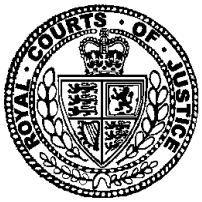

Neutral Citation Number: [2019] EWHC 3192 (Admin)

Case No: CO/2682/2017.

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 November 2019

Before :

Ms Margaret Obi
(sitting as a Deputy High Court Judge)

- -

Between :

The Queen (on the application of Shirko Ismail) **Claimant**

- and -

Secretary of State for the Home Department **SSHD**

- -

Mr Raza Husain QC, Mr David Chirico and Mr Stephen Knight (instructed by **Duncan Lewis Solicitors**) for the Claimant
Robin Tam QC and Ms Julie Anderson (instructed by the **Government Legal Department**)

Hearing dates: 17 & 18 October 2019

- -

Approved Judgment

Ms Margaret Obi:

This judgment is divided into nine sections as follows:

I. Introduction

1. This is a claim for judicial review. The factual context is representative of the well-known phenomenon of asylum seekers applying for asylum in several EU Member States or seeking to apply in a particular Member State having transited from other Member States, otherwise known as '*forum shopping*'. The Dublin III Regulation is the latest European Regulation which seeks to establish criteria and mechanisms for determining which Member State is responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person. The host Member State may request the Member State which it considers to be responsible under the Dublin III Regulation to either '*take charge*' of that applicant or take the applicant back. A request to '*take charge'* applies where the person has not yet lodged an application for asylum in the responsible Member State and '*take back*' applies where, as in the present case, the person concerned has lodged an application for asylum before moving to the host Member State. If a Member State agrees to the request, the host Member State will transfer the applicant in accordance with the procedure as set out in the Dublin III Regulation. To ensure the procedure is implemented the Dublin III Regulation permits detention subject to strict criteria relating to the purpose, proportionality and necessity of the detention.

2. The Claimant is a national of Iraq and was detained by the Secretary of State for the Home Department (SSHD) on 10 May 2017. He claims that his detention was unlawful on the basis that he was not detained in accordance with Article 28 of the Dublin III Regulation and the Transfer for Determination of an Application for International Protection (Detention) (Significant Risk of Absconding Criteria) Regulations 2017 (SI 405/2017) ('the 2017 Regulations'). This is the only ground upon which permission to apply for judicial review was granted.

3. The Claimant seeks orders:

    i. Declaring the Claimant's detention unlawful;

    ii. Damages;

iii. Costs;

iv. Any other remedy the Court thinks fit.

4. The Claimant's detention entirely post-dates the decision of the Court of Justice of the European Union (CJEU) in *Policie ČR v Al Chodor and others* Case C-528/15 [2017] 3 CMLR 24. In *Al Chodor* it was held that Article 28(2) (detention on grounds that there is a significant risk of absconding) and Article 2(n) (definition of 'risk of absconding') must be interpreted as requiring a '*binding provision of general application*' setting out objective criteria for determining when an individual poses a risk of absconding in order for detention under the Dublin III Regulation to be lawful and that '*settled case-law confirming a consistent administrative practice …cannot suffice.*' Immediately after the *Al Chodor* judgment was handed down the SSHD promulgated the 2017 Regulations.

II. Preliminary Issue – Duty of Candour

5. Before turning to the application to amend and the background to this case, it is necessary for me to consider an important preliminary issue.

6. During the pre-action stage the SSHD did not disclose (i) a file note dated 11 May 2017; and (ii) the detention reviews. The file note was obtained by the Claimant via a subject access request; it was not served by the SSHD in these proceedings. However, the content of the file note was produced in the GCID notes which were disclosed. The SSHD disclosed the 21 Day Detention Review and the 28-day Detention Review on 7 October 2019. During the hearing itself the 24-Hour Detention Review was disclosed. The Claimant made seven requests for disclosure of all documents relating to his detention in letters to the UK Dublin/Third Country Unit, during the pre-action stage of these proceedings and other proceedings, in his Statement of Facts and Grounds of Judicial Review and in correspondence with the Government Legal Department. However, disclosure in judicial review proceedings is not dependent on requests being made and the general rules in civil procedure requiring the disclosure of documents do not apply. Parties must disclose any information or material facts which either support or undermine their case to assist the Court. As the Administrative Court Judicial Review Guide 2019 makes clear, '*[t]he Court will expect public authorities to comply with the duty of candour without being reminded of it.*'

7. Mr Tam QC described the non-disclosure as a '*documentary oversight*' and at worst a '*muddle*'. Mr Husain QC accepted that the non-disclosure was not deliberate. However, he submitted that the *effect* was to mislead and that the disclosure of the detention reviews in particular was selective, partial and misleading.

8. Although I accept that no member of the SSHD's legal team acted in bad faith, it is impossible to overstate the importance of the continuing duty of candour in judicial review proceedings. The trust and confidence upon which the duty of candour depends is undermined by the events which have occurred in these proceedings and can compromise the ability of the executive's legal representatives to discharge their ethical and professional duties. Failures of this kind on the part of the executive are

detrimental to the rule of law and can have repercussions beyond the individual case. There can be a significant knock-on effect. I do not consider that the SSHD properly discharged her duty in this case and this is of particular concern given the nature of the claim and the vulnerable status of the Claimant. There can be no excuse for this poor compliance and it must be deprecated in the strongest possible terms.

III. Applications to Amend Particulars of Claim

The Applications and Submissions

9. On 9 October 2019, the Claimant lodged an application to amend the grounds of claim following late receipt of the detention reviews. The application sought permission to argue that the Claimant's detention was unlawful in principle between 17 May 2017 and 31 May 2017 because (i) there was an obligation to carry out 7 day and 14 day reviews under the non-Third Country Unit review timetable; (ii) the reviews had not been carried out; and (iii) therefore the Claimant's detention was unlawful (see ***R v Kambadzi) v Secretary of State for the Home Department*** [2011] UKSC 23). The Claimant also sought permission to clarify his pleadings in relation to damages, interest and costs. Mr Husain submitted that the Claimant was potentially entitled to substantial damages as a consequence of his unlawful detention. Although Mr Tam accepted that the detention reviews had not been carried out and therefore the Claimant had been unlawfully detained, he opposed the application on the basis that only nominal damages would flow from that liability (see ***OM (Nigeria)*** [2011] Civ 909).

