Neutral Citation Number: [2019] EWCA Civ 207

Case No: C4/2018/0998 – 0999
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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)
MRS JUSTICE LAMBERT
[2018] EWHC 689 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2019

Before :

LORD JUSTICE DAVIS
THE SENIOR PRESIDENT OF TRIBUNALS
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

PESHAWA OMAR **SARAH JALAL** **SHAHRAM JALAL** **SAJEED SADIQIMEZIDI** **HAMID REZA SALIMI DARANI** **MOHSEN ASKARI**	**Appellants**
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

Michael Fordham QC, David Chirico and Stephen Knight (instructed by **Duncan Lewis Solicitors**) for the **Appellants**
Alan Payne (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 7th February 2019

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Approved Judgment

Lord Justice Davis :

Introduction

1. In the immediate aftermath of the decision of the European Court of Justice (Second Chamber) in *Policie ČR etc v Al Chodor and others* (Case C-528/15; [2017] 3 C.M.L.R. 24) ("*Chodor")* the Transfer for Determination of an Application for International Protection (Detention) (Significant Risk of Absconding Criteria) Regulations 2017 ("the 2017 Regulations") were made and came into force on 15 March 2017. By these Judicial Review proceedings the claimants, as part of the relief sought, say that the 2017 Regulations are, and from inception have been, unlawful. It is said that they fail lawfully to implement and give effect to the requirements of Regulation (EU) No. 604/2013 of the European Parliament and of the Council ("the Dublin III Regulation"): which is designed to establish 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 stateless person. The claimants also, in the alternative, say that the criteria set out in the 2017 Regulations are unlawful on grounds of want of proportionality.

2. The question of the lawfulness of the 2017 Regulations was on 27 September 2017 directed by Lavender J to be heard in effect as a preliminary issue. The proceedings brought variously by these claimants have otherwise in the interim been stayed. The matter came before Lambert J. Following a two day hearing in the Administrative Court the judge, in a careful and thorough reserved judgment handed down on 28 March 2018, rejected the claimants' contentions. She concluded that the 2017 Regulations were lawful.

3. The claimants now appeal to this court, with permission granted by the judge. Before us, as below, the claimants (appellants) were represented by Mr Fordham QC, Mr Chirico and Mr Knight; and the Secretary of State for the Home Department (respondent) was represented by Mr Payne.

Background

4. The factual background needs, for present purposes, only the barest outline. All of the claimants are adults. All are third-country nationals. All at various times in 2017 entered the United Kingdom unlawfully, for the most part travelling in the back of a lorry. All in due course were to claim asylum.

5. Eurodac searches were made with regard to each. Those revealed that all had previously had their finger prints taken in another Member State, in some instances in more than one Member State: and some had also previously claimed asylum in another Member State. As the judge noted, the immigration history of each claimant demonstrates features typical of migrants prospectively subject to the Dublin III Regulation procedures.

6. Requests were made to the relevant Member State to take back the relevant claimant under Article 18(1) of the Dublin III Regulation. These were accepted or deemed to be accepted. At various stages the claimants were detained pending prospective removal

to the relevant Member State. Removals have not been effected, however, and each of the claimants has subsequently been released from detention, with reporting conditions. Some of the claimants have in their proceedings challenged the decision to remove them to another Member State and all have challenged the decision to detain them for the purposes of such removal. That challenge extends to the lawfulness of the 2017 Regulations. The matter has proceeded on the footing that the detention in each of the cases occurred after the 2017 Regulations came into force.

The Legal Framework

7. The Dublin III Regulation itself came into effect on 1 January 2014. It both supersedes and is significantly different from its predecessor regulation, the Dublin II Regulation: Council Regulation (EC) No. 343/2003. The initial draft had been the subject of an Explanatory Memorandum, to which we were referred. The broad objective in departing in significant respects from the Dublin II Regulation was stated to be, first, to enhance the efficiency of the system put in place and, second, to ensure that the needs of individual applicants were comprehensively addressed under the procedure for determination of responsibility. It was stressed that there was a need to guarantee effective and speedy access to procedures for determining refugee status whilst preventing abuse of such procedures by the lodging of multiple claims in a number of Member States. The main aim of the proposal was summarised as: "to increase the system's efficiency and to ensure higher standards of protection for persons falling under the Dublin procedure."

