne submits, criteria other than those which are listed are taken into account in the decision-making, or the criteria are not considered, then this would give rise to a challenge on the grounds of non-compliance. It follows that I do not find however that the Regulations are unlawful by failing to be mandatory and exhaustive.

55. I now turn to the issue between Mr Fordham and Mr Payne concerning the necessary closeness of the connection between the criteria and the risk of absconding which is intended by the Dublin III Regulation. I have already commented that the purpose of the application of the objective criteria is to provide, in an individual case, the basis upon which it is determined that there are reasons to believe that a person may abscond. The objective criteria (defined generally and in the abstract) limit the basis upon which that determination may be made. I agree with Mr Payne that the factors relevant to the existence of a risk of absconding may be very wide when considered across the whole range of individual circumstances to be examined. I agree with him for example that the existence of the risk may be established by a history of non-compliance generally or by acts or failures which are not directly associated with previous absconding. The <u>nature</u> of the history of non-compliance, the acts or failures to act and whether they are within the context of absconding are relevant to the existence of the risk and also to the significance of the risk itself. Given the range of individual circumstances which may be revealed on the fact-based individual assessment, a wide range of factors is appropriate.

56. My approach above is consistent with parts of the document containing the Commission Recommendations for the establishing of a "Returns Handbook". This document was provided to me by Mr Payne following the oral submissions. Although

I have not received formal written submissions from either party, neither suggest that I should not read the document with interest. Mr Fordham reminds me that the document relates to the Returns Directive to which the UK is not a signatory and that the Commission itself considers the *Al Chodor* judgment to be only "indirectly" relevant in the context of the Returns Directive. He informs me that the Returns Directive applies to all categories of third country nationals who have no right at all to remain in EU territory and that the range of immigration histories revealed by those people is likely to be wider and different from that relevant to Dublin III migrants. He also contrasts the wider grounds for detention under the Returns Directive, which include as a separate ground that "*the third country national concerned avoids or hampers the preparation of return or the removal process*" and the lower threshold for detention (only a risk of absconding and not a significant risk).

57. At page 10 of the Commission Recommendation, the authors consider article 3(7) of the Returns Directive which is in similar terms to article 2(n) of Dublin III (*the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond*). The Commission considered *Al Chodor* and the requirement that objective criteria be clearly set in binding provisions of general application. The Commission noted that:

> "While Member States enjoy a wide discretion in determining such criteria they should take into due account the following ones as an indication that an illegally staying third country national may abscond:

- Lack of documentation
- Lack of residence, fixed abode or reliable address
- Failing to report to authorities
- Explicit expression of intent of non-compliance with return related measures
- Existence of conviction for a criminal offence
- Ongoing criminal investigations and proceedings
- Non-compliance with a return decision
- Prior conduct (ie escaping)
- Lack of financial resources
- Being subject to a return decision issued by another Member State
- Non-compliance with the requirement to go to the territory of another Member State
- Illegal entry into the territory of the EU member states and of the Schengen Associated countries.

National legislation may establish other objective criteria to determine the existence of a risk of absconding.

58. My decision on the necessary closeness of the link between the criteria and the risk of absconding does not turn on the Commission Recommendation above. I accept Mr Fordham's point here that a stated basis for detention under the Return Directive

includes avoiding/hampering the preparation of the removal process. However, even with that point well in mind, the breadth of the objective criteria which the Commission states Member States "*should take into due account ... as an indication that a third country national may abscond*" supports my preference for the looser connection submitted by Mr Payne over the direct link which is asserted by Mr Fordham.