10. During the course of the hearing Mr Husain, in response to a challenge from Mr Tam, made a further oral application to amend the grounds. He sought permission to argue that the Claimant was entitled to know the legal and factual basis for his detention. However, his primary submission was that no application was required as it was addressed in his skeleton argument and Mr Tam had engaged with the substance of the point in his skeleton argument.

Decision

11. As a consequence of my judgment in relation to Ground 1, I concluded that no useful purpose would be served by granting the application to amend the grounds of claim in relation to the failure to carry out detention reviews. The submissions made on behalf of the Claimant, in relation to the failure to communicate the factual and legal basis for his detention, were set out in Mr Husain's skeleton argument. I was satisfied that Mr Tam was put on notice that this was in issue and that he had an opportunity to address it fully. Therefore, permission to amend the particulars of claim was not required.

12. However, in view of my observations with regard to the duty of candour, I concluded that it was in the interests of justice, to grant the application for the Claimant to amend his Statement of Facts and Grounds to enable indemnity costs to be pleaded.

IV. Factual Background and Procedural History

13. On 27 January 2017, the Claimant was encountered at Belfast Stena Docks whilst attempting to board a ferry to Cairnryan. He had travelled from Ireland that day without a visa. When asked for identification, he presented an Irish public services card. He was arrested and served with a notice of liability to removal. He was fingerprinted and photographed. A EURODAC (fingerprint database for identifying asylum seekers and irregular border-crossers) search revealed that the Claimant had been fingerprinted in (i) Austria on 6 May 2016; (ii) France on 14 June 2016; and (iii) Ireland on 17 October 2016. On the same day the Claimant voluntarily departed to Ireland.

14. On 10 May 2017, the Claimant was encountered in Northfleet, Kent amongst a group of suspected illegal entrants concealed in the rear of a refrigerated lorry that had travelled from Spain via France. The lorry had crossed from Calais to Dover that day. The Claimant had in his possession a passport bearing a name and date of birth which was not his own.

15. The Claimant was served with IS.96 (a notice to a person liable to detention) and detained. He claimed asylum. In his initial interview, the Claimant said that he had left Iraq about two years previously. He had travelled to Turkey, then Bulgaria, and then Austria via many countries. He had been travelling illegally. He had been fingerprinted in many countries, such as Austria, Germany, France, Italy, Ireland, Turkey, Greece and others which he could not remember. He said that he had claimed asylum in France and Ireland. He had not waited for an outcome of either of the applications. He had wanted to come to the UK, but the lorry he was in ended up in Ireland, so he claimed asylum there. He wanted to come back to the UK, but the lorry he entered went all the way to France. He stayed in 'a jungle' near Dunkirk until crossing back to the UK. He said he had a brother in the UK but did not know where he was or his immigration status.

16. The Claimant was fingerprinted. A EURODAC search revealed that in addition to the countries referred to in paragraph 13 above (Austria, France and Ireland) the Claimant had been fingerprinted in Greece on 24 November 2015. This was believed to be as a result of an irregular border crossing.

17. On 19 May 2017, the SSHD made formal requests under the Dublin III Regulation to Austria, France, Germany and Ireland. On 24 May 2017, responses were received from Austria and Germany rejecting the SSHD's requests. However, a response from Ireland accepted responsibility under the Dublin III Regulation. The initial deadline for a Dublin III Regulation transfer to Ireland was 5 July 2017.

18. On 31 May 2017, the Claimant's detention was reviewed and maintained. On 31 May 2017, the Claimant's solicitors wrote to the SSHD requesting the Claimant's release from detention on temporary admission. On 1 June 2017, the Claimant was removed

from association under Rule 40 for an alleged assault of another detainee. On the same day, a response was received from France rejecting the SSHD's Dublin III Regulation request to take responsibility for the Claimant's asylum claim. On 2 June 2017, the Claimant's asylum claim was refused and certified on safe third country grounds. That same day, the SSHD refused the Claimant's request for temporary admission. On 7 June 2017, the Claimant's detention was reviewed and maintained.

19. On 30 May 2018, the Claimant was interviewed by the Voluntary Returns Service (VRS) following an application made by him to return to Iraq. On 20 June 2018, the Claimant was told that his assisted return application had been approved, and forms were sent to him for signature and return. On 13 July 2018, the Claimant's application was treated as withdrawn as he had failed to engage with the VRS process and attempts to contact him had been unsuccessful.

20. The procedural history of this case is as follows:

    i. On 2 June 2017, the Claimant's solicitors wrote a pre-action protocol letter before claim concerning the lawfulness of the Claimant's detention.

    ii. On 5 June 2017, the Claimant's solicitors wrote another pre-action protocol letter before claim concerning the lawfulness of his removal from association for the alleged assault.

    iii. On 6 June 2017, the Claimant's solicitors issued the present proceedings on two grounds; Ground 1: detention is in breach of Article 28 Dublin III Regulation and Ground 2: The ***Hardial Singh*** principles were not satisfied. The Claimant also made an application for interim relief. On the same day, O'Farrell J refused the Claimant's application for interim relief and refused permission to apply for judicial review. The Judge considered that the Claimant had no arguable case:

        a. On the basis of the Claimant's immigration history, there was a clear risk of absconding, given that many applications for asylum had been made in different countries but the Claimant had not waited for a determination of them; the Claimant had entered the UK illegally; and the Claimant had been in possession of a false passport.

        b. There was no arguable breach of the ***Hardial Singh*** principles as the Claimant's removal was intended within 2 or 3 weeks.

    iv. On 7 June 2017, the Claimant issued further judicial review proceedings concerning the lawfulness of his removal from association.

