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The detention of asylum seekers pending transfer under the Dublin III Regulation: *Al Chodor*

Case C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie* v. *Salah Al Chodor and Others*, Judgment of the Court (Second Chamber) of 15 March 2017, EU:C:2017:213.

1. Introduction

Much ink has been spilt on the rationale underpinning, and the challenges posed by, the detention of asylum seekers – i.e. individuals who have broken no criminal law (other than possibly criminal law provisions in relation to immigration control), but who are nonetheless detained during the examination of their asylum claim or pending their removal from the country.[1] The very basis of detention throughout the different stages of the asylum procedure, as well as the applicable guarantees, remain particularly contentious issues, both from an EU law and international human rights law standpoint. Detained asylum seekers pay the human cost of policy choices that threaten the right to liberty and disrespect the rule of law.

Al Chodor concerned the detention of asylum seekers pending their transfer to the Member State responsible for examining their asylum application under the Dublin III Regulation,[2] and in particular, whether the determination that they posed a "significant risk of absconding" as per the wording of its Article 28(2) should take place based on criteria laid down in national legislation. The comment on the judgment stresses the key clarifications provided by the Court as regards Dublin-related detention, in conjunction with insights into the national developments before and after the release of the judgment. Furthermore, the comment observes existing loopholes that merit further consideration and reflects on its relevance for other EU instruments that refer to the "risk of absconding".

1. See e.g. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Brill, 2010); id., "Detention of Foreigners", in Guild and Milderhoud (Eds.), *The First Decade of EU Migration and Asylum Law* (Brill, 2011); Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005); the contributions in the special issue edited by De Bruycker and Tsourdi, "The challenge of asylum detention to refugee protection", 35 *Refugee Survey Quarterly* (2016), 1–6; Costello, "Human rights & the elusive universal subject: Immigration detention under international human rights and EU law", 19 *Indiana Journal of Global Legal Studies* (2012), 257.

2. Dublin III Regulation 604/2013, O.J. 2013, L 180/31.

2. The permissibility of detaining non-EU nationals under EU law in a nutshell

2.1. *The detention of irregular migrants under the Return Directive*

In the fields of asylum and immigration, two distinct legal regimes of detention must be distinguished; (a) detention of asylum seekers prior to a final decision on their protection claim has been reached; and (b) detention of rejected asylum applicants or other non-EU nationals whose residence rights have either terminated, or who have irregularly entered and are the subject of return procedures under the Return Directive.[3]

Whereas the former regime is discussed in more detail, a few remarks are also due in relation to immigration detention so as to inform the subsequent analysis. Article 15(1) of the Return Directive prescribes that irregular migrants may be detained prior to their removal from the EU (Schengen) territory when there are no other sufficient, but less-coercive, measures that may be applied effectively in a specific case, with a view to preparing their return and/or carrying out the removal process. The non-exhaustive list of permissible detention grounds[4] includes the existence of a risk of absconding, or where the third-country national concerned avoids or hampers their return. Article 3(7) defines the term "risk of absconding" as "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". Over time, the ECJ has repeatedly been asked to provide guidance and interpretation on its detention rules,[5] including their correlation with asylum detention, with the ECJ adamantly maintaining the distinction between the two legal frameworks.[6]

2.2. *Regulating the detention of asylum seekers under EU law: A strict test?*

The development of a European asylum policy in the form of a Common European Asylum System (CEAS) has been an ongoing endeavour since

3. Return Directive 2008/115, O.J. 2008, L 348/98.

4. Art. 15(1) of the Return Directive states "in particular".

5. Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, EU:C:2009:741; Case C-534/11, *Mehmet Arslan* v. *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, EU:C:2013:343; Case C-383/13 PPU, *M. G. and N. R.* v. *Staatssecretaris van Veiligheid en Justitie*, EU:C:2013:533; Case C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, EU:C:2014:1320; Joined Cases C-473 & 514/13, *Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate* v. *Kreisverwaltung Kleve*, EU:C:2014:2095; Case C-474/13, *Pham*, EU:C:2014:2096.

6. Case C-534/11, *Arslan*, paras. 48–49. Also see *infra*, section 2.2.

1999. A relatively comprehensive regional protection framework has progressively emerged in two phases comprised of a complex set of legal instruments that govern which Member State is obliged to examine an asylum claim,[7] to whom refugee status must be recognized,[8] under which procedures,[9] and what are the entitlements of the asylum seeker in the meantime.[10] Furthermore, throughout the development of the CEAS, Member States remain bound by their obligations under international refugee law, primarily the 1951 Refugee Convention,[11] and human rights law, notably the European Convention on Human Rights.[12]

In the first phase of the CEAS, the regulation of detention was largely under the radar. Article 18(1) of the original Asylum Procedures Directive merely prohibited Member States from holding a person in detention "for the sole reason that he/she is an applicant for asylum". Article 7(3) of the original Reception Conditions Directive contained an ambiguous provision according to which Member States could confine an applicant to a particular place "in accordance with their national law", when proved necessary "for example for legal reasons or reasons of public order".[13] Nonetheless, no acceptable detention grounds were discerned. As for the Dublin II Regulation, it was silent on that subject, hence the aforementioned general guarantees laid down in Article 7(3) of the original Reception Conditions Directive applied.

The amended EU asylum *acquis* contains elaborate provisions regulating permissible detention grounds, rights of detained applicants, detention conditions, and vulnerable applicants. Article 8(1) of the recast Reception Conditions Directive reiterates the proscription on detaining asylum seekers

7. Dublin III Regulation 604/2013, O.J. 2013, L 180/31, which replaced Dublin II Regulation 343/2003, O.J. 2003, L 50/1.

8. Qualification Directive 2011/95 (recast), O.J. 2011, L 337/9, which replaced O.J. 2004, L 304/12.

9. Asylum Procedures Directive 2013/32 (recast), O.J. 2013, L 180/60, which replaced O.J. 2005, L 326/13.

10. Reception Conditions Directive 2013/33 (recast), O.J. 2013, L 180/96, which replaced O.J. 2003, L 31/18.

11. As regards detention in particular, this is recognized in Recitals 3, 4, 22 and 23 of the recast Qualification Directive 2011/95. Also see Joined Cases C-175, 176, 178 & 179/08, *Aydin Salahadin Abdulla and Others* v. *Bundesrepublik Deutschland*, EU:C:2010:105, para 52. However, the protection against detention is limited. Arts. 26 (freedom of movement) and 31 (non-penalization of refugees for their "illegal entry or presence") of the 1951 Refugee Convention are relevant in this respect. As regards Art. 26 and its applicability to asylum seekers, see Hathaway, op. cit. *supra* note 1, p. 173. For a concise overview, see Costello and Mouzourakis, "EU law and the detainability of asylum-seekers", 35 *Refugee Survey Quarterly* (2016), 47–73, at 50–53.

12. Mole and Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe Publishing, 2010).

13. Art. 7(3) of the original Reception Conditions Directive 2003/9.

merely for reasons of administrative convenience.[14] Rather, detention may be permitted only when proved necessary, based on an "individual assessment of each case", where less coercive (alternative) measures cannot be applied.[15] As has been pointed out, EU law functions in this context in a manner that "simultaneously constructs the asylum seeker as a detainable subject, while also limiting States' powers of detention".[16] Importantly, Article 8(3) of the Reception Conditions Directive stipulates six exhaustive grounds for detention: (a) to determine the applicant's identity or nationality;[17] (b) to determine elements of the claim, particularly in cases where there is a "risk of absconding", a concept which is not defined therein; (c) to determine the applicant's right to enter; (d) to prevent an applicant from delaying or frustrating a return procedure;[18] (e) on national security or public order grounds;[19] and (f) to secure transfer procedures under the Dublin III Regulation. Overall, detention of asylum seekers is deemed as the exception, whereby "applicants may be detained only under very clearly defined exceptional circumstances", [20] whilst national authorities must individually assess each case based on the principles of necessity and proportionality. Nevertheless, whereas the establishment of a closed list of detention grounds for permissible detention has been welcomed as a ground-breaking development, the list is arguably rather long and broadly worded, thus allowing Member States wide leeway.[21]

At the time of writing, the third phase of the CEAS is in the making, including few yet noticeable changes in the regulation of asylum detention. The revised Reception Conditions Directive[22] will incorporate the definition on the "risk of absconding" as envisaged in the Return Directive,[23] and

14. It also makes reference to Art. 26(1) of the recast Asylum Procedures Directive 2013/32.

15. Art. 8(2) of the recast Reception Conditions Directive, 2013/33.

16. Costello and Mouzourakis, op. cit. *supra* note 11, at 47. For an assessment, Majcher, "Crimmigration in the Recast of the CEAS: Detention and Restriction on Movement of Asylum Seekers under EU Law" (Paper presentation at the CINETS Conference, Queen Mary, University of London, 5–6 Oct. 2018).