59. With the above in mind, I address the individual regulations. Adopting Mr Fordham's suggested test, I ask myself whether taken individually or collectively the criteria give effect to the Dublin III requirement for the implementation into domestic law of objective criteria which underlie the reasons for believing that a person may abscond and whether they are necessary for identifying the existence of such a risk.

i) Mr Fordham argues that 4(a) and (b) are unlawful as they are too broad and expansive and would capture the vast majority of Dublin III migrants. I do not accept the argument that the fact that the immigration history of the vast majority of Dublin III migrants may demonstrate features which are caught by the criteria renders them unlawful. See above. A person's absconding history and a previous withdrawal of an asylum claim in another state (demonstrating a determination to reach the UK) are rationally connected with the risk of absconding.

ii) I do not accept Mr Fordham's argument that 4(c) and (d) are too broadly drawn and are not sufficiently linked to the risk of absconding. A history of non-compliance (in any immigration respect) is in my judgment sufficiently connected to the "existence of a risk" of absconding. It would then be necessary to consider whether, if either or both of the criteria were fulfilled, the risk of absconding is judged to exist when considered in the individual context and whether if so the risk was significant and detention necessary. The nature of the condition(s) which had been breached and whether or not there was an explanation or reasonable excuse would be relevant to these further inquiries.

iii) 4(e): I reject Mr Fordham's argument that a finding that a person who is found to be unlikely to return voluntarily to any other state is not sufficiently rationally connected with a risk of absconding. It is common sense that a person who refuses to return to another state on a voluntary basis <u>may</u> pose a risk of absconding. Again, whether the risk in fact is judged to exist and if so whether the risk is a significant one and whether other less coercive measures may suffice to address the risk are not the purpose of the objective criteria.

iv) 4(f): I reject the argument that this provision is unlawful on the basis that it would capture the vast majority of Dublin III migrants (see above).

v) 4(g): Mr Fordham criticises this criterion on the basis that it does not explain whether and how the ties to the UK increase or decrease the prospect of absconding. I accept that the criterion does not spell out the implications of the presence of ties. However, it is common sense that the presence of family or other ties in the UK may be a reason for the person absconding to avoid transfer away from the UK. However, as I have said above, the criteria must be satisfied <u>before</u> it can be determined that there is a risk of the basis which the criteria provide. Whether the risk exists is still (and separately) to be determined having regard to the subjective fact-based aspect of the process; in other words, on the basis of all of the circumstances. To suggest that, within each criterion, the various permutations of facts which tend towards the risk

existing or which go the other way would defeat the purpose of the objective criteria, which is to provide a limited series of bases upon which the risk of absconding is to be determined whilst permitting the application of those criteria to each applicant on a case by case basis taking into account "*all of the individual, specific circumstances which characterise each applicant's situation*" (*Al Chodor*, [AG60]). I do not therefore accept that the criterion is too expansive.

vi) 4(h): I do not accept that the imminence of the person's removal from the UK is "generic, neutral and imprecise" or, putting it another way, is too expansive and undefined. Mr Payne informed me that there is good evidence that the likelihood of a person absconding increases the closer to the planned date for transfer. I accept this. Again, it chimes with common sense that those facing an immediate and close threat of transfer are more likely to abscond to avoid transfer. I repeat the point which I have made above however: the fact that the criterion is satisfied does not mean that the person would, following an individual assessment, be judged to pose such a risk, let alone a significant risk which requires detention as a necessary means of giving effect to a Dublin transfer. However, I find that there is a rational connection between the criterion and the risk of absconding.

vii) 4(i)-(k): I do not accept that evidence of previous use of deception in relation to an immigration or asylum claim is too broadly drawn or insufficiently connected with a risk of absconding to comply with the requirement of Dublin III. Nor that a failure to produce satisfactory evidence of identity, nationality or lawful basis of entry or failure to give satisfactory answers to enquiries are too broad. I find that these factors are rationally connected to the existence of the risk of absconding. I repeat what I have said above. If the criteria are satisfied then it does not follow that the decision-maker would or should conclude that the risk exists, or if it does exist that the risk is a significant one or that detention is necessary and proportional which are all separate judgments to be made by the decision maker.

60. I conclude that taken individually and collectively the 2017 Regulations define objective criteria for determining whether reasons exist in an individual case to believe that an individual may abscond; and that the criteria are necessary for that purpose.

61. It follows that I dismiss the claim.