8. Recital (20) of the Dublin III Regulation provides as follows:

> "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. In particular, the detention of applicants must be in accordance with Article 31 of the Geneva Convention. 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. As regards the general guarantees governing detention, as well as detention conditions, where appropriate, Member States should apply the provisions of Directive 2013/33/EU also to persons detained on the basis of this Regulation."

9. The Dublin III Regulation then sets out various provisions. Of central importance to the present appeal is Article 28. That, under the heading "Detention", provides in the relevant respects as follows:

> "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 in accordance with this Regulation, on the basis of an 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 the transfer under this Regulation is carried out."

As for "risk of absconding", that is the subject of definition by Article 2(n), which provides as follows:

> " 'risk of absconding' means 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."

10. It was the interpretation of aspects of the provisions of Article 28 read with Article 2(n) which was before the Court of Justice in *Chodor*. That case is very important context: because it was the decision in *Chodor* which prompted (on the same day that the decision in *Chodor* was handed down) the making of the 2017 Regulations – albeit they doubtless had been prepared in advance on a contingency basis. Moreover, *Chodor* does not necessarily simply provide context. For it is the claimants' contention that aspects of the reasoning in *Chodor* bear directly on the issue of the lawfulness of the 2017 Regulations: albeit Mr Fordham said that his argument did not wholly depend on the reasoning in *Chodor* and that it ultimately founded itself on the proper interpretation and application of Article 28 read with the definition contained in Article 2(n) of the Dublin III Regulation.

Chodor

11. It is therefore very important to assess just what it was that *Chodor* was actually concerned to decide.

12. It is clear that the true point in issue, as spelled out in the request by the Czech court for a ruling, was as to what was connoted by "objective criteria defined by law", as specified in Article 2(n) of the Dublin III Regulation. In particular, did the phrase "by law" mean that legislation or a "national law" must be adopted? Or would it suffice if the criteria were apparent from the case law of the courts and/or the administrative practice of the Member State in question? See paragraph AG4 of the opinion of the Advocate General and paragraph 24 of the judgment of the Court.

13. At paragraph 28 of the judgment of the Court, it was noted that the "objective criteria" had been set out neither in the Dublin III Regulation nor in any other EU legal act. It followed that:

> "…the elaboration of those criteria, in the context of that regulation, is a matter for national law."

It thus was held that:

> "…criteria such as those listed [sic] in art. 2 (n) of the Dublin III Regulation require implementation in the national law of each Member State."

14. After referring to the "high level of protection" afforded to applicants under the Dublin III Regulation and after referring to related matters, the Court said this at paragraph 38:

> "According to the European Court of Human Rights, any deprivation of liberty must be lawful not only in the sense that it must have a legal basis in national law, but also that lawfulness concerns the quality of the law and implies that a national law authorising the deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness (see to that effect, *Del Rio Prada v Spain* (470/09) (2014) 58 E.H.R.R. 37, §125). "

The Court then said this at paragraphs 40 to 42 of its judgment:

> "40. 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, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.
>
> 41. With regard to the first of those safeguards, it must be recalled that the limitation on the exercise of the right to liberty is based, in the present case, on art.28(2) of the Dublin III Regulation, read in conjunction with art.2(n) thereof, which is a legislative act of the EU. The latter provision refers, in turn, to national law for the definition of the objective criteria indicating the presence of a risk of absconding. In that context, the question arises as to what type of provision addresses the other safeguards, namely those of clarity, predictability, accessibility and protection against arbitrariness.
>
> 42. In that regard, as was noted by the Advocate General at AG63 of his Opinion, it is important that the individual discretion enjoyed by the authorities concerned pursuant to art.28(2) of the Dublin III Regulation, read in conjunction with art.2(n) thereof, in relation to the existence of a risk of absconding, should be exercised within a framework of certain predetermined limits. Accordingly, it is essential that the criteria which define the existence of such a risk, which constitute the basis for detention, are defined clearly by an act which is binding and foreseeable in its application."