    v. On 13 June 2017, an interim relief hearing took place in and was adjourned to 15 June 2017 for disclosure of documents relating to the Claimant's removal from association. (This hearing was subsequently vacated because the Claimant had been returned to free association.)

    vi. On 14 June 2017, the Claimant applied within the present proceedings to renew his application for permission to apply for judicial review. On 15 June 2017, the Claimant was medically certified as fit to fly. However, it was noted

that a pre-action protocol response in relation to the Claimant's removal from association remained outstanding. Instructions were given for the pre-action protocol response, notices of liability for removal and refusal of the asylum claim to be prepared. Thereafter, a flight to Ireland was to be booked.

vii. On 19 June 2017, the Claimant applied to the First-tier Tribunal ('FTT') for bail. The application was received by the FTT on 20 June 2017.

viii. On 20 June 2017, the pre-action protocol response in relation to the Claimant's removal from association was sent to his solicitors.

ix. On 27 June 2017, the Claimant's bail application was received by the SSHD. On 28 June 2017, because of the time being taken to resolve the removal from association matter, an 'extra time' letter was sent to Ireland, extending the removal deadline to 6 December 2017.

x. On 30 June 2017, C was granted bail by the FTT, and was released on the same day.

xi. On 7 July 2017, Swift J ordered that the removal from association matter be stayed pending the outcome of ***R v (Muasa) v Secretary of State for the Home Department*** [2017] EWHC 2267 (Admin). On 29 November 2017, by consent the Court ordered that the present proceedings be stayed pending the outcome of ***R v (Omar) v Secretary of State for the Home Department*** [2018] EWHC 687 (Admin).

xii. On 11 April 2018, the Claimant's solicitors wrote to the SSHD asserting that because the Claimant had not been removed to Ireland by 24 November 2017, the UK now bore responsibility for considering the Claimant's asylum claim. The solicitors requested confirmation that the Claimant's asylum claim would be dealt with by the UK.

xiii. On 13 August 2018, the SSHD replied to the Claimant's solicitors reiterating that the Claimant's case continued to be being dealt with under the Dublin III Regulation with a view to removing the Claimant to Ireland where he had claimed asylum. However, because of the continuing judicial review proceedings, removal directions had been suspended.

xiv. On 8 May 2019, at a hearing before Clive Sheldon QC (sitting as a deputy High Court judge), the Claimant was granted permission to apply for judicial review on Ground 1 alone. The Claimant was refused permission to apply for judicial review on Ground 2, relating to the ***Hardial Singh*** principles.

V. Legal Framework

EU Law

Dublin III Regulation and Article 28

21. Article 1 of the Dublin III Regulation provides that *'[t]his Regulation lays down 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 ('the Member State responsible')*.'

22. Article 20 of the Regulation is entitled "*Start of the procedure*". Article 20(1) provides that *"[t]he process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State"*.

23. Article 20(2) provides that *'[a]n application for international protection shall be deemed to have been lodged once a form submitted by the applicant or a report prepared by the authorities has reached the competent authorities of the Member State concerned. Where an application is not made in writing, the time elapsing between the statement of intention and the preparation of a report should be as short as possible'*.

24. Article 28 in full provides 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.*
>
> *Where a person is detained pursuant to this Article, the period for submitting a take charge or take back request shall not exceed one month from the lodging of the application. The Member State carrying out the procedure in accordance with this Regulation shall ask for an urgent reply in such cases. Such reply shall be given within two weeks of receipt of the request. Failure to reply within the two-week period shall be tantamount to accepting the request and shall entail the obligation to take charge or take back the person, including the obligation to provide for proper arrangements for arrival.*
>
> *Where a person is detained pursuant to this Article, the transfer of that person from the requesting Member State to the Member State responsible shall be carried out as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of the request by another Member State to*

> *take charge or to take back the person concerned or of the moment when the appeal or review no longer has a suspensive effect in accordance with Article 27(3).*
>
> *When the requesting Member State fails to comply with the deadlines for submitting a take charge or take back request or where the transfer does not take place within the period of six weeks referred to in the third subparagraph, the person shall no longer be detained. Articles 21, 23, 24 and 29 shall continue to apply accordingly.*
>
> *4. As regards the detention conditions and the guarantees applicable to persons detained, in order to secure the transfer procedures to the Member State responsible, Articles 9, 10 and 11 of Directive 2013/33/EU shall apply.'*

Domestic Law

25. Section 3 of the Immigration Act 1971 sets out the requirement for a person who is not a United Kingdom citizen (or a person with a right of abode in the UK) to be granted leave to enter, or leave to remain, in the United Kingdom. A person without current valid leave to remain in the United Kingdom is subject to administrative removal or deportation. The Immigration Act 1971 provides broad powers of detention pending deportation or removal in Schedules 2 and 3.

26. Paragraph 16(2) of Schedule 2 to the 1971 Act provides *inter alia*:

> *"If there are reasonable grounds for suspecting that a person is someone in respect of whom [removal] directions may be given …, that person may be detained under the authority of an immigration officer pending –*
>
> *(a) a decision whether or not to give such directions;*
>
> *(b) his removal in pursuance of such directions."*

27. The exercise of the powers to detain a person administratively is subject to well-established common law limitations. They were set out in the *Hardial Singh* case and authoritatively summarised by Lord Dyson MR in *Lumba v Secretary of State for the Home Department* [2012] UKSC 12. In *R (AA (Afghanistan)) v Secretary of State for the Home Department* [2012] EWCA Civ 1383, the Court of Appeal held that for detention to be lawful under this power it was not necessary for Home Secretary to establish with certainty that the person was someone in respect of whom removal directions *could* be made.

