



Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 10 November 2016¹

Case C-528/15

Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie

v

Salah Al Chodor,

Ajlin Al Chodor,

Ajvar Al Chodor

(Request for a preliminary ruling

from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic))

(Reference for a preliminary ruling — Criteria and mechanisms for determining the Member State responsible for examining an application for international protection — Regulation (EU) No 604/2013 (Dublin III) — Article 28(2) — Detention for the purpose of transfer — Article 2(n) — Significant risk of absconding — Objective criteria defined by law — No national legislation defining such criteria))

I – Introduction

1. By its request for a preliminary ruling, the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) is questioning the Court of Justice as to the interpretation of the provisions of Regulation (EU) No 604/2013² ('the Dublin III Regulation') which circumscribe the Member States' freedom to detain applicants for international protection³ ('applicants') pending their transfer to the Member State responsible for processing their application.

2. In accordance with Article 28(2) of the Dublin III Regulation, the freedom of Member States to detain applicants pending their transfer is conditional, in particular, on there being a 'significant risk of [their] absconding'. Article 2(n) of that regulation, which defines the 'risk of absconding', provides that that risk must be assessed, in each individual case, on the basis of 'objective criteria defined by law'.

3. At the time of the events giving rise to the dispute in the main proceedings, those criteria had not yet been laid down in Czech legislation, although a legislative amendment intended to introduce such criteria had been proposed. According to the Czech Government, that legislative amendment has since been adopted.

1 — Original language: French.

2 — Regulation of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31).

3 — As is apparent from Article 2(b) of the Dublin III Regulation, read in conjunction with Article 2(h) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9), an 'applicant for international protection' is, in essence, any third-country national or stateless person who has made an application for refugee status or subsidiary protection status.

4. It is in those circumstances that the referring court is asking, in essence, whether the requirement, mentioned in Article 2(n) of the Dublin III Regulation, that the objective criteria for assessing whether there is a risk of absconding must be defined 'by law' means that legislation must be adopted, or whether that requirement may also be satisfied if such criteria are apparent from the case-law of the higher courts and/or from the administrative practice of a Member State.

II – Legal framework

A – *The ECHR*

5. Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), provides:

'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'

6. Article 53 of the ECHR states that 'nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party'.

B – *EU law*

1. The Charter

7. Article 6 of the Charter of Fundamental Rights of the European Union ('the Charter') states that 'everyone has the right to liberty and security of person'.

8. Article 52 of the Charter provides:

'1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

...

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

...'

2. The Dublin III Regulation

9. According to recital 20 of the Dublin III Regulation:

‘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.’

10. Article 2(n) of the Dublin III Regulation defines the ‘risk of absconding’ as ‘the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond’.

11. Article 28 of that regulation, entitled ‘Detention’, provides:

‘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. Directive 2013/33

12. Recital 15 of Directive 2013/33/EU⁴ (‘the Reception Directive’) states:

‘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, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both ... the manner and the purpose of such detention. Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as [a] judicial remedy before a national judicial authority.’

13. Under Article 8 of that directive:

‘1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection

⁴ — Directive of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96).

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

3. An applicant may be detained only:

...

(f) in accordance with Article 28 of [the Dublin III Regulation].

The grounds for detention shall be laid down in national law.’

C – Czech law

14. Paragraph 129(1) of Law No 326/1999 on the residence of foreign nationals in the Czech Republic and amending other laws on the residence of foreign nationals (‘the Law on the residence of foreign nationals’) provides that ‘the police shall detain a foreign national who has entered or stayed in the Czech Republic illegally for the period of time necessarily required in order to secure transfer procedures in accordance with an international treaty concluded with another Member State of the European Union before 13 January 2009 or with directly applicable legislation of the European Union’.

15. At the time the order for reference was adopted, a legislative procedure was underway to amend Paragraph 129 of the Law on the residence of foreign nationals by inserting a fourth subparagraph, worded as follows:

‘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 avoided transfer to a State bound by directly applicable EU legislation, or has attempted to abscond or has 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.’

16. According to the Commission’s written observations, the Czech legislature adopted that amendment on 11 November 2015. At the hearing, the Czech Government confirmed that the amendment had been adopted.