17. This ground has been interpreted in Case C-18/16, *K.* v. *Staatssecretaris van Veiligheid en Justitie*, EU:C:2017:680.

18. This ground reflects the ECJ ruling in Case C-534/11, *Arslan*, paras. 62–63.

19. This ground has been interpreted in Case C-601/15 PPU, *J.N.* v. *Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:84.

20. Recital 15 of the recast Reception Conditions Directive, 2013/33.

21. Costello and Mouzourakis, op. cit. *supra* note 11, at 62; Tsourdi, "Asylum detention in EU law: Falling between two stools?" 35 *Refugee Survey Quarterly* (2016), 7–28, at 20–26.

22. Proposal for a directive of the European parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016)465.

23. The same definition is found in the Dublin III Regulation as well (see further *infra*).

detention of minors will be limited to exceptional circumstances only.[24] Importantly, a new ground for permissible detention features in the proposed Article 8(3)(c), according to which an applicant may be detained to "ensure compliance with restrictions on freedom of movement . . . where [he/she] has not complied with these restrictions and where there is a risk of absconding". Amidst concerns that detention based on that ground will constitute a "punitive measure",[25] a provision explicitly dismissing so has been added to the negotiated text.[26]

2.3. *Pre-transfer detention of asylum seekers under the Dublin III Regulation*

For the purposes of the present contribution, the last ground of permissible detention merits further attention. The Dublin system is designed to allocate responsibility to one Member State for the examination of an asylum application and is precisely premised on the possibility of sorting out asylum seekers whose claims have not been examined, but who may nonetheless be sent to another Member State for their claims to be assessed there. While awaiting their transfer, these asylum seekers may be detained. At the heart of this ground lies the phenomenon of secondary movements, a concept which under EU law describes situations whereby non-EU nationals move out of countries designated under the Dublin rules as responsible for examining their asylum application, which are often those through which they first entered the EU.

Against this background, Article 28 of the Dublin III Regulation proscribes Member States from detaining asylum seekers for the sole reason that they are subject to the transfer procedure under the Dublin rules. Member States are thus not given a *carte blanche* to detain them, but detention is permitted when three requirements are met: first, "(w)hen there is a significant risk of absconding".[27] A replica of Article 3(7) of the Return Directive, Article 2(n)

24. This was not envisaged in the Commission proposal. Compare with Council, Document 5458/19 (21 Jan. 2019), at 11–12. Few amendments in that respect have not yet been agreed upon. See Council, Document 6600/19 (26 Feb. 2019).

25. UNHCR, "UNHCR comments on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) – COM(2016)465" (August 2017), pp. 10–11; ECRE, "ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive COM(2016)465" (October 2016), p. 12.

26. Art. 8(1) last sentence. See Council, Document 10009/18 ADD 1 (18 June 2018), at 42.

27. The Member States are authorized to detain persons concerned even before the request to take charge or take back is submitted to the requested Member State, when the conditions are met, the notification of the transfer decision not being a prerequisite for such a placement. See Case C-647/16, *Adil Hassan* v. *Préfet du Pas-de-Calais*, EU:C:2018:368, para 67.

of the Dublin III Regulation defines the concept of the "risk of absconding" as "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 a stateless person who is subject to a transfer procedure may abscond". However, the threshold of risk that must be reached so as to justify detention is set higher in Dublin-related detention (*significant* risk of absconding) than in detention necessary for assessing elements of the asylum claim (risk of absconding) and detention pending removal (risk of absconding). In cases when there is such a significant risk, Member States may detain asylum seekers in order to secure transfer procedures "on the basis of an individual assessment".[28] The second and third conditions involve respectively the proportionality of the detention and the need for it, that is the absence of alternative less coercive measures that can be applied effectively.[29]

Article 28(3) further sets out strict deadlines for submitting a request to the Member State deemed responsible and for conducting the transfer.[30] Specifically, detention may last only for as long as it is reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer is carried out.[31] In effect the transfer of that person to the Member State responsible must be carried out as soon as practically possible and six weeks after the implicit or explicit acceptance of the request to take charge or take back the person concerned or the moment when the appeal or review no longer has a suspensive effect. If the deadlines are not complied with, either in terms of filing a request to the Member State responsible or because the transfer did not take place, the person may no longer be detained. As for detention conditions and guarantees applicable to persons detained, the relevant provisions of the recast Receptions Conditions Directive are fully applicable.[32] This is irrespective of the fact that the Dublin system is operational in Member States that are not bound by the recast Reception Conditions Directive, namely Ireland, Denmark and the UK, which have opted out of the Directive.[33]

28. Art. 28(2) of the Dublin III Regulation.

29. Ibid.

30. The proposal for a Dublin IV Regulation does not alter the rules, with the exception of stricter time limits for Member States to submit requests for take back or charge and conduct the transfer. See Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016)270.

31. Art. 28(3) of the Dublin III Regulation. For an interpretation of the rules on time limits, see Case C-60/16, *Mohammad Khir Amayry* v. *Migrationsverket*, EU:2017:675.

32. Art. 28(4) of the Dublin III Regulation.

33. Costello and Mouzourakis, op. cit. *supra* note 11, at 62.

Against this background, *Al Chodor* concerned the interpretation of the first of the aforementioned conditions, in particular the requirement that the objective criteria for establishing a "significant risk of absconding" must be defined by law, in accordance with Article 2(n) of the Dublin III Regulation.

3. *Al Chodor*: A reminder of the fundamental rights side of the Dublin III Regulation

3.1. *Factual and legal background*

In May 2015, Al Chodor and his two minor children, all Iraqi nationals of Kurdish origin, travelled from Hungary to the Czech Republic without any documentation establishing their identity. After a police check, the Czech Foreigners Police Section established that they had travelled through Turkey to Greece and had continued their journey to Hungary where they had been directed to a refugee camp, which they had left two days later so as to join family members in Germany. A Eurodac check revealed that the Al Chodors had lodged an application for international protection in Hungary, on the basis of which they were subject to the transfer procedure pursuant to Article 18(1)(b) of the Dublin III Regulation. Pending their transfer, they were placed in detention in accordance with national law. The existence of a "significant risk of absconding" was based on the lack of residence permits or accommodation in the Czech Republic, and the fact that they had left the refugee camp in Hungary without awaiting the determination of their asylum claim. The regional Court found the decision ordering detention unlawful, opining that the Czech legislation does not prescribe objective criteria for the assessment of the risk of absconding within the meaning of Article 2(n) of the Dublin III Regulation, thus rendering Article 28(2) inapplicable. In fact, at the time the reference to the ECJ was made, the Czech Republic was amidst a legislative amendment precisely on that matter. The case was appealed on a point a law before the Supreme Administrative Court, which decided to seek a preliminary ruling enquiring whether the fact that the objective criteria for Dublin-related detention were recognized by settled case law would meet the "defined by law" requirement as set out in Article 2(n), insofar as that case law confirms a consistent administrative practice characterized by the lack of arbitrary elements, predictability, and an individual assessment of each case.