2017 Regulations

28. Article 3 of the 2017 Regulations provides as follows:

> *'These Regulations apply where an asylum seeker, P, is liable to detention under Schedule 2 to the Immigration Act 1971 and—*

> *(a) P's fingerprint data has been processed in accordance with [the recast EURODAC Regulation] and a comparison with data held by another participating State is to be undertaken;*
>
> *(b) evidence or information listed in Annex II to Commission Regulation (EC) No. 1560/2003 [the Dublin Implementation Regulation] has been identified which suggests that, in accordance with the Dublin III Regulation, another participating State may be responsible for examining P's application for international protection;*
>
> *(c) P is the subject of an information sharing request made by the United Kingdom to another participating State under Article 34 of the Dublin III Regulation; or*
>
> *(d) P is the subject of a take charge or take back request made by the United Kingdom to another participating State under Sections II and III of Chapter VI of the Dublin III Regulation—*
>
> *(i) which has yet to be determined, or*
>
> *(ii) which has been accepted and arrangements are being made for P's transfer from the United Kingdom to another participating State.'*

VI. Submissions

The Claimants Submissions

29. Mr Husain submitted that the Dublin III Regulation applies once an individual makes a claim for asylum which is lodged with the competent authority or when the relevant person's fingerprints have been taken for comparison in accordance with the EURODAC regulation. Both of the above events occurred on 10 May 2017. Mr Husain referred the Court to the '*Notice to Detainee Reasons For Detention and Bail Rights*', dated 10 May 2017, which contains a box side-marked, '*There is insufficient reliable information to decide on whether to grant you temporary admission or release.*' That box was ticked. There is a separate box for detention on the basis that the detainee is '…*likely to abscond if given temporary admission or release*'. That box was not ticked. Mr Husain submitted that the documentation confirms that the Claimant was not detained because of a significant risk that he would abscond. He invited the Court to conclude that the decision to detain the Claimant on 10 May 2017, was in order to return him to one of the countries to which the SSHD had made '*take charge*' requests and was not taken in accordance with the 2017 Regulations and therefore violated Article 28 of the Dublin III Regulation.

30. In response to the submission, made by Mr Tam, that the Claimant's detention was never within the scope of Article 28(1), Mr Husain submitted that the temporal scope of Article 28 clearly demonstrates that the SSHD's argument is unsustainable for the following reasons:

i. *Text.* The scope of the Dublin III Regulation is much wider than the transfer of asylum seekers between Member States and detention within the context of those transfer arrangements. Article 1 refers to the '*criteria and mechanisms for determining the Member State responsible for examining an application for international protection.'* Article 20 is entitled '*Start of the Procedure*' and makes it clear that the '*process*' starts as soon as an application for asylum is lodged. Article 28 refers to the person '*subject to the procedure*'; not the person subject to transfer. The Explanatory Note to the 2017 Regulations uses the same language as *Al Chodor* and confirms that the SSHD recognised that it applied to asylum seekers '*whose application is subject to the Dublin III Regulation procedure*.' The scope of Article 28 is the same as the Dublin III Regulations, in that, Article 28 continues to apply as long as the SSHD is taking action which is required or authorised by the Dublin III Regulations, including a decision under Article 17(1) to examine an application which is not its responsibility.

ii. *Context.* When an individual is detained under Article 28(3) the Member State must submit a '*take charge*' or '*take back*' request within one month. Therefore, Article 28(3) contemplates detention even before a request for transfer has been submitted.

iii. *Purpose.* In the initial proposal which ultimately led to the Dublin III Regulation (COM (2008) 820 final), the EU Commission proposed the introduction of a new provision '*recalling the underlying principle that a person should not be held in detention for the sole reason that he/she is seeking international protection*' and '*in order to ensure that detention of asylum seekers under the Dublin procedure is not arbitrary, limited specific grounds for such detention are proposed*'. The provision by which those '*limited specific grounds*' are imposed is Article 28 which, in its final form, also includes detention time limits and further restrictions on the power to detain. Furthermore, in *Al Chodor*, the CJEU noted that the Dublin III Regulation as a whole was intended to '*make the necessary improvements […] not only to the effectiveness of the Dublin system but also to the judicial protection enjoyed by asylum seekers.'* It '*places significant limitations on the power of the member states to detain a person*' and provides a '*limitation on the exercise of the fundamental right to liberty enshrined in art 6 of the Charter [of Fundamental Rights]*', and therefore pursues the objective (amongst other things) of '*protecting the individual from arbitrariness*', and detention pursuant to it is '*subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness*.'

iv. *Principle.* Article 28 improves the protection against deprivation of liberty by imposing limitations on Member States. It should be broadly construed and therefore should apply if the context, language and purpose permits.

v. *Precedent. In Hassan v Préfet du Pas-de-Calais (Case C-647/16) the CJEU held that it is '…clear from article 28(2)(3) of that Regulation that the member states are authorised to detain persons concerned even before the request to take charge or take back is submitted to the requested member state, when the*

conditions laid down by that article are met, the notification of the transfer decision not being a prerequisite for such a placement.'

vi. *SSHD's own regulations.* Article 3 of the 2017 Regulations '*Persons to whom these Regulations apply*' sets out the routes that will trigger an examination of an individual's asylum claim under the Dublin III Regulation. They are not conjunctive.

vii. *SSHD's own practice.* The 21 Day Detention Review demonstrates that, as of 31 May 2017, when the Claimant was not yet subject to a transfer, the caseworker was applying the 2017 Regulations. Application of the Dublin III Regulation at a very early stage (subject to the triggering events) causes the SSHD no operational difficulty. If in practice the SSHD invoked the Dublin III Regulation at the end of the process, once transfer arrangements were in place to effect a transfer to another Member State, a witness statement to that effect would have been provided.

31. During his submissions Mr Husain referred the Court to the judgment in *Khaled (no.2) and others v Secretary of State for the Home Department* [2016] EWHC 1394 (Admin) which was decided before the CJEU handed down judgment in *Al Chodor.* In *Khaled (no.2)* Garnham J held that:

> *'Article 28(2) […] applies in the circumstances covered by article 28(1), namely where the detention was solely for the purpose of a removal under Dublin III and not when the detention is authorised under some free-standing domestic law provision.'* (§64).