15. The Court's conclusion was that "only" a provision of general application could meet the requirements of clarity, predictability, accessibility and protection against

arbitrariness (paragraph 43). The answer to the question posed for decision was expressed in these terms (in paragraph 47 and reflected also in RI):

> "Consequently, the answer to the question referred is that art.2(n) and art.28(2) of the Dublin III Regulation, read in conjunction, must be interpreted as requiring Member States to establish, in a binding provision of general application, objective criteria underlying the reasons for believing that an applicant who is subject to a transfer procedure may abscond. The absence of such a provision leads to the inapplicability of art.28(2) of that regulation."

16. At first sight, therefore, the decision in *Chodor* was only concerned with the requirement (under Article 2(n)) as to the source of the law setting out the criteria: not as to the content of such criteria. Indeed that was specifically so identified in paragraph AG80 of the Advocate General's opinion; and that also corresponds with the stated conclusion of the Court in R1. Nowhere does *Chodor* seek to specify the requisite criteria. I will come on to say how Mr Fordham nevertheless attempts to extract more from that decision.

The 2017 Regulations

17. The decision in *Chodor* threw up a potential difficulty in the United Kingdom. It is plain, on any view, that the decision in that case would be met (in terms of the requisite source of law) by setting out the criteria in a statute or statutory instrument. But at that time there was no such statute or statutory instrument in the United Kingdom. It was plainly, therefore, the function of the 2017 Regulations promptly to meet the decision in *Chodor* in that regard and to fill any possible lacuna that might be said to exist in the United Kingdom in this respect.

18. Paragraph 3 of the 2017 Regulations provides that they apply to asylum seekers liable to detention under Schedule 2 to the Immigration Act 1971 in the circumstance there specified. These include Eurodac identification cases – and the present are, as I have said, such cases. Paragraph 4 of the 2017 Regulations – which in substance is what the claimants in the present case attack – provides as follows:

> "Criteria to be considered when determining risk of absconding
>
> 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 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 or consideration of their application for international protection under the Dublin III Regulation;
>
> (f) whether P had 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 satisfactorily 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."

19. In the Explanatory Note (albeit not part of the 2017 Regulations) it is among other things said:

> "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."

Hemmati

20. In the written arguments before us considerable reference was made to the recent decision of the Court of Appeal in *Hemmati and others v Secretary of State for the Home Department* [2018] EWCA Civ 2122. But in oral argument its relevance to the issues arising on the present appeal before us was more or less disclaimed. In my view, that was right. *Hemmati* was not concerned with the lawfulness of the 2017 Regulations.

To the contrary, it was concerned with the lawfulness (or otherwise) of the position in the United Kingdom antedating the 2017 Regulations. In particular, the issue was whether the domestic law principles set out in *re Hardial Singh* [1984] 1 W.L.R. 704 and in the published policy contained in Chapter 55 of the Secretary of State's Enforcement Instructions and Guidance sufficed to meet the "defined by law" requirements of Article 28 and Article 2(n) of the Dublin III Regulation, as interpreted by the Court of Justice in *Chodor*. A further question was whether, if they did not, damages were payable for the tort of false imprisonment calculated under domestic law principles or whether they were payable pursuant to European law principles: see paragraph 5 of the judgment of Sales LJ and paragraph 160 of the joint judgment of the Master of the Rolls and Peter Jackson LJ.

21. On both these questions the court was divided. Sales LJ, in the minority, considered that the then domestic law did meet the requirements of Article 28 and Article 2(n), as interpreted in *Chodor*. The Master of the Rolls and Peter Jackson LJ took the opposite view. The court was similarly divided on the issue of calculation of damages.

22. All this is no doubt very interesting: and indeed we were told that permission to appeal to the Supreme Court on both issues has very recently been granted to the Secretary of State. But they simply are not the issues before us. It is correct that certain general statements of Lambert J at first instance in the present case were approved in *Hemmati:* for example, at paragraph 175 the majority approved the following general statement of Lambert J at paragraph 44 of her judgment with regard to the criteria referred to in Article 2(n):

> "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."