3.2. *Opinion of the Advocate General*

The Opinion of Advocate General Saugmandsgaard Øe, delivered on 10 November 2016, proposed that the objective criteria for assessing the

existence of a risk for absconding must be defined in legislation, in the form of written rules of law that have been adopted by the legislature. Although the ECJ reached a similar conclusion, the Opinion followed a slightly different reasoning, and deserves some consideration.

At the outset, the Advocate General put to rest certain concerns raised by the referring court regarding the discrepancies observed in the different language versions of the Dublin III Regulation, whereby in some versions Article 2(n) is phrased as requiring a definition of the criteria *in legislation*, whereas in others, the criteria should be defined *by law* more generally. Indeed, in the Bulgarian, Spanish or German versions the expression used corresponds to the French term "loi"; however, the British, Polish and Slovak versions use broader expressions corresponding to the French term "droit", therefore, other rules of law laying down the criteria for determining the risk of absconding may be included.[34] These concerns are exacerbated due to the broad interpretation of the term "law" by the European Court of Human Rights (ECtHR), which is not limited solely to legislation, but incorporates other sources of law.[35] In that respect, the Advocate General opined that the concept of "law" in Article 2(n) of the Dublin III Regulation has an independent meaning distinct from that referred to in the ECHR,[36] which in any case merely establishes "a minimum level of protection of fundamental rights" that does "not affect the possibility that EU law may provide more extensive protection of those rights".[37]

Having set out the groundwork for his subsequent analysis, the Advocate General reasoned why the protection of the right to liberty afforded by asylum applicants under EU law is more extensive than under the protection offered by the ECHR. He highlighted that Member States are bound by their obligations under the ECHR, *in casu* Article 5(1)(f), the second limb of which – where action is taken with a view to that individual's deportation or extradition – has been deemed as the one within which Dublin detention falls.[38] However, detention for the purposes of deportation or removal under the ECHR is not conditional upon necessity "for example to prevent the individual from absconding",[39] with the sole requirement that action is taken diligently with a view to removal.[40] Thus, the recast Reception Conditions

34. Opinion of A.G. Saugmandsgaard Øe, ECLI:C:2016:865, para 38.

35. ECtHR, *Kruslin* v. *France*, Appl. No. 11801/85, judgment of 24 Apr. 1990, para 29; *Sunday Times* v. *United Kingdom*, Appl. No. 6538/74, judgment of 26 Apr. 1979, para 47.

36. Opinion, paras. 39–42.

37. Ibid. para 43.

38. Ibid. paras. Ibid. paras. 49–50.

39. ECtHR, *Chahal* v. *United Kingdom*, Appl. No. 22414/93, judgment of 11 Nov. 1996, para 51.

40. Ibid. para 51.

Directive and the Dublin III Regulation mark a higher level of protection afforded at EU level, as testified by the requirement of the existence of "a significant risk of absconding"; the exhaustive list of detention grounds set out in Article 8(3) of the Reception Conditions Directive; and the nature of detention as "a measure of last resort that may only be taken in the absence of less coercive alternative measures".[41]

In the Advocate General's view, defining the risk of absconding in law serves a dual objective: legal certainty and ensuring that the exercise of national authorities' discretion regarding the application of the criteria for assessing the risk of absconding remains within a framework of certain predetermined markers.[42] In support of that view, he drew inspiration from the preparatory works for the adoption of the Return Directive,[43] whereby the risk was assessed on the basis of "individual and objective criteria", later replaced by the expression "objective criteria defined by law".[44] These changes testified to the desire to ensure the foreseeability of the criteria to determine the risk of absconding and to counterbalance the national powers by requiring the assessment to be based on objective criteria of a general and abstract nature.[45]

Then, the Advocate General affirmed that the objectives of ensuring legal certainty and circumscribing national authorities' discretion may be achieved only through the adoption of the relevant criteria *in a legislative text*. Neither administrative practice nor case law offers sufficient guarantees in terms of foreseeability; such criteria may fluctuate as that administrative practice develops, lacking the stability necessary to be regarded as "defined by law".[46] Furthermore, in view of the uncertainty as to whether the administrative practice was even publicized, the Advocate General opined that it cannot be guaranteed that the individuals concerned would have access to it.[47] Admittedly, considering that an individual, specific assessment of the risk is also necessary, absolute legal certainty is not guaranteed. Nevertheless, laying down the criteria in legislation to guide that assessment offers higher guarantees.[48] As for delimiting the national authorities' discretion, the Advocate General found that legislation provides additional assurances as

41. Ibid. paras. 52–55.
42. Ibid. paras. 62–63.
43. Ibid. paras. 64–68. This should be all the more the case since according to Art. 9(1) of the recast Asylum Procedures Directive an asylum seeker has the right to remain on national territory until the adoption of a decision at first instance.
44. Ibid. para 69.
45. Ibid. para 70.
46. Ibid. paras. 74–77.
47. Ibid. para 78.
48. Ibid. para 79.

regards the external control of the discretion of the administrative and judicial authorities responsible for assessing the risk of absconding.[49] Indeed, the discretion of national authorities is effectively restricted when the criteria to assess the risk of absconding are determined and then applied by institutionally separate authorities.[50]

3.3. *The judgment*

The ECJ followed a different path, which could be divided into five steps. As a first step, the Court clarified the nature of regulations and their function in the system of sources of EU law. Whereas the provisions of regulations generally have immediate effect without the need for the national authorities to adopt implementing measures, some provisions may necessitate the adoption of measures of application by the Member States.[51] Article 28(2) Dublin III Regulation showcased such possibility, requiring the elaboration of the objective criteria determining the existence of a risk of absconding to be "defined by law". In the absence of EU rules, their elaboration remains with national law.[52] That finding was also confirmed by Article 8(3)(f) of the recast Reception Conditions Directive which permits the detention of asylum seekers for Dublin-related purposes and specifies that the grounds for such detention must be laid down in national law.[53]

As a second step, the ECJ concentrated on the interpretation of the concept of "law", reaffirming its settled view that in interpreting an EU law provision it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it forms part.[54] In view of the linguistic disparities, as noted by the referring court and the Advocate General, the Court conceded that a purely textual examination of the notion "defined by law" is inconclusive as to whether case law or consistent administrative practice is capable of being included within that concept.[55]

Therefore, in its third and fourth steps the Court sought to determine the scope of the provision by reference to the purpose and general scheme of the rules of which it forms part.[56] As regards the general scheme, the Court

49. Ibid. paras. 81–82.
50. Ibid. para 82.
51. Judgment, para 27. See Joined Cases C-42, 45 & 57/10, *Vlaamse Dierenartsenvereniging VZW and Marc Janssens* v. *Belgische Staat*, EU:C:2011:253, paras. 47–48.
52. Judgment, para 28.
53. Ibid.
54. Case C-550/14, *Envirotec Denmark ApS* v. *Skatteministeriet*, EU:C:2016:354, para 27.
55. Judgment, para 31.
56. Ibid. para 32.

recalled its finding in *Ghezelbash*[57] that the Dublin III Regulation is intended to make the necessary improvements, in the light of experience, not only to the effectiveness of the Dublin system but also to the judicial protection enjoyed by asylum seekers.[58] The Court stressed that the Dublin III Regulation must be interpreted in a manner that maximizes the protection of asylum seekers so as to offer a "high level protection", including the rules on their pre-transfer detention.[59] The Court understood the requirement embedded in Article 28 as permitting detention, subject to "significant limitations on the power of the Member States to detain a person".[60] Like the Advocate General, the Court observed the historical evolution of the Dublin rules, whereby the Dublin III Regulation offers "greater guarantees" in comparison to its predecessor, which shows the greater focus afforded by the EU legislature to the protection of applicants.[61] As for the objective pursued by Articles 2(n) and 28(2) of the Dublin III Regulation, the Court contended that those provisions constitute a limitation to the fundamental right to liberty,[62] as enshrined in Article 6 of the Charter, which may be justified under Article 52(1) of the Charter. In addition, given that Article 6 mirrors Article 5 ECHR, the Court pointed out that Article 52(3) of the Charter mandates that where the latter contains rights that correspond to those encompassed in the ECHR, their meaning and scope must be the same with those laid down by the ECHR. Therefore, the Court found that in interpreting Article 6 EUCFR, account must be taken of Article 5 ECHR as the minimum threshold of protection.[63]