III – The dispute in the main proceedings, the question referred for a preliminary ruling, and the procedure before the Court

17. Salah Al Chodor and his two sons Ajlin and Ajvar Al Chodor (‘the Al Chodors’), all of whom are Iraqi nationals, were subject to a police check carried out in the Czech Republic on 7 May 2015. Since the Al Chodors were unable to produce any documents proving their identities, the Policie České republiky, Krajské ředitelství [policie] Ústeckého kraje, odbor cizinecké policie (Foreigners Police Section, Regional Directorate of the Ústí nad Labem Region, Police Force of the Czech Republic) (‘the Foreigners Police Section’) initiated an administrative procedure concerning them.

18. During their interview with the Foreigners Police Section, the Al Chodors stated that they were of Kurdish origin and that their village had been invaded by fighters from the 'Islamic State' terrorist organisation. The Al Chodors had crossed Turkey into Greece, from where they had continued their journey by lorry. In Hungary, the police detained them and made digital records of their fingerprints. Salah Al Chodor stated that he signed some documents at that point. The next day, the Al Chodors were taken to a railway station and directed to a refugee camp. They apparently left that camp two days later, with the intention of joining members of their family in Germany.

19. After arresting the Al Chodors in the Czech Republic, the Foreigners Police Section consulted the Eurodac database and found that they had filed an application for asylum in Hungary. In addition, they did not have any residence permits or travel documents. They did not have either the financial means to pay for accommodation in the Czech Republic or any contact person capable of assisting them in that regard.

20. The Foreigners Police Section considered that, since the Al Chodors had left the refugee camp in Hungary without awaiting a decision on their application for asylum, were aware that they were staying illegally, and had expressed an intention to continue their journey on to Germany, there was a significant risk that they would abscond. On the basis of that finding, and the belief that there were no other less coercive measures that could be applied in their case, the Foreigners Police Section, by decision of 8 May 2015, placed the Al Chodors in detention for a period of 30 days, pursuant to Paragraph 129(1) of the Law on the residence of foreign nationals, read in conjunction with Article 28 of the Dublin III Regulation. At the end of that period of detention, the Al Chodors were to be transferred to Hungary, that being the Member State responsible for examining their application for asylum under the Dublin III Regulation.

21. The Krajský soud d'Ústí nad Labem (Regional Court, Ústí nad Labem, Czech Republic), hearing an action brought by the Al Chodors challenging that decision, annulled the decision. It held that, since the objective criteria for assessing the risk of absconding are not defined by Czech legislation as required by Article 2(n) of the Dublin III Regulation, applicants cannot be detained in the Czech Republic on the basis of Article 28(2) of that regulation. The Regional Court thus followed the approach taken by the Bundesgerichtshof (Federal Court of Justice, Germany)⁵ and the Verwaltungsgerichtshof (Administrative Court, Austria).⁶

22. The Al Chodors were released as soon as the decision of the Foreigners Police Section was annulled. They have since left the Czech Republic for an unknown destination.

23. The Foreigners Police Section brought an appeal on a point of law before the Nejvyšší správní soud (Supreme Administrative Court) against the judgment of the Krajský soud d'Ústí nad Labem (Regional Court, Ústí nad Labem). According to the Foreigners Police Section, the mere fact that there are no provisions of national law defining the objective criteria for assessing the risk of absconding does not mean that Article 28(2) of the Dublin III Regulation is not applicable.

24. The referring court therefore seeks to ascertain whether Article 28(2) of the Dublin III Regulation, read in conjunction with Article 2(n) of that regulation and/or Paragraph 129(1) of the Law on the residence of foreign nationals, provides a sufficient legal basis in view of the fact that the national legislation lays down no objective criteria for assessing whether there is a risk of absconding. The referring court questions whether the recognition of such criteria in the established case-law of the higher courts, or indeed in administrative practice, satisfies the requirement in Article 2(n) of that regulation that those criteria be defined 'by law'.

5 — Bundesgerichtshof, 26 June 2014, V ZB 31/14.