But, that said, the court in *Hemmati* simply was not concerned with the issue of the lawfulness or quality of the content of paragraph 4 of the 2017 Regulations: see paragraph 98 of the judgment of Sales LJ.

23. It was nevertheless plain enough that both Mr Fordham and (in particular) Mr Payne were, in argument before us, keeping a weather-eye on the pending appeal in the Supreme Court in *Hemmati*. As I see it, nothing advanced by either of them before us really bore on the issues seemingly arising in that case; but if in some way it might be said that they did then I record that each of them in any event stated that their submissions before us were without prejudice to what might be argued on appeal in *Hemmati*.

24. I should also add that, in his written argument, Mr Fordham had suggested that the fact that certain of the criteria listed in paragraph 4 of the 2017 Regulations derived from Chapter 55 of the Enforcement Instructions and Guidance (a "tainted source", as he would put it, in the light of the majority decision in *Hemmati*) of itself vitiated those criteria in terms of lawfulness. Lambert J had – in my opinion, rightly – rejected such

an argument; and at all events Mr Fordham indicated to us that he did not pursue it, other than making it a "point of comment".

The judgment of Lambert J

25. I will take the judgment of Lambert J relatively shortly, while paying tribute to its thoroughness. It is readily accessible: [2018] EWHC 689 (Admin).

26. The claimants had among other things argued that the criteria set out in paragraph 4 of the 2017 Regulations were "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" (paragraph 24).

27. Lambert J acknowledged that the criteria there set out in paragraph 4 of the 2017 Regulation were broad and that their reach would potentially extend to many Dublin III individuals. But she considered that that did not of itself point to the criteria being unlawful (paragraph 41). She considered that the first stage of the assessment related to the risk of absconding. But she went on to say that whether the person was actually to be detained was a distinct question to be determined by reference to whether there was a risk of absconding; the significance of that risk; and the effectiveness of alternative measures (paragraph 47).

28. Her conclusion was that the criteria listed in paragraph 4 of the 2017 Regulations did comply with Article 28 and Article 2(n); that those criteria were rationally linked to a risk of absconding; and, further, that taken both individually and cumulatively the criteria listed in paragraph 4 (a) – (k) were justified as necessary and proportionate.

The arguments before this court

29. The arguments before us were to a significant extent a redeployment of the arguments before Lambert J.

30. Two overarching grounds of appeal were advanced before us on behalf of the claimants. First, it was said that the judge was wrong not to accept "that the objective criteria in the 2017 Regulations must define the existence of the risk of absconding, as explained in [*Chodor*]". Second, and as an alternative argument, it was said that the judge was wrong to conclude that the criteria set out in the 2017 Regulations were proportionate.

31. It was a feature of Mr Fordham's argument on lawfulness that application of the required criteria should in effect of itself provide the answer to whether there was a significant risk of absconding. His approach in effect required that if one or more of the objective criteria (appropriately drafted) is fulfilled then a significant risk of absconding is, as it were, deemed to exist. He acknowledged the rigidity of approach thereby involved; but he said that a rigidity of approach and of application with regard to such criteria so far from being objectionable (and perhaps, one might have thought, potentially prejudicial to individual applicants) was actually to be approved, indeed required, as supplying the necessary requirements of clarity, predictability and accessibility and the necessary protection from arbitrariness. He submitted that was reinforced by the statement of the Court of Justice at paragraph 28 of *Chodor*, where it was said that it was essential that the criteria which "define the existence of such a risk, which constitute the basis of detention, are defined clearly by an act which is binding

and foreseeable in its application". Mr Fordham also for this purpose placed considerable emphasis on the use of the word "define".

32. As to the proportionality of the 2017 Regulations, he submitted that, since the fundamental freedom of liberty of the person was potentially involved, a very high intensity of review on the part of the court was required: and the measures in question were, among other things, required to be justified by the Secretary of State as being no more than was suitable and necessary to meet the attainment of the objective in question: cp. *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2016] AC 697 at paragraphs 52 and 74. He submitted that the Secretary of State "does not begin to show that".