32. In a later judgment, *R (S) v Secretary of State for the Home Department 1 WLR 3641*, John Howell QC (sitting as a deputy high court judge) with the benefit of the *Al Chodor* judgment held that Garnham J's conclusion '*…cannot stand with the subsequent decision of the Court of Justice in Al Chodor*' (§ 40).

33. Mr Husain further submitted that Garnham J's conclusion was effectively overruled on appeal by the Court of Appeal in *R (Hemmati) v Secretary of State for the Home Department* [2018] EWCA Civ 122.

The SSHD's Submissions

34. Mr Tam's submissions in relation to the scope of Articles 28(1) and 28(2) can be summarised as follows:

i. The scope of application of Article 28(1) must be a pure question of law. It follows that arguments about the meaning of the SSHD's paperwork will not provide any illumination on the application of Article 28(1) in principle;

ii. The Claimant misstates the SSHD's approach and that of Garnham J in *Khaled (no.2)*. Article 28 simply does not apply to detention unless and until the individual is subject to Dublin III Regulation transfer arrangements after

agreement is reached to effect a transfer to another Member State. In summary: (a) Garnham J did not hold that in an Article 28 case, a domestic law power to detain can displace Article 28; (b) John Howell QC misunderstood this part of Garnham J's judgment (analysed as Garnham J's second relevant conclusion), although he joined the wide consensus that Garnham J's first relevant conclusion (that Article 28 only applies where detention is solely for the purpose of a removal under the Dublin III Regulation; it does not apply if the detention is justified on other grounds) is correct; (c) Sales LJ's explanation of John Howell QC's misunderstanding was clearly correct; (d) The majority of the Court of Appeal did not disagree with Sales LJ, and the agreed assumption on which ***Hemmati*** was decided meant that they did not implicitly overrule Garnham J; (e) None of this, therefore, sheds any light on the question of when an individual is detained solely for the purpose of a Dublin III Regulation removal.

iii. The use of the Dublin III Regulation transfer mechanism is optional. Member States can always choose not to use the transfer mechanism in some cases.

iv. Even if the above submissions are rejected it is clear that the terms of Article 28 can only apply in a case with a cross border element. Article 28 is in Section V ('Detention for the purposes of transfer') of Chapter VI ('Procedures for taking charge and taking back'). The words '*taking charge*' and '*taking back*' show that Chapter VI can only operate in a case in which the Article 18(1) obligation is triggered, namely a case with a cross border element. Therefore, the argument that Article 28 applies at the outset must be incorrect. The location of Article 28 within the Dublin III Regulation shows that its scope must be more limited by reference to transfer, even if other parts of the Dublin III Regulation were (contrary to the SSHD's submission) to be construed to be wider in scope.

v. It is not part of the SSHD's case that there was a '*contingent warrant*' or a '*contingent authority to detain*' (based on the phrase '*contingent intention*' used by Sales LJ in ***Hemmati*** to describe a different point).

35. Mr Tam submitted that as a matter of principle the Claimant's detention was never within the scope of Article 28. He further submitted that the Dublin III Regulation is concerned with arrangements for *transfers* of asylum seekers falling within its scope of application and with detention in the context of operation of those transfer arrangements. At no time during the Claimant's detention was a transfer agreed, nor was he at any time detained for the *sole* reason of effecting an agreed transfer under the authority of the Dublin III Regulation. Whilst the possibility of use of the transfer mechanism was considered for a period, that possibility has now fallen away, and the Claimant's asylum claim will be substantively considered.

36. Mr Tam further submitted that, if at any material time Article 28(1) and the restrictions on detention set out in Article 28(2) did apply, then the Claimant's detention was in accordance with those restrictions because it was consistent with the criteria set out in the 2017 Regulations.

VII. Issues

37. Mr Tam in his Detailed Grounds of Defence stated that at all times the Claimant was detained for the '*dual purpose*' of (i) ensuring his availability for a Dublin III Regulation removal and (ii) ensuring his availability for direct removal to Iraq if a Dublin III Regulation transfer did not take place and if the SSHD ultimately determined to reject his asylum claim. However, as foreshadowed in paragraph 34(v) above, in his skeleton argument he refuted the assertion (made by Mr Husain in his skeleton argument) that it was ever part of the SSHD's case that there was a '*contingent warrant*' or '*contingent intention to detain*' in domestic law terms. Furthermore, Mr Tam's primary submission was that the Claimant's detention was not within the scope of the Dublin III Regulation. However, as mentioned in paragraph 36 above, he submitted that *if* the Claimant's detention did fall within Article 28(1) it was lawful because the 2017 Regulations were correctly applied.

38. Therefore, there was no '*contingent intention*' argument before the Court, and no dispute that if the Claimant's detention fell within the Dublin III Regulation, the 2017 Regulations applied. In these circumstances, I determined that the issues, as set out in the Mr Husain's skeleton argument, should be narrowed to reflect the core issues to be determined in this case. In my view the issues for the Court to determine are as follows:

    i. Did the Claimant's detention fall within the scope of Article 28 of the Dublin III Regulation?

    ii. If so, was the Claimant's detention in violation of the provisions within Article 28 and the 2017 Regulations?

VIII. Analysis

Issue (1) – *Did the Claimant's detention fall within the scope of Article 28 of the Dublin III Regulation?*

39. The starting point is Article 28(1) and the proper construction of the '*sole reason*' for detention under the procedures of the Dublin III Regulation. In *Khaled (No.2)* Garnham J decided that Article 28(1) does not apply when the detention of an individual is authorised under a free-standing domestic law provision. He also decided that the restriction set out in Article 28(2) can only apply in circumstances in which Article 28(1) itself applies. Garnham J went on to state at [§ 65]:

> *'The Immigration Act 1971 provides that a person who does not have current valid leave to remain is subject to administrative removal. The Claimants fall into that category. As noted above, the 1971 Act gives powers of detention provided by paragraph 16(2) of Schedule 2. That was the power exercised in the case of these Claimants. The fact that the SSHD then decided to employ the Dublin III provisions to effect removal to Bulgaria does not affect the legality of the detention. Article 28 governs and conditions the exercise of*

> *powers to detain when Dublin III is the source of the power to detain and remove; it does not abolish the pre-existing power under English domestic law to detain a non-UK citizen with no right to enter or remain in the UK pending their removal by whatever lawful means are available to the SSHD.'*

40. In *R (W) v Secretary of State for the Home Department* [2017] EWHC 9 (Admin), Her Honour Judge Alice Robinson (sitting as a High Court Judge), stated that she found the reasoning of Garnham J in *Khaled No.2* '*compelling*' [§106] and expressly agreed with it.