By linking the interpretation of Article 6 of the Charter with Article 5 ECHR, the fifth step required the Court to look at the interpretation of the latter article by the ECtHR. Reference was made to *Del Río Prada* v. *Spain*[64] where the ECtHR held that the lawfulness of any deprivation of liberty is determined not only when there is a legal basis in national law but also in relation to its quality, which implies that the national law must be sufficiently accessible, precise and foreseeable in its application, so as to avoid the risk of arbitrariness.[65] The elimination of arbitrariness is understood as meaning that

57. Case C-63/15, *Mehrdad Ghezelbash* v. *Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409.

58. Judgment, para 33.

59. Judgment, para 34.

60. Ibid.

61. Ibid. para 35.

62. Ibid. para 36.

63. Ibid. para 37.

64. ECtHR, *Del Río Prada* v. *Spain*, Appl. No. 42750/09, judgment of 21 Oct. 2013, para 125.

65. Judgment, para 38.

"there can be no element of bad faith or deception on the part of the authorities".[66]

By deeming detention a *serious* interference with the right to liberty, the Court required the aforementioned strict safeguards in the criteria for determining the risk of absconding, in particular, the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.[67] As regards the types of provisions that would ensure these safeguards, the Court agreed with the Advocate General that the individual discretion enjoyed by national authorities must be exercised within a framework of certain predetermined limits.[68] In view of the purpose of the provisions and the aim of ensuring a high level of protection for asylum seekers, only a "binding provision of general application" could meet the aforementioned requirements.[69] The adoption of rules of general application provides the necessary guarantees insofar as such wording sets out the limits of the flexibility of those authorities in the assessment of the circumstances of each specific case in a manner that is binding and known in advance.[70] In agreement with the Advocate General,[71] the Court found that criteria established by a binding provision are best placed for the external direction of the discretion of those authorities for the purposes of protecting applicants against arbitrary deprivations of liberty.[72] In turn, settled case law confirming a consistent administrative practice cannot suffice.[73]

4. Commentary

The ruling in *Al Chodor* has already made history as the first judgment interpreting the rules on Dublin-related detention.[74] It highlighted the protective function of the Dublin rules and aimed at curing a series of bad practices at the national level. In this section, comments are given on the reasoning of the ECJ and the Advocate General, and on the domestic interpretation of the "defined by law" requirement pre- and post-*Al Chodor*. The relevance of the judgment to other EU instruments is explored, exposing the limitations of the judgment as regards the interpretation of the concept of

66. Ibid. para 39.
67. Ibid. para 40.
68. Ibid. para 42.
69. Ibid. paras. 43 and 45.
70. Ibid. para 44.
71. Paras. 81–82 of the Opinion.
72. Judgment, para 44.
73. Ibid. para 45.
74. Since then, the judgment in Case C-60/16, *Khir Amayry* has been released.

the "risk of absconding", with an emphasis on the "objective criteria" requirement.

4.1. *The gravity of the interference with the right to liberty that detention represents: Serious or particularly serious?*

A first message drawn from the judgment involves the gravity of the interference with the right to liberty, as enshrined in Article 6 EUCFR, that detention amounts to. The ECJ contended that detention constitutes a *serious* limitation to the right to liberty,[75] which marks the first – and, so far, the only – time that the seriousness of the interference has been addressed by the ECJ. In *JN*, concerning detention imposed by the Dutch authorities on an asylum seeker on grounds of "public order and national security" based on his past criminal convictions, the Court did not consider the nature of the limitation with the right to liberty, but merely took into account "the gravity of the interference with that right which detention represents" in its proportionality assessment.[76] The same approach was followed in *K*, concerning the detention of asylum seekers for the purpose of identification, which was interestingly delivered a few months after *Al Chodor*.[77] Arguably, in neither of these two cases had the Advocates General raised that point. However in *Al Chodor*, Advocate General Saugmandsgaard Øe carefully referred to this issue twice. Paragraph 46 of his Opinion reads:

> … "[T]he detention of those persons – which constitutes a *particularly serious* interference with their fundamental right to liberty guaranteed by Article 6 of the Charter (24) – should be limited to 'exceptional circumstances'".

The "particularly serious nature of the interference" was also mentioned in paragraph 82 of his Opinion, so as to limit the discretion enjoyed by national authorities. The Advocate General thus managed to "sneak in" his assessment of the nature of the limitation that detention poses, albeit without further substantiation or reasoning. The Court did not engage with this issue until

75. Although in a different context, it is worth comparing with the judgments in Joined Cases C-293 & 594/12, *Digital Rights Ireland Ltd* v. *Minister for Communications*, *Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, EU:C:2014:238, where the Grand Chamber makes reference to "particularly serious interference", which shows the different grades of interference.

76. Case C-601/15 PPU, *J.N.*, para 56.

77. Case C-18/16, *K.*, para 40.

towards the end of the judgment[78] and downgraded the degree of interference to the level of "serious". Regrettably, there is no further explanation and the lack of such reiteration in the subsequent case of *K* may raise an eyebrow as to whether this was a one-time wonder. The seriousness of the interference with the right to liberty in the context of the CEAS is inextricably linked to the exceptional character of detention, and dictates the strictness of safeguards applicable to asylum seekers. Recognizing that detention of asylum seekers poses a "particularly serious limitation" to the right to liberty would be testament to the high level of protection that the ECJ aimed at, securing the spirit of the CEAS as a whole, and would take into account the inherent vulnerability of asylum seekers. It would also be in line with the fact that contrary to other grounds, Dublin-related detention may only be ordered when the asylum seeker poses a *significant* risk of absconding. Therefore, it would have been preferable if the Advocate General's view had been endorsed by the Court, so as to provide a very high benchmark for future protection of asylum seekers in this context.

4.2. *The "defined by law" requirement: A protection cloak for asylum seekers*

At the core of the judgment is the EU protection afforded to the right of liberty enjoyed by asylum seekers pending transfer to another Member States pursuant to Dublin rules against arbitrariness at the domestic level. *Al Chodor* echoes an array of national judgments that required the objective criteria determining the existence of a risk of absconding to be prescribed in domestic legislation, thus rejecting mere reliance on administrative practices or case law. On several occasions, domestic detention practices exposed governments to legal actions as regards unlawful detention, both before and after the entry into force of the Dublin III Regulation. In 2014, the German Federal Court of Justice scrutinized section 62(3) of the Residence Act to find that it did not detail any objective criteria defining a risk of absconding.[79] In practice, this meant that despite the formal existence of a German provision, the latter was superficial and without content.[80] Whereas the criteria to determine the risk could be discerned by case law, the Federal Court had an extensive margin of appreciation, which in the German legal system is only verifiable by higher courts and to a limited extent only. As a result, it declared that Dublin transfers

78. Judgment, para 40 reads "it follows from the foregoing that the detention of applicants, constituting a serious interference with those applicants' right to liberty, is subject to compliance with strict safeguards …".