33. For his part, Mr Payne observed at the outset that the underlying objective of the Dublin III Regulation was not simply to enhance the protections available to asylum seekers potentially within its scope. It also was to improve efficiency of procedures in effecting transfers back and to avoid abusive applications and the frustration, through absconding, of transfer procedures: as explained in the Explanatory Memorandum and in, for example, *Khir Amayry v Migrationsverket* Case C-60/16; [2018] 1 W.L.R. 1935 at paragraphs 30 – 31.

34. He went on to object that Mr Fordham's arguments operated virtually to displace the requirement in Article 2(n) for "reasons to believe" and instead postulated the objective criteria as of themselves establishing, where fulfilled, the existence of a significant risk. He further submitted that Mr Fordham's arguments also undermined the express requirement under the Dublin III Regulation that each case should be dealt with on an individualised case by case basis; and, moreover, undermined the freedom of individual Member States (as confirmed by the Dublin III Regulation) to formulate their own objective criteria. As to *Chodor*, he said that that case was directed at an entirely different issue and lent no support at all to the claimants' arguments.

35. As to proportionality, Mr Payne did not accept the nature of the review put forward by Mr Fordham. Rather, he said, the nature of the review was more appropriate to that applicable where a Member State is seeking to exercise a discretion conferred on it as to implementation of a Directive: see paragraph 73 of *Lumsdon.* In any event, he said, the 2017 Regulations were proportionate whichever review yardstick was applied.

Decision

36. Although some aspects of the reasoning of the judge may perhaps be queried, I am in no doubt that, overall, she reached the right conclusion and in essentials for the right reasons.

(1) Lawfulness by reference to the provisions of the Dublin III Regulation

37. The starting point – and, in truth, the ending-point – has to be the Dublin III Regulation itself, and its appropriate interpretation: an interpretation to be undertaken with a view to fulfilling its objectives.

38. An initial point to note is that the Dublin III Regulation (by Article 28(2) and Article 2(n)) has indeed left it to each Member State to formulate objective criteria as to the reasons for belief in a risk of absconding: see *Chodor* at paragraph 28. But on Mr Fordham's approach this fact of itself becomes an oddity. On his approach, one might have expected such criteria (if intended to have the uniform and prescriptive rigidity which he advocates) to be set out in the Dublin III Regulation itself or in some other European law act. At all events, it would appear that, on his approach, all Member States should be expected to have the same, or at all events substantially the same, objective criteria in the national law of each of them (it appears, from such information as we were given, that currently most of them decidedly do not). Such considerations, however, straightaway raise an initial query as to the correctness of the propositions and approach being advanced.

39. A second point is that the arguments advocated on behalf of the claimants seem almost counter-intuitive from the point of view of Dublin III individuals. One would have thought that the almost "tick box" approach to an exhaustive list of objective criteria which is advocated might tell against, rather than in favour of, their true interests and not be conducive to fairness. Certainly the claimants' arguments do not easily fit with the stipulation in Article 2(n) that the reasons to believe that there is a risk of absconding must be looked at by reference to the "individual case": as also confirmed in Article 28(2).

40. Third, and linked to that, Article 2(n) is in terms drafted by reference to "reasons to believe" that there is a risk of absconding. There is force in Mr Payne's objection that the claimants' approach would tend against an individual assessment and evaluation on such a basis of belief and would tend to equate, without more, the fulfilment of any of the objective criteria with the existence of a significant risk (the "tick box" approach).

41. Nor, in my opinion, can the claimants get any support from the decision in *Chodor*. As I have said, that case was directed at an altogether different legal issue: viz. what is meant by "defined by law" in Article 2(n). But to the extent that reliance was sought to be placed on the statements in paragraph 42 of the judgment in that case, that with respect involved a mis-reading of that paragraph. That paragraph is not concerned with the quality or content of the objective criteria: it is concerned with the need for the criteria to be set out clearly by a binding "act", foreseeable in its application, in each Member State. Moreover it is plain, set in context, that the word "define" as there used, and as used in Article 2(n), is not used in a narrow sense but is used in a broad sense of "setting out" or "establishing": as indeed is confirmed by paragraph 47 of the decision in *Chodor*. In my view, the claimants, in constantly emphasising the word "define", seek to give that word far more weight than it can, in context, reasonably bear.