41. In *S* John Howell QC set out what he understood to be Garnham J's three relevant conclusions. For present purposes only the first and second are relevant: *'(i) Article 28 only applies where detention is solely for the purpose of a removal under the Dublin III: it does not apply if the detention is justified on other grounds;'* and '*(ii) Article 28 is accordingly irrelevant when detention for the same purpose is under some other power: in his view article 28 does not apply 'when the detention is authorised under some-free-standing domestic law provision'* [emphasis added][§38]. However, as recognised by Sales LJ in his dissenting judgment in *Hemmati* [§72] Garnham J in his second conclusion was not referring to detention '*for the same purpose*' when he referred to detention '*…under some free-standing domestic law provision'*. I accept the submission made by Mr Tam that a proper reading of Garnham J's judgment strongly indicates that he meant circumstances in which detention was not solely for the purpose of a Dublin III Regulation removal. I also accept his submission that the majority in the Court of Appeal (Sir Terence Etherton MR and Peter Jackson LJ) did not overrule Garnham J on this point. They stated in reference to the dissenting judgment of Sales LJ, '*…in his judgment [he] considers various matters which it is not necessary to decide on these appeals, and many of which were not the subject of submissions on the hearing of the appeals. We prefer to express no view of them*.' [§197]. Therefore, Sales LJ's analysis of Garnham J's judgment and the errors in John Howell QC's judgment were neither accepted nor rejected. This was because the Court of Appeal was not required to make any judicial finding that any of the claimants had been detained solely for the purpose of a Dublin III removal and therefore that Article 28(1) applied to them. The decision was based on an agreed assumption that Article 28(1) did apply. Sales LJ summarised the position in the following terms [§107]:-

> *'I say this is my provisional view because ultimately we did not hear argument on this, despite the ruling of Garnham J in Khaled. After debate at the start of the hearing before us in which the court sought to clarify what issues arose for its decision, Mr Swift told us that in the case of each appellant we should proceed on the assumption that the sole reason he was detained was that the Secretary of State wished to remove him using the Dublin III procedure (ie if he was not removed using that procedure, the Secretary of State would simply accept his asylum claim here without further examination and would not seek to remove him to his country of origin). Ms Lieven agreed. We were not told the reason for this concession by the Secretary of State. I assume it was made in order to present the*

> *court with a simplified set of cases in order to seek its guidance in relation to a situation in which article 28 is applicable. It is not usual for a court to examine a case on the basis of assumed facts, but since it became evident that no party or counsel was prepared to argue the case on any other basis we agreed to proceed on the basis of this assumption.'*

42. A natural reading of Article 28(1) supports the contention that a Member State cannot hold a person in detention simply because the individual is subject to the Dublin III Regulation procedures. As Garnham J stated in *Khaled No.2* it implies that if the individual's detention is justified on other grounds under domestic law, Article 28 did not make that detention unlawful. However, as stated above, *Khaled No.2* was decided before the CJEU handed down judgment in *Al Chodor*. In my judgment Garnham J's interpretation cannot survive the decision in *Al Chodor*.

43. In *Al Chodor* the asylum seekers were a father and his two sons ('the Al Chodors'). They were Iraqi nationals. The Al Chodors were stopped by the police in the Czech Republic and subsequently arrested. The police found, having consulted the EURODAC database, that they had previously claimed asylum in Hungary. The police took the view that there was a serious risk of the Al Chodors absconding. The Czech police detained the Al Chodors for a period of 30 days in accordance with the relevant Czech legislation. At the end of the period of detention the Al Chodors were transferred back to Hungary, that being the Member State responsible for examining their application for asylum under the Dublin III Regulation. The Al Chodors brought an action against the decision ordering their detention. The Czech Court annulled that decision, finding that Czech legislation does not lay down objective criteria for the assessment of the risk of absconding within the meaning of Article 2(n) of the Dublin III Regulation. That Czech Court accordingly ruled that the detention was unlawful. The Czech police brought an appeal on a point of law before the Supreme Administrative Court, Czech Republic against the first instance decision which generated a reference to the Court of Justice. The Court of Justice held that (i) the objective criteria for determining the risk of absconding must be established in a '*binding provision of general application*'; '*settled case-law confirming a consistent administrative practice …cannot suffice*.' [§ 45 and 47]; (ii) the absence of such a binding provision leads to the inapplicability of Article 28(2) of the Dublin III Regulation [§ 47]; and (iii) in the absence of those criteria the detention must be declared unlawful [§ 46].

44. *Al Chodor* recognises that Article 28 confers a power to detain in order to secure transfer procedures in accordance with Dublin III and that failure to comply with its requirements will render such detention unlawful. The '*high level of protection afforded to applicants covered by the Dublin III Regulation'* [§ 34] is undermined even if a Member State's domestic law authorises detention for that purpose (as it did in *Al Chodor*). Similarly, it would be inconsistent with the '*high level of protection*' if Member States were able to circumvent the restrictions in Article 28 by relying on domestic provisions for purposes which include, but are wider than, detention for the purpose of securing transfer to another Member State in accordance with the Dublin III Regulation procedures. Such an approach would render compliance with the Dublin III Regulation procedures optional. Mr Tam submitted that the Dublin III Regulation *is* optional. However, in my judgment that cannot be correct as the

safeguards included within the Dublin III Regulation would be devoid of practical effectiveness if it was entirely dependent on the SSHD to determine when it should be invoked. It would also be the antithesis to certainty. Furthermore, I accept the submission made by Mr Husain that in *Al Chodor* at no point did the Czech Republic renounce a dual intention to remove the Al Chodors to Iraq, if ultimately it was required to determine their asylum claim substantively. Nor did the CJEU consider it necessary to consider the ultimate outcome of the Al Chodors' substantive claim, or whether the Czech Republic had the power to detain them pursuant to the examination of that substantive claim. In any event, as the Court of Justice stated in *Stichting Al-Aqsa v Council of the European Union* (Joined Cases C-539/10P and C-550/10P) there are at least two constraints on domestic legislation: (i) '*the direct applicability of a regulation precludes, unless otherwise provided, the Member States from taking steps which are intended to alter the scope of the regulation itself.*'; and (ii) '*Member States must not adopt a measure by which the Community nature of a legal rule and the consequences which arise from it are concealed from the persons concerned*' [§ 86 and 87].