79. Bundesgerichtshof, 26 June 2014, V ZB 31/14.

80. Ibid, para 62(3) 1st sentence, No. 5 merely mentions an intention of absconding without specifying further.

could no longer be based on a risk (or intention) of absconding. In Austria, the absence of objective criteria in national legislation led the Administrative High Court to consider Dublin detention as unlawful, resulting in amending the Aliens Police Act in July 2015.[81] Furthermore, the Higher Administrative Court of Luxembourg also emphasized that Article 2(n) of the Dublin III Regulation refers to provisions of legislative nature.[82] In addition, the Slovenian Supreme Court found that the lack of objective Dublin-specific criteria is not remedied by the application *mutatis mutandis* of the criteria for determining the risk of absconding in cases of pre-removal detention or irregular migrants and can only be sufficient in a particular case if in light of the specific circumstances of the case there is no doubt about the existence of the risk of absconding.[83] Finally, in the similar context of defining the risk of absconding within the meaning of Article 3(7) of the Return Directive, the Dutch Council of State held that the risk of absconding had to be grounded on objective criteria defined by legislation and an administrative practice would not suffice in that respect.[84] The aforementioned judgments corroborate the findings of the European Migration Network in 2014 that at least ten States participating in the Dublin system had adopted no Dublin-specific criteria concerning the risk of absconding and kept on applying the general grounds for detention of irregular migrants by analogy, despite the enactment of the Dublin III Regulation earlier that same year and disregarding the difference of degree between the two types of detention.[85]

Against this background, the ECJ set important limitations to the imposition of detention to asylum seekers pending Dublin transfer and made it clear that the discretion enjoyed by national authorities must be clearly circumscribed via "a binding provision of general application" specifying

81. Verwaltungsgerichtshof (VwGH) 19 Feb. 2015, ZI, Ro 2014/21/0075-5. For the aftermath, see Constitutional Court, V 152-153/2015-19 <www.asylumlawdatabase.eu/en/case-law/austria-constitutional-court-v-152-1532015-19-decision-dated-13-june-2016> (all websites last accessed 30 Apr. 2019).

82. Cour administrative du Grand-Duché de Luxembourg, 6 Oct. 2016, roll no 35301C. See also the judgments of the Tribunal administratif (Administrative Court, Luxembourg), Second Chamber, 5 Mar. 2015, roll no 35902, and Third Chamber, 24 Dec. 2015, roll no 37301.

83. Administrative Court of the Republic of Slovenia, 29 July 2016, Judgment I U 1102/2016. <www.asylumlawdatabase.eu/en/case-law/slovenia-administrative-court-republic-slovenia-29-july-2016-judgment-i-u-11022016#content>.

84. Raad van State, 21 Mar. 2011, BP9284, 201100555/1/V3.

85. European Migration Network, "The use of detention and alternatives to detention in the context of immigration policies" Synthesis Report for the EMN Focused Study, 2014, at 17. Also see <ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/590_emn_ahq_on_detention_in_dublin_cases_en.pdf>; <eumigrationlawblog.eu/detention-of-asylum-seekers-interaction-between-the-return-and-reception-conditions-directives-in-bulgaria/>.

objectively when a risk exists.[86] In turn, reliance on criteria for determining the existence of such risk found in any document not sharing these characteristics, such as policy documents detailing administrative practices or case law, is doomed to render detention of the asylum seeker in question unlawful. *Al Chodor* confirmed the protective function of the Dublin rules and clarified that the effective operation of the CEAS requires the observance of fundamental rights as enshrined in the EUCFR and the ECHR and the provision of a high level of protection. The corollary implication for asylum seekers is a declaration that their detention was unlawful, and that they would be entitled to compensation in damages. It goes without saying that *ex post* remedies are merely cold comfort to those who have been unlawfully detained, but in the aftermath of *Al Chodor* possibly thousands of asylum seekers may initiate proceedings before national courts to seek declarations of their unlawful detention.

There is a noticeable disparity between the Advocate General's Opinion and the Court's ruling as regards the key message of the judgment. On the one hand, the Advocate General unequivocally contends that the criteria determining the existence of a risk of absconding should be drawn out in *legislation*.[87] On the other hand, the Court cautiously referred to a *binding provision of general application* that would ensure clarity, predictability and protection against arbitrariness.[88] In *Hemmati and Others*, the English Court of Appeal claimed that the ECJ's wording is vague and does not expressly state that the criteria must be laid down in national legislation, hence the Lords refrained from expressing a firm view.[89] In that respect, it could be counter-argued that first, the ECJ explicitly endorsed the relevant pronouncements of the Advocate General in paragraphs 81 and 82 of the Opinion, which refer to "legislation", thus it would be misplaced to consider that the Court actually disagreed with the Advocate General on that point. Second, it is difficult to see what type of national "law" would fulfil the requirements of a "binding provision of general application" that safeguards protection against arbitrariness and predictability other than a legislative act. Rather, the judgment could be interpreted as meaning that the national criteria should be listed *at least* in national legislation, thus allowing the possibility in

86. Prior to *Al Chodor* this view was supported by De Bruycker, Mananashvili and Renuadière, "The extent of judicial control of pre-removal detention in the EU", European Synthesis Report for the Project CONTENTION, 2014, at 23.

87. See Opinion paras. 36, 39, 45, 79, 81, 84.

88. Judgment, para 44.

89. *Hemmati and Others* v. *R and the Secretary for State for the Home Department* [2018] EWCA Civ 2122.

the future for EU law to interfere in that respect and detail the criteria via any subsequent configuration of the Dublin III Regulation, which would be binding and of general application.

4.3. *Asylum detention between rocks: The (uneasy) relationship between EU law and European Human Rights Law*

As has been made clear, the reasoning of the ECJ differs from the Opinion in numerous respects. That includes the analytical lens through which the ruling was reached. In that respect, a key distinction involves the relevance of the ECtHR case law as regards the interpretation of EU rules on asylum detention. It was mentioned above that the rules governing detention of asylum seekers have been developed within a broader context of multi-level legal obligations at international and regional (CoE) level. As hinted by the Advocate General, the ECHR landscape in relation to asylum detention is quite complex. Article 5(1)(f) ECHR allows Member States to control the liberty of foreign nationals in an immigration context and identifies two forms of detention: "to prevent [the migrant] from effecting an unauthorized entry into the country"; and detention "of a person against whom action is being taken with a view to deportation or extradition". The ECtHR has been called on numerous occasions to determine the standards of protection afforded to asylum applicants. In *Saadi* v. *United Kingdom*,[90] the ECtHR contended that asylum seekers could be deemed to have effected unauthorized entry, even if their claims were being examined. States did not have to demonstrate that detention was necessary in the individual case, as long as it was lawful and non-arbitrary. That restrictive approach has been criticized – rightly so – as leaving a wide margin of discretion for States.[91] Furthermore, it has been proposed that asylum seekers who are formally in the asylum process cannot be deemed as "effectuating unauthorized entry", thus their detention cannot

90. ECtHR, *Saadi* v. *United Kingdom*, Appl. No. 13229/03, judgment of 29 Jan. 2008, paras. 44–66; *Mikolenko* v. *Estonia*, Appl. No. 10664/05, judgment of 8 Aug. 2009, paras. 56–58; *Rusu* v. *Austria*, Appl. No. 34082/02, judgment of 2 Oct. 2008, paras. 47–60; *Aden Ahmed* v. *Malta*, Appl. No. 55352/12, judgment of 23 July 2013, paras. 125–146; *Lokpo and Touré* v. *Hungary*, Appl. No. 10816/10, judgment of 20 Sep. 2011, paras. 10–25; *L.M. and Others* v. *Russia*, Appl. No. 40081/14, judgment of 15 Oct. 2015, paras. 137–152; *Gebremedhin* v. *France*, Appl. No. 25389/05, judgment of 26 Apr. 2007, para 75. None of these cases relate to Dublin detention.