42. Indeed, as I see it, paragraph 42 of the decision on *Chodor* is if anything actually against the claimants' arguments: for not only does it confirm the "individual discretion" available to Member States, in relation to the existence of a risk of absconding, but also it confirms that that discretion is to be exercised "within a framework" of certain predetermined limits. The word "framework" is revealing. It accords entirely with the wording of Article 2(n) which requires that the reasons to believe are "based on" objective criteria defined by law.

43. Turning to the content of the 2017 Regulations, there can be no valid objection that they are not "mandatory". The language of paragraph 4 (consistent with its heading) is clear

that the criteria set out in (a) – (k) "must" be considered. That is explicit language of prescription. Further, I reject the contention that the criteria set out in paragraph 4 are no more than a non-exhaustive list of relevancies. Paragraph 4 is not open-ended: it self-evidently delimits the criteria required to be considered. Put in the language of *Chodor*, it plainly provides a "framework of predetermined limits".

44. It may in fact here be noted that Article 2(n) itself, which defines "risk of absconding", is drafted by reference to the existence of reasons to believe that a person may abscond. It is Article 28(2) that introduces the requirement that such risk must be "significant". But there is no definition as such of "significant risk of absconding"; and the requirement of objective criteria defined by law as set out in Article 2(n) does not of itself extend to an assessment of the significance of such risk.

45. The 2017 Regulations however – as their title connotes – do apply to an assessment of *significant* risk. That is explicitly confirmed, notwithstanding the actual heading to paragraph 4, by the opening line of paragraph 4 itself. For that reason, I would respectfully query aspects of the judgment of Lambert J which suggest a three-stage approach: the first stage being an assessment of risk of absconding, the second stage being an assessment of the significance of the risk and the third stage being an assessment of the availability and effectiveness of alternative measures. It is correct that the *significance* of the risk of absconding involves an evaluation on the part of the decision-maker by reference to the listed criteria: the need for an evaluation of not only the existence but also the degree of risk being entirely in accordance with the requirement in Article 28 and Article 2(n) for an individualised assessment on a case by case basis. But the 2017 Regulations are in fact so drafted as, in effect, to fuse those first two stages: and, given the terms of Article 28, that is a practical, as well as legitimate, basis for setting out the relevant objective criteria. It permits the decision-maker to evaluate the weight to be given to such criteria (where fulfilled) and to take account of any explanations or mitigation that there may be in respect of any criterion in each particular case. That is, as I see it, designed to be an entirely practicable and sensible way of approaching the assessment of significant risk and is amply compliant with Article 28 and Article 2(n), read as a whole.

46. I should also draw attention to a crucial further aspect of the overall approach called for. It is emphatically *not* the case – as Lambert J rightly stressed – that if the objective criteria (or some or all of them) are held to be satisfied then a Dublin III asylum seeker *must* be detained. To the contrary, Article 28 makes clear that the assessment (in an individual case) of the existence of a significant risk of absconding is but a necessary condition precedent to a decision to detain. But whether or not actually to detain remains a matter of discretion in each case: as the wording of Article 28(2) makes explicit ("where there is a significant risk of absconding, Member States *may* [emphasis added] detain…and only in so far as detention is proportional…"). This is critical to the way in which the measure works. And there is nothing whatsoever in the 2017 Regulations which goes against that. That matter of itself, as it seems to me, also disposes of Mr Fordham's complaint that any one or more of the various criteria (a) – (k) in paragraph 4 would apply to almost all, or the great majority, of Dublin III individuals. Maybe they would. But the 2017 Regulations – in the interests of the asylum seeker – not only require a weighing of the relevant criteria but also do not in any way cut down the taking into account of all residual matters relating to the fairness and proportionality of actual detention.