45. The unsuccessful claimants in *Khaled No.2* (Hemmati and Khalili) and the claimant in S were three of the five claimants in *Hemmati*.) Garnham J's conclusion in *Khaled No.2* was not overruled by the Court of Appeal in *Hemmati.* However, the Court of Appeal decision is inconsistent with the rationale as set out in Garnham J's judgment. The majority of the Court of Appeal held [§ 191] that:

> *'...paragraph 16(2) of Schedule 2 to the Immigration Act 1971 confers a discretion to detain persons liable to be removed from the United Kingdom pending a decision whether or not to give directions for removal and pending removal in pursuance of such directions, and it was that discretion which was purportedly exercised in respect of all the appellants. The detention of the appellants was unlawful because it was purportedly pursuant to the policy in the EIG which was in itself unlawful insofar as it failed to give effect to article 28(2) and article 2(n) […] Although the CJEU, at paras 36 and 41 [of Al Chodor] described the effect of article 28(2) as a limitation on the fundamental right to liberty, its direct effect in the United Kingdom operated as a limitation on the exercise of the statutory discretion to detain pursuant to paragraph 16(2) of Schedule 2 to the 1971 Act'* [emphasis added].

46. Mr Tam submitted that the Dublin III Regulation is concerned with arrangements for *transfer* of asylum seekers falling within its scope of application between Member States and with detention in the context of those arrangements. It was his contention that the Dublin III Regulation is only engaged when a transfer agreement has been reached between the Member States at a very late stage in the process. I do not accept these submissions. First, it ignores the judgment in *Hassan* which makes it clear that Member States are authorised to detain asylum seekers '…*when the conditions laid down by [Article 28(2) and (3)] are met…*' even before a '*take charge*' or '*take back*' request has been made. In my judgment the position adopted by the SSHD is unsustainable. Secondly, it ignores the fact that the Dublin III Regulation procedure covers all stages of an asylum application from third country nationals or stateless

persons including the initial asylum claim, the final determination by the Member State and the transfer of the asylum seeker to the responsible Member State, in appropriate cases. This is clear because in addition to the Article 28 provisions on detention the Dublin III Regulation provides for (i) the rights of all applicants for international protection to receive information about the Dublin III Regulation, that right commencing as soon as the application for international protection is lodged (Article 4(1); (ii) the requirement to interview a person '*in order to facilitate the process of determining the Member State responsible*' (Article 5(1); (iii) the criteria by which the host Member State is required to determine which Member State is '*responsible*' for examining the substantive asylum claim (Chapters III and IV); (iv) the procedures by which Member States '*take charge*' or '*take back*' an applicant for international protection (Chapter VI Articles 20-25), and strict mandatory time limits (the maximum time limits for making take back and take charge requests are measured from '*the date on which the application for international protection was lodged within the meaning of Article 20(2)'*) (Articles 21(1); 23(2)); (v) the procedures and safeguards relating to a person's transfer from the host Member State to another Member State (Articles 26-27 and 29-32); and (vi) procedures for administrative co-operation and information sharing at all stages of the Dublin III procedure (Article 34).

47. Although Mr Husain stated in his skeleton argument that the Dublin III Regulation '*amounts to a compulsory first stage in every application made for asylum in the EU*' he made it clear during his oral submissions that he was referring to the narrow class of asylum seekers that meet the criteria for transfer or possible transfer under the Dublin III Regulation. However, within that class the Dublin III Regulation has wide application. There will be asylum seekers who will not be transferred under the Dublin III Regulation for a wide range of reasons and the SSHD will be obliged to consider the asylum claim substantively. As Mr Tam submitted, domestic law contains powers to detain foreign nationals entering without leave to enter or remain, whilst their identity and immigration status is investigated. Frequently, foreign nationals claim asylum without declaring that they have claimed asylum in another Member State. If the foreign national has not made a prior claim for asylum elsewhere in the EU, they may be detained to ensure removal to their country of origin or habitual residence in the event that their claim for asylum in the UK is unsuccessful. If a EURODAC check reveals that the individual has made a prior asylum claim in another Member State, the SSHD can choose to consider the asylum claim substantively or can choose to ask the other Member State to accept responsibility for the asylum claim. That Member State may not accept such responsibility. If a Member State accepts responsibility in principle, the asylum seeker may argue that it would be a breach of his ECHR or other rights to transfer him to that Member State. Alternatively, the individual may bring a legal challenge, or some other event may occur, that delays removal beyond the time permitted for a Dublin III transfer. No transfer arrangements can be agreed while the lawfulness of transfer is challenged, and the process may be suspended or discontinued altogether. No Dublin III Regulation transfer arrangements will ever be made if the Member State does not accept responsibility, or if the individual is successful in his ECHR claim, or if removal is delayed beyond the permitted time.

48. The Dublin III Regulation will not come into play the moment a foreign national is apprehended at the border. However, it will come into play shortly thereafter, as

asylum claims and/or identification as an asylum seeker via EURODAC are events which are likely to occur fairly quickly. The wording of Article 20 makes it clear that the process of determining the Member State responsible for examining the individual's asylum claim starts as soon as the application is lodged with the host Member State. Furthermore, Article 17 provides a mechanism for the host Member State to determine the asylum application even if they are not the responsible Member State. Therefore, the event which starts the process is clear and the two events likely to bring the determination of the '*responsible*' Member State to an end are provided for under the Dublin III Regulation: (i) transfer to another Member State, or (ii) consider the claim substantively.