91. Moreno-Lax, "*Beyond Saadi* v. *UK*: The 'Necessity' Requirement for Administrative Detention of Asylum Seekers in the EU (Reflexive Governance in the Public Interest, Working Paper No. REFGOV-FR-31, 2010); O'Nions, "No right to liberty: The detention of asylum seekers for administrative convenience" 10 *European Journal of Migration and Law* (2008), 149–185.

be based on Article 5(1)(f) ECHR, but States would have to justify under Article 5(1)(b) on coercive detention.[92] In addition, in *Firoz Muneer* v. *Belgium*[93] and *A. M. and Others* v. *France,*[94] the ECtHR classified Dublin-related detention as falling within the second limb of Article 5(1)(f), without a necessity test foreseen.[95] This assessment was unquestionably conceded by the Advocate General,[96] but has found resistance among legal scholars and practitioners who have argued that Dublin detention may not be justified under any grounds of Article 5 ECHR whatsoever.[97]

Against this background, the Advocate General cautiously acknowledged the inherent limitations of protection for asylum seekers under the ECHR and instead took an EU-centric approach in his reasoning, by focusing on the fundamental rights dimension of the EU asylum *acquis*, and its protective function viewed in its historical evolution. The *acquis* goes beyond the basic, minimum ECHR standards and does not preclude the EU legislature from establishing more extensive protection. Thus, the Advocate General prioritized protection of asylum applicants over administrative convenience and reaffirmed the constitutional value of the Charter as a self-standing source of fundamental rights protection at EU level. This would enable the EU rules to develop a more independent path of protection towards asylum seekers.

The ECJ also took a firm view that the rule of law should apply, nevertheless it explicitly anchored the interpretation of Article 6 of the Charter to that of Article 5 ECHR and reflected on the interpretation of "arbitrariness" of detention as given by the ECtHR. The minimum threshold of protection of the rights guaranteed is thus to be determined not only by reference to the text of the ECHR but also, *inter alia*, by reference to the ECtHR case law. This approach reflects the Human Rights Committee's General Comment No. 35, which states that "arbitrariness is not to be equated

92. See ECtHR, *Musa* v. *Malta*, Appl. No. 42337/12, judgment of 23 July 2013; *O.M.* v. *Hungary*, Appl. No. 9912/15, judgment of 5 July 2016, paras. 42–44. For supporters of that view, see Costello, "Immigration detention: The grounds beneath our feet" 68 *Current Legal Problems* (2015), 156–57; European Law Institute, *Statement of the European Law Institute: Detention of Asylum Seekers and Irregular Migrants and the Rule of Law* (2017), p. 69. Also see, ECRE, "ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive COM(2016) 465" (2016), p. 11.

93. ECtHR, *Firoz Muneer* v. *Belgium*, Appl. No. 56005/10, judgment of 11 July 2013.

94. ECtHR, *A. M. and Others* v. *France*, Appl. No. 56324/13, judgment of 12 July 2016.

95. ECtHR, *Chahal* v. *The United Kingdom*, Appl. No. 22414/93, judgment of 11 Nov. 1996.

96. Tsourdi also supports that view, op. cit. *supra* note 21, at 16.

97. AIDA, "The legality of detention of asylum seekers under the Dublin III Regulation" (AIDA Legal Briefing No. 1, 2015).

with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality".[98] It is noteworthy that the ECJ refrained from commenting on the specific limb of Article 5(1)(f) within which Dublin-related detention belongs. It even steered away from any debate as to whether such detention could be deemed as falling within other grounds listed in Article 5 ECHR. Instead, the judgment simply refers to Article 5 ECHR in general.[99] Furthermore, the criteria for determining the lawfulness of detention were drawn from a judgment that involves the application of Article 5(1)(a) ECHR on detention "after conviction by a competent court". This may indicate that the ECJ aimed at viewing detention of asylum seekers in the abstract, without the limitations attached to the ECtHR case law on Article 5(1)(f) as briefly highlighted above. It may also subtly pave the way for emancipating asylum detention from its usual Article 5(1)(f) context, which will result in raising the standards of protection by requiring a necessity test to justify detention. Furthermore, this subtle bypassing enabled the Court to protect detained asylum seekers pending Dublin transfer by avoiding taking a stance as to whether EU rules afford higher protection than the ECHR and thus creating further friction between the regional regimes. At the same time, it was highlighted that the development of the EU asylum *acquis* goes hand-in-hand with its compliance with human rights law. Thus, deprivation of liberty which is lawful under national law may still be arbitrary and unlawful under the ECHR.[100] In addition, the ECJ's approach marks a deviation from *JN*, where the position of EU law was distinguished from the prior case law of the ECtHR. There, the ECJ underscored from the outset that the ECHR is not "a legal instrument which has been formally incorporated into EU law". As such, the Court assessed the validity of the clause in the recast Reception Conditions Directive in the light of the Charter, although that assessment had taken place in view of the ECHR *as referred to* in the Charter.[101] The same reasoning was followed also in *K*.[102] In *Al Chodor*, it is evident that the ECJ has taken note of the convoluted ECtHR case law and tried to square the circle by reconciling the standards of protection offered by the ECHR with that afforded under EU law.

98. Human Rights Committee, General Comment No. 35, para 12. See also Human Rights Committee, *Van Alphen* v. *Netherlands* (Communication No. 305/1988, 1990), para 5.8. Also see <eulawanalysis.blogspot.com/2017/05/immigration-detention-and-rule-of-law.html>.

99. See judgment paras. 37 and 39.

100. <eulawanalysis.blogspot.com/2017/05/immigration-detention-and-rule-of-law.html>.

101. Case C-601/15 PPU, *J.N.*, paras. 45–46. Emphasis added. <eulawanalysis.blogspot.com/2016/03/detention-of-asylum-seekers-first-cjeu.html>.

102. Case C-18/16, *K.*, para 32.

4.4. *The aftermath of Al Chodor: Legislative reforms and jurisprudence at the national level*

In the wake of *Al Chodor* significant changes took place at legislative level, coupled with important judgments interpreting the Court's pronouncements. In Belgium, as a result of the judgment, the Aliens Office stopped issuing detention orders based on a risk of absconding in the context of Dublin procedures.[103] Furthermore, the Belgian Aliens Act was amended and entered into force in March 2018 to introduce objective criteria for the definition of the "risk of absconding".[104] However, it has been pointed out that the eleven criteria listed therein are overly broad, e.g. lodging an asylum claim more than eight days after arrival or non-cooperation with the authorities.[105]

The French legal landscape was also affected by the judgment. On 27 September 2017, the Cour de Cassation clarified that the absence of a legislative provision prescribing the objective criteria for determining the existence of a significant risk of absconding, aiming at the Dublin system, precluded the applicability of detention for the purpose of carrying out a Dublin transfer. As in the case of Belgium, prior to the *Al Chodor* judgment, the "risk of absconding" was assessed pursuant to the rules governing return procedures, coupled with guidelines for the Prefectures in the form of an Instruction by the Ministry of Interior.[106] The Cour de Cassation further stressed that applying the criteria to determine the risk of absconding in relation to non-EU nationals who are subject to an obligation to leave the French territory or are assigned to a residence is not an option.[107] In response to that ruling, an amendment to the CESEDA (Code of Entry and Stay of Foreigners and Asylum Law) was adopted in March 2018 to pinpoint

103. Information provided by the Aliens Office: Myria, Contact Meeting, 21 June 2017, <bit.ly/2BVlncU>.

104. Before *Al Chodor*, Belgium did not have asylum-specific criteria for the assessment of the risk of absconding and did not define the "significant risk of absconding" either. Rather, Belgian authorities routinely detained asylum seekers pending transfer simply because they were subject to the transfer process. See <www.asylumineurope.org/reports/country/belgium/asylum-procedure/procedures/dublin>.

105. <www.asylumineurope.org/sites/default/files/report-download/aida_be_2017update.pdf> at 15 and 86. Also see <www.asylumineurope.org/news/26-03-2018/aida-2017-update-belgium-netherlands>.