47. For these reasons, I have no real hesitation in rejecting the first ground of appeal.

48. But if more were needed – I do not think that it is – there is more.

49. First, the judge, understandably enough, asked Mr Fordham at the hearing to come up with a form of objective criteria for assessing significant risk which he would accept as lawful. The effort he came up with – and which he maintained before us, even though he was prepared to accept that there could be other lawful formulations, although he put no alternative before us – was this:

> "(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."

50. One only has to glance at this to see, with respect, how limited it is. At all events, it is demonstrable that a Member State could legitimately go further in establishing its own criteria. The point is underpinned by consideration of the proposed amending legislation which the Czech Republic was proposing to introduce (but had not then introduced) as set out in paragraph 12 of *Chodor*. That was in the following terms:

> "The police shall decide to detain a foreign national for the purpose of his transfer to a State bound by directly applicable legislation of the European Union only if there is a significant risk of absconding. There is considered to be a significant risk of absconding in particular where the foreign national has stayed in the Czech Republic illegally, has already previously avoided transfer to a State bound by directly applicable EU legislation, or has attempted to abscond or expressed an intention not to comply with a final decision to transfer him to a State bound by directly applicable EU legislation, or if such an intention is apparent from his behaviour. There is also considered to be a significant risk of absconding where a foreign national who is to be transferred to a State bound by directly applicable EU legislation which is not immediately adjacent to the Czech Republic cannot lawfully travel to that State independently and

cannot provide the address of a place of residence in the Czech Republic."

51. The significance of this is that Mr Fordham held this up as an example of what would be lawful. But by reference to his own arguments, that is unexplained. Indeed, it is, as I see it, inexplicable. For instance, the main part of that amending legislation is qualified by the words "in particular": connoting that there may be other, unexpressed, criteria. That is not overcome, pace Mr Fordham's efforts, by the inclusion of the final sentence of the amendment. In saying this, I stress that I am not for one moment seeking myself to comment on the lawfulness of the Czech legislative amendment. All I say is that by reference to the claimants' own arguments it would not be lawful: yet they somehow at the same time seek to say that it is.

52. The second point is this. On 27 September 2017 the Commission published a Commission Recommendation establishing a common "Return Handbook". (This, it is to be noted, relates to a Return Directive from which the United Kingdom had opted out.) In its approach to the risk of absconding, as set out in paragraph 1.6 of the Annex to the Commission Recommendation, and after referring to the decision in *Chodor,* the Commission stresses that Member States "enjoy a wide discretion" in determining such criteria. It is proposed in the Annex, however, that a listed series of matters – twelve in number – be taken into due account. This list is far more extensive and wider than those criteria formulated by Mr Fordham (as set out above), is far more extensive and wider than those set out in the Czech amending legislation set out in *Chodor* and indeed is far more extensive and wider than the list of criteria set out in paragraph 4 (a) – (k) of the 2017 Regulations themselves. For good measure, the Annex goes on to state that "National legislature may establish other objective criteria to determine the existence of a risk of absconding"; and yet further it permits Member States additionally to provide further objective circumstances constituting a "rebuttable presumption" of a risk of absconding.

53. All this, as Mr Fordham frankly acknowledged, is flat against his argument. It no doubt is the case, and I accept, that such provisions in this Annex to the Commission Recommendation do not operate as some kind of legal precedent binding on this court. But even so it connotes that if the claimants' arguments are right then the Commission appears woefully to have misunderstood the meaning and effect of Article 28 and Article 2(n). The more realistic view, of course, is that the Commission has not misunderstood the meaning and effect of the Dublin III Regulation at all: rather, it is the claimants' arguments which are wrong.

54. So these further points operate to confirm the view which I in any event reach: which is that the claimants' attack on the lawfulness of the 2017 Regulations on the basis set out in the first ground of their appeal is untenable.

(2) Proportionality

55. I turn to the second ground of appeal: which is that the 2017 Regulations cannot be justified as proportionate.

56. I would observe straightaway that, if that is right, then again the Commission appears woefully to have misappraised the lawfulness of the recommendations as to objective criteria made in the Annex to the Commission Recommendation. At all events, if the

2017 Regulations are unlawfully disproportionate then these recommended criteria set out in the Annex surely must, a fortiori, also be unlawfully disproportionate.