49. In my judgment, when Article 28 is read in the context of the decision in *Al Chodor*, the binding authority of the Court of Appeal in *Hemmati*, the principle of the primacy of EU law and the protective purpose of the Dublin III Regulation, the exercise of any power to secure transfer in accordance with the Dublin III Regulation must comply with that Regulation. Detention is not permitted under Article 28(1) on the sole *ground* that transfer to another Member State is imminent or that there is a realistic prospect of transfer to another Member State. In other words, asylum seekers should not be detained simply because they fall within the Dublin III Regulation procedure. There must be something else; and that something else is '*a significant risk of absconding*' - Article 28(2). Article (3) makes it clear that any period of detention must be for as short a period as possible and for no longer than the time reasonably necessary to fulfil the required administrative procedures. It also sets out the procedure to be followed if a Member State fails to comply with a deadline. It is clear from the structure of Article 28 that the Dublin III procedure includes asylum seekers in detention and those not in detention. Article 28(3) is a binding provision and has direct effect. Once the criteria for determining the Member State for examining an asylum claim have been met the case must be considered within the Dublin III Regulation procedures. Therefore, there are limitations on the detention provisions in domestic law.

50. For the reasons stated above I am satisfied that, as a matter of principle, the Claimant's detention was within the scope of Article 28(1).

51. The Claimant's detention was also within the scope of Article 28(1) on the facts. The file note of 11 May 2017, states:

> *'EURODAC and screening completed - potential TCU case. Detention to be maintained to effect removal under Dublin Regs if there is TCU interest.*
>
> *If there is no further TCU interest, subject should be routed via NAAU and released on reporting.'*

52. Mr Tam submitted that the note simply records that if the Dublin III Regulation became irrelevant to the Claimant's case, his circumstances may point in favour of release. I do not accept that is a natural reading of the file note. In my judgment the file note clearly indicates that the SSHD's intention was to detain the Claimant if he was to be retained within the Dublin III Regulation procedure. However, if the UK accepted responsibility for the Claimant's asylum claim, he was to be released. Furthermore, the contemporaneous file note does not support the suggestion that the

Claimant's detention was for dual purposes; it was for the singular purpose of effecting a transfer under the Dublin III Regulation.

53. In my judgment the Claimant's detention was within the scope of Article 28(1) on the facts.

Issue (2) – Was the Claimant's detention in violation of the provisions within Article 28 and the 2017 Detention Regulations?

54. The Claimant was detained in order to effect a transfer to another Member State under the provisions of the Dublin III Regulation. As acknowledged by Mr Tam the 2017 Regulations were intended to satisfy the obligation created by Article 28(2) and Article 2(n) of the Dublin III Regulation to prescribe in domestic law the objective criteria on which an Article 28(2) assessment of risk must be based.

55. There was no dispute that during his detention the Claimant was not informed that he was being detained under Article 28, or that the SSHD was exercising a discretion conferred by EU law. Nor was the Claimant informed that he was being detained in accordance with the 2017 Detention Regulations. It is essential that a detainee is made aware of the legal and factual basis for his or her detention so that they can exercise the right challenge their detention [see *Fox, Campbell and Hartley v United Kingdom* (1990) 13 EHRR 157][§ 40]. Where the power to detain is limited by EU law, the provision of the essential factual and legal grounds for such detention is required in order to ensure compliance with the general principle of effectiveness, together with Article 47 of the Charter of Fundamental Rights (right to an effective remedy). In accordance with Article 28 asylum seekers can only be detained on grounds that there is a significant risk of absconding (not merely a risk of absconding), the assessment of which must be based on an individual assessment. In addition, there are maximum time limits and the detention must be proportionate and can only be justified when less coercive alternative measures cannot be applied. As stated in *Al Chodor* the Dublin III Regulation was intended to improve '*the judicial protection enjoyed by asylum seekers*'[§ 33]. The detention provisions limit the fundamental right to liberty enshrined in Article 6 of the Charter and '*it follows…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*'[see *Al Chodor* § 39]. It is clear from Article 28(4) that Article 9.4 of the Reception Directive requires detained asylum seekers to be informed of the reasons for their detention and the procedures laid down in national law for challenging the detention order and Article 9.3 of that Directive requires Member States to provide for a speedy judicial review of the lawfulness of the detention.

56. Detention under the Dublin III Regulations can only be justified on the basis of a significant risk of absconding in accordance with the criteria established in the 2017 Detention Regulations. There are no detention reviews which demonstrate that the SSHD determined that the Claimant posed a 'significant' absconding risk. Nor is there any reference to proportionality or necessity based on the Claimant's individual circumstances.

57. For all these reasons the SSHD failed to comply with Article 28 and the 2017 Regulations. Therefore, the Claimant's detention was unlawful.

Summary

58. My views on the proper construction of Article 28 differ from Garnham J in *Khaled No2*, Her Honour Judge Robinson (sitting as a Deputy High Court Judge) in *W* and John Howell QC in *S* to the extent that he agreed that Article 28(1) only applies where detention is solely for the purpose of a removal under the Dublin III Regulation. Although not bound by them, in accordance with the test in *R v Greater Manchester Coroner ex parte Tal* [1985] QB 67 I should not depart from the views expressed in these judgments unless I consider that their views are clearly wrong. In light of *Al Chodor* I am satisfied that departure from these views is required.

59. In my judgment (i) the Claimant's detention fell within the Dublin III Regulation; and (ii) his detention was unlawful because it was not in accordance with the Dublin III Regulation and the 2017 Regulations.

60. The assessment of the amount of damages will be a matter to be determined by the court to which this case is remitted.

61. Any consequential applications, including costs, are to be dealt with in writing.