106. Instruction issued on 19 July 2016.

107. The position was soon endorsed by the Paris Tribunal de Grande Instance which invalidated the decision of the Prefet du al de Marne to detain an asylum seeker subject to a Dublin transfer (Marne JLD, No. 17/03843 of 30 Sept. 2017) and the Paris Court of Appeal confirmed so (B17/04273 of 2 Oct. 2017. For commentary, see <www.asylumineurope.org/news/28-09-2017/france-highest-courts-clarify-dublin-detention> and <www.asylumlawdatabase.eu/en/journal/french-suite-effect-al-chodor-detention-asylum-seekers-purpose-dublin-transfer>.

Dublin-bespoke criteria; until then it was submitted that some Prefectures continued to detain asylum seekers despite the Cour de Cassation ruling.[108]

A somewhat different and perhaps unexpected response came from the UK, where *Al Chodor* generated an immediate chain reaction. The "reasons for detention" were merely drawn from administrative practice as included in the "Enforcement Instructions and Guidance" (EIG).[109] In fact, the UK was the only Member State that had intervened in the case disputing the requirement that the criteria should be laid down in legislation. Within a few hours of the judgment, the Transfer for Determination of an Application for International Protection (Detention) (Significant Risk of Absconding Criteria) Regulations 2017 was enacted with a view to introducing the criteria in the then policy and administrative practice. Since then, the legality of the criteria and their compliance with *Al Chodor* were unsuccessfully challenged in *R (on the application of Omar)* v. *SSHD*.[110] The claimants argued that the Regulations were unlawful because the objective criteria identifying the risk of absconding were merely a non-exhaustive list of optional relevant considerations or factors insufficiently linked to the risk of absconding. The case was dismissed, with the court finding that the criteria are both "mandatory" and "exhaustive". However, at the time of writing an appeal on this case is pending.

Importantly, the unlawfulness of the pre-*Al Chodor* detention practice in the UK was confirmed by the Court of Appeal in *Hemmati and Others*.[111] The case was brought by five asylum seekers, who argued that their Dublin detention prior to 15 March 2017 – date of the Regulations' enactment –, which was grounded on the existence of a "significant risk of absconding", was unlawful. Surprisingly, the judgment was split, with two judges giving the majority finding in favour of the appellants and one dissenting opinion. Even more surprisingly, the majority and the minority opinions provided alternative readings of *Al Chodor* as regards the "defined by law" requirement. In the dissenting opinion, Lord Sales argued that the ECJ's reasoning amounted to "half-way house interpretation" of the "defined by law" requirement, which focuses on the substantive qualities of the "act" in a manner similar, though

108. AIDA, "Country Report: France" (2018), at 99. For more information on the French practice, see AIDA, "Access to asylum and detention at France's borders" (2018), at 10.

109. Detention of asylum seekers under UK law takes place on the basis of the *Hardial Singh* principles and/or the Secretary of State's published policy in Ch. 55 of his Enforcement Instructions and Guidance (EIG). See *Re Hardial Singh* [1984] 1 WLR 704 as rehearsed in later authorities such as *R (I)* v. *Secretary of State for the Home Department* [2002] EWCA Civ 888 and *Lumba* v. *Secretary of State for the Home Department* [2012] 1 AC 245.

110. *R (on the application of Omar)* v. *the Secretary of State for the Home Department* [2018] EWHC 689.

111. *Hemmati and Others* v. *R and the Secretary of State for the Home Department* [2018] EWCA Civ 2122.

not identical, to the way in which the ECtHR has interpreted the word "law" in the ECHR.[112] Policies were thus capable of binding decision makers because any deviation would have to be for good reason and no reason to depart from EU law can be a good reason.[113] The majority took a different approach, opining that neither the case law nor the EIG satisfied the requirements of clarity, predictability, accessibility and protection against arbitrariness. There was no reference to the Dublin III Regulation and no direction to determine whether an individual would pose a significant risk of absconding, but merely "general advice" as regards the exercise of the power to detain.[114] In the majority's view, a list of factors is not sufficient, as some factors were clearly irrelevant to the risk of absconding.[115] As for the "defined by law" requirement, the majority did not express a firm opinion, but, as mentioned earlier, it was stressed that the language of the ECJ in paragraph 44 of its decision used the less emphatic expression "best placed" than the clear statement of the Advocate General.[116]

4.5. *The relevance of Al Chodor for other EU instruments prescribing detention of non-EU nationals*

Whereas *Al Chodor* refers to pre-transfer detention, its relevance for other EU instruments permitting detention, particularly pre-removal detention pursuant to the Return Directive, but also other detention grounds listed in the recast Reception Conditions Directive, should not be discarded. As noted above, immigration and asylum detention are subject to different legal frameworks and the ECJ has made clear that the Return Directive cannot be applied to asylum seekers.[117] However, as mentioned earlier, the differentiated regime has not prevented certain States from applying the criteria to determine the risk of absconding also in the case of detained transferees. After all, the "risk of absconding" is defined in the same way both in the Return Directive and the Dublin III Regulation. However, the Reception Conditions Directive does not provide a definition of the risk of absconding. In *K*, Advocate General Sharpston stressed that the objective of Article 8(3)(b) of the Reception Conditions Directive, which permits detention of asylum seekers

112. Ibid. para 97.
113. Ibid. para 117.
114. Ibid. paras. 170–171.
115. Ibid. para 172. Sales LJ dissented on the basis that neither Art. 2(n) nor *Al Chodor* required that the criteria were set out separately or identified clearly as relevant to the risk of absconding. He considered that some criteria were obviously unrelated to the risk of absconding, so that persons were unlikely to find it confusing. See ibid. para 128.
116. Ibid. para 186.
117. Case C-534/11, *Arslan*, paras. 48–49.

when there is a "risk of absconding", is to prevent arbitrary detention, which was a key underpinning of the reasoning in *Al Chodor*.[118] Advocate General Saugmandsgaard Øe also draws parallels between immigration and asylum detentions in *Al Chodor*.[119] This points in the direction that a consistent interpretation of the concept of the "risk of absconding" is imperative and, therefore, the ruling relates not only to Dublin cases but also to immigration or asylum detention of third-country nationals in any Member State bound by the relevant EU legislation.[120] Arguably, it has been the immigration law criteria determining the risk of absconding that have been used in asylum cases and not the other way round; however, the interpretation of the term "risk of absconding" should be consistent across the fields.

4.6. *The "objective criteria" requirement: A protection cloak too small?*

This commentary would be incomplete without reflecting on whether the "objective criteria" requirement which is linked to the "defined by law" protection cloak surrounding asylum seekers is nonetheless insufficient. Indeed, the regulation of Dublin-related detention is no bed of roses. This is because the content of the objective criteria determining the existence of a "significant risk of absconding", as referred to in Article 2(n) of the Dublin III Regulation, remains left to the discretionary powers of each Member State. Therefore, *Al Chodor* could not provide guidance as to the normative validity of the criteria prescribed in the Czech case law, whether or not they are objective and consistent with the requirements of proportionality, or even whether the detention is necessary in the first place. Thus, in referring to the objective criteria, the ECJ variously referred to "objective criteria defining the existence of a risk of absconding",[121] "the criteria which define the existence of the risk"[122] and "the objective criteria underlying the reasons for believing that an applicant may abscond".[123]

Be that as it may, it is worth noting that the interpretation of the concept of "absconding" is underpinned by broad, open-ended and often ambiguous

118. See Case C-18/16, *K.*, EU:C:2017:349, para 73. Also see <eulawanalysis.blogspot.com/2017/05/immigration-detention-and-rule-of-law.html>.