57. I am of the clear view, in agreement with the judge, that the 2017 Regulations are not unlawfully disproportionate. I consider the position clear cut. I propose to express my views shortly. In doing so, I make plain that I would also approve the detailed reasoning of the judge on this aspect.

58. In agreement with the judge, I very much doubt, as an initial point, if the test for assessing proportionality as put forward on behalf of the claimants is made good. What is said is that the 2017 Regulations can only be justified (if at all) by a yardstick both of suitability and of necessity (see *Lumsdon* at paragraph 52): and a court's review of the proportionality of the 2017 Regulations is required accordingly to be at the most intensive end of the spectrum.

59. The reasons (which are interlinked) whereby I doubt that this is correct are essentially three.

    1) First, as I have already emphasised, the Dublin III Regulation has left it to Member States to set out in national law their own objective criteria. Thus a wide measure of discretion has been conferred on Member States as to how they give effect to the requirements of Article 28 read with Article 2(n). The 2017 Regulations are thus an instrument designed to implement and give effect to European law, in the form of the Dublin III Regulation, which has itself given a measure of discretion as to content in that regard.

    2) Second, it must also be emphasised again that the objective of the Dublin III Regulation is not just to afford enhanced protection to asylum seekers potentially within its ambit. It is also – indeed centrally so – to ensure the efficiency of operation of the procedures under which the appropriate Member State is to take responsibility and for that purpose to prevent frustration of such procedures by (for example) absconding. True it is that the 2017 Regulations are geared to the assessment of a significant risk of absconding as a precursor to any potential decision to detain. But the wider objectives have to be borne in mind.

    3) Third, it is also essential to bear in mind that, for the reasons given above, fulfilment of some or all of the objective criteria does not mandate a decision to detain. Any decision to detain is evaluative and discretionary: and is a decision which, by its nature and as Article 28(2) confirms, is itself required to meet requirements of proportionality and not to be exercised where other less coercive effective measures are available.

60. For these reasons, I would not be minded to accept the claimants' formulation of the required approach. But even accepting it for present purposes (as the judge also was prepared to do) I in any event agree with the judge that the 2017 Regulations are justified as proportionate.

61. One only has to look at the matters set out in paragraph 4 (a) – (k) of the 2017 Regulation to see that they are all rationally and closely connected to an assessment of significant risk of absconding, and are not conducive to arbitrariness. They are also

plainly objective. Mr Fordham raised some quibbles – and, with respect, quibbles are what they were – as to some of them. For example, he queried the relevance of (g) relating to ties with the United Kingdom. But one can readily see ways in which the presence of ties with the United Kingdom could properly bear on the assessment of risk of absconding. In fact, as recorded in the judge's judgment at paragraph 59, Mr Fordham criticised every single one of the listed grounds (a) – (k) as too broad and/or insufficiently connected with a risk of absconding. For the reasons the judge gave, those criticisms are not tenable, whether taken individually or collectively. Nor, as I have said, is the overarching objection that such criteria would, between them, of themselves tend to encompass almost all potential Dublin III individuals such as to be of itself a valid legal objection.

62. Further I do not, for myself, readily comprehend how the formulation proffered on the part of the claimants as acceptable objective criteria (see paragraph 49 above) or the proposed amending legislation in Czech law apparently considered acceptable by the claimants can be justified as proportionate – as the claimants' arguments might connote – but the 2017 Regulations cannot be.

63. It is also essential to bear in mind the very important consideration that, once and if an assessment of significant risk has been made, any actual decision to detain of itself remains discretionary and must be justified as proportionate. In fact, that point of itself seems to me to be the strongest possible contra-indication against the correctness of this argument on want of proportionality.

64. Overall, it is clear, in my opinion, that this proportionality challenge to the 2017 Regulations – even adopting the most intensive level of review – must fail.

Conclusion

65. I would dismiss this appeal on both grounds advanced and would confirm the conclusion of the judge. The remaining aspects of the Judicial Review claims may therefore now proceed to decision.

The Senior President of Tribunals:

66. I agree.

Lord Justice Hickinbottom:

67. I also agree.