119. See in particular Opinion paras. 85 and 87.

120. Admittedly, the fact that *Al Chodor* is essentially a Dublin case makes it easier to argue so, since that Regulation applies to Dublin Associated States, Ireland and the UK. The Return Directive, on the other hand, does not apply to Schengen Associated States and is a measure building upon the Schengen *acquis.*

121. Judgment, para 28.

122. Ibid. para 42.

123. Ibid. para 45.

criteria; discrepancies among Member States are observed.[124] Furthermore, as highlighted earlier, the lack of uniformity, combined with the direct applicability of the Dublin III Regulation, seems to have led some Member States to apply the lower threshold set in their national law in implementing the Return Directive. An exhaustive analysis of the criteria elaborated at the national level falls outside the scope of the present contribution; however, an anthology of examples illustrates some alarming domestic practices. In the evaluation of the Dublin III Regulation in 2015, it was submitted that some Member States, such as Poland, indicated that detention could be automatically resorted to for applicants who entered the country irregularly, even though the sole ground for detention was "to secure transfer procedures in accordance with this Regulation".[125] Furthermore, in Poland, the lack of identity documents is in itself sufficient evidence of the existence of a significant risk of absconding.[126] In Austria, an insufficient link between the asylum seeker and the country of residence in the form of "family relations, sufficient resources or secured residence" is taken to imply a risk.[127] Importantly, there is no reference to a "significant" risk of absconding, as per the requirement of Article 28(2) of the Dublin III Regulation. Regrettably, in June 2016, the Constitutional Court (VfGH) dismissed constitutional concerns as regards the adequacy of the Austrian implementation, considering that the necessity is sufficient.[128] For Switzerland, such a risk may be inferred where an asylum seeker demonstrates conduct in the country or abroad which lead the authorities to believe that he will not cooperate with instructions.[129] In Germany, far-reaching criteria are applicable; the fact that an asylum seeker has paid substantial sums of money to irregularly enter the country is considered as indicating that they are likely to avoid transfer to ensure those expenses were not made in vain.[130] This unduly wide reading of the permissibility of Dublin-related detention contradicts the Member States' duty to interpret narrowly any restriction on the right to liberty under Article 6 of the Charter. Nevertheless, the situation will not alter under the third phase of the CEAS, even though the United Nations High Commissioner for Refugees (UNHCR) has repeatedly called for the elaboration of clear criteria determining the risk of absconding, given the considerable consequences attached to these concepts. Factors that have been suggested include the past

124. For overview, see AIDA, "Common asylum system at a turning point: Refugees caught in Europe's solidarity", Annual Report, 2015.

125. Commission, Evaluation of the Dublin III Regulation (2015) p. 16.

126. Arts. 87(2) and 88a(1) of the Law on Protection, as amended in November 2015.

127. Art. 76 of the Aliens Police Act, as amended in July 2015.

128. VfGH, Decision V 152-153/2015-19, 13 June 2016.

129. Art. 76a of the Swiss Federal Law on Foreigners.

130. Art. 2(14) of the German Residence Act.

history of cooperation and/or compliance on the part of the applicant; family or community links or other support networks in the country of asylum; their willingness or refusal to provide information about the basic elements of their claim; or whether the claim is considered manifestly unfounded or abusive.[131] The case law of the ECtHR may offer some inspiration as regards factors that denote lack of a risk of absconding. In *Segeda* v. *Russia*, relating to Article 5(1)(C) ECHR, such factors were the state of health, stable place of residence, no attempt to escape, strong family ties, no previous criminal record.[132]

Article 6 of the proposed recast Return Directive constitutes a first attempt to codify at EU level a list of common objective criteria for the determination of the existence of a risk of absconding.[133] The non-exhaustive, quite broad list of no less than fourteen criteria incorporates a series of considerations, including standardized concerns, such as the lack of documentation proving identity, [134] the lack of residence, fixed abode or reliable address, explicit expression of intent of non-compliance with return-related measures or non-compliance with a return decision. It also includes far-reaching considerations such as the lack of financial resources, or the subjection to a return decision issued by another Member State.[135] It even links pre-removal detention with previous criminal convictions or criminal investigation/ proceedings even though in the 2017 Return Handbook it was noted that "[i]t is not the purpose of Article 15 [of the 2008 Return Directive] to protect society from persons which constitute a threat to public policy or security".[136] In the light of *Al Chodor* and national jurisprudence as mentioned above, it must be highlighted that any criteria determining the risk of absconding in the case of irregular migrants may not be applied by analogy and *a priori* to asylum seekers. Whereas for reasons of legal certainty and reliability, as well as more equal protection of rights, analogous application could be favoured, it must be recalled that the Dublin III Regulation requires a higher degree of

131. See UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) Guidelines 4.2 and 4.1.1, para 22. Also, in *A* v. *Australia*, the UN Human Rights Committee clarified that assertions about a general risk of absconding cannot legitimise detention. See UN Human Rights Committee (HRC), *A.* v. *Australia*, CCPR/C/59/D/560/1993, 3 Apr. 1997.

132. *ECtHR*, *Segeda* v. *Russia*, Appl. No. 41545/06, judgment of 19 Dec. 2013, para 65.

133. Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018)634.

134. However, in Case C-146/14 PPU, *Mahdi*, para 73, the ECJ found that the lack of proper documentation ought not to be equated with a risk of absconding.

135. Council, Document 14859/18 (30 Nov. 2018), at 3. With the exception of the addition of a further criterion concerning "deliberate provision of false information in an oral or written form or concealment of essential information about the case prior to the return" the changes to the list are minimal. See Council Document 13772/18 (5 Nov. 2018), at 32–34.

136. Commission, *EU Return Handbook* (2017), p. 79.

"risk of absconding" as evidenced by the addition of "significant". Therefore, as the Slovenian Constitutional Court highlighted in its judgment of 31 December 2018, certain criteria may be relevant in both circumstances, but only those that comply with the specific characteristics and objectives of the Dublin III Regulation.[137] Consequently, any implementation of a future Return Directive at the national level should not be considered as a motor for Member States to add further criteria in their assessment that may result in expanding domestic detention policies.

5. Conclusion

This case note aimed at casting light on *Al Chodor* and the significance of its pronouncements as regards the detention of asylum seekers whose claim has not yet been determined, but who are nonetheless awaiting transfer to another Member State. The Court's decision aims at curing longstanding pathologies at the national level, where the criteria for determining whether asylum seekers pose a significant risk of absconding under the Dublin III Regulation derive from policy documents and case law, often in an analogous application of the relevant criteria drawn up to determine the risk of absconding of irregular migrants pending deportation. In that respect, it was made clear that the "law" detailing the criteria must be binding and of general application, and reflected the findings of the Advocate General. In its line of reasoning, the ECJ, though embracing the relevance of the abundant ECtHR case law as regards Article 5 ECHR when interpreting Article 6 of the Charter, also cautiously avoided opining on the standards of protection or on the specific ground of Article 5 under which detention of asylum seekers falls. This may be seen as an attempt to disentangle asylum detention from its traditional Article 5(1)(f) environment. Thus, by emphasizing the fundamental rights side of an arguably not particularly asylum seeker-friendly EU legal instrument, the ECJ highlighted its emerging role as a constitutional court and managed to provide a high level of protection to detained asylum seekers pending Dublin transfer, without disrupting the close relationship between the ECHR and the Charter. Applause is also due for national courts that, with few exceptions, have had the reflex to recognize the loopholes and live up to the expectations of asylum seekers.

Undoubtedly, the right to liberty is faced with a difficult test when confronted with the exercise of State power in the area of immigration control, and *Al Chodor* marks a significant step towards upholding the rule of law even in a controversial area like pre-transfer detention. There is ample room for

137. UPRS Sodba in sklep I U 2578/2018-13, 31 Dec. 2018.

improvement though. For example, as highlighted earlier, even if the objective criteria are "defined by law", their elaboration is left to Member States, where broad lists of vague and inconclusive criteria have often been observed. The applicability of other permissible detention grounds under Article 5 ECHR to justify asylum detention and the meaning of a "*significant* risk of absconding" as opposed to a mere "risk of absconding" are also unclear. The questions are endless; asylum detention is bound to remain in the spotlight.

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