6 — Verwaltungsgerichtshof, 19 February 2015, RO 2014/21/0075-5.

25. In that regard, that court refers to its own case-law concerning the interpretation of ‘a significant risk of absconding’, as reflected in several of its judgments. According to one such judgment, one objective criterion for assessing whether such a risk exists is a previous infringement of a Member State’s laws together with an infringement of EU law.⁷ In another judgment, that court accepted other criteria, including the entry of the person concerned into the Schengen area without leave to remain, together with contradictory statements about that person’s entry into the Czech Republic and a general lack of credibility.⁸ In two other judgments, the court recognised a person’s illegal entry into the Czech Republic or a person’s illegally staying there as objective criteria.⁹ In another judgment, the lack of documents proving identity was held to be an objective criterion.¹⁰

26. In addition, the referring court observes that the practice followed by the Foreigners Police Section as regards detaining applicants under Article 28(2) of the Dublin III Regulation is foreseeable, not arbitrary and consistent with national legislation as interpreted by its established case-law. Moreover, each case is assessed individually.

27. The referring court adds that the Czech legislature was planning to codify that case-law by amending the Law on the residence of foreign nationals so as to include a list of objective criteria for assessing the risk of absconding.

28. In those circumstances, the Nejvyšší správní soud (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does the [mere] fact that no objective criteria for assessment of a significant risk that a foreign national may abscond [within the meaning of Article 2(n) of the Dublin III Regulation] have been defined in [national legislation] render detention under Article 28(2) of that regulation inapplicable?’

29. The Foreigners Police Section, the Czech, Greek and United Kingdom Governments and the European Commission have filed written observations. The Czech and United Kingdom Governments and the Commission were represented at the hearing on 14 July 2016.

IV – Analysis

A – Preliminary observations

30. The factual context of the present case is emblematic of the phenomenon, widely observed in recent years, of ‘secondary movements’ whereby numerous applicants for international protection move from the Member State responsible for processing their application in accordance with the criteria laid down in the Dublin III Regulation¹¹ (often the Member State of first entry)¹² to another Member State where they wish to settle and apply for international protection.¹³

7 — Judgment of 10 June 2015, čj. 2 Azs 49/2015-50.

8 — Judgment of 4 December 2014, čj. 9 Azs 199/2014-49.

9 — Judgments of 23 November 2011, čj. 7 As 79/2010-153, and of 17 June 2015, čj. 1 Azs 39/2015-56.

10 — Judgment of 9 October 2014, čj. 2 Azs 57/2014-30.

11 — The criteria are, in hierarchical order: the existence of family links (Articles 8 to 11); possession of a visa or valid residence document issued by a Member State (Article 12); and entry (legal or illegal) into the territory of a Member State (Articles 13 to 15).

12 — See European Commission, DG Migration and Home Affairs, ‘Evaluation of the Dublin III Regulation — Final Report’, 4 December 2015, p. 4.

13 — See Communication from the Commission to the European Parliament and the Council of 6 April 2016 (COM(2016) 197 final, p. 4).

31. Faced with such migration, the Member State in which an applicant is present may request the Member State which it considers responsible under the Dublin III Regulation to take charge of that applicant, or to take him back.¹⁴ If the requested Member State agrees to the request, the requesting Member State will transfer the applicant there in accordance with the procedure laid down in that regulation ('the transfer procedure').¹⁵ In order to ensure that that procedure is implemented, the Dublin III Regulation permits, subject to strict guarantees, recourse to coercive measures such as detention¹⁶ and supervised departure or departure under escort.¹⁷

32. Thus, Article 28(2) of the Dublin III Regulation — to which Article 8(3)(f) of the Reception Directive refers — authorises Member States to detain applicants, provided that three conditions are met.

33. The first condition concerns the purpose of such a measure, and requires the measure to be implemented 'when there is a significant risk of absconding ... in order to secure transfer procedures on the basis of an individual assessment'. Article 2(n) of that regulation defines the risk of absconding as 'the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant ... may abscond'.

34. The second and third conditions concern, respectively, the proportionality of the detention and the need for it — that is, the absence of other less coercive measures that might effectively be taken instead.

35. The question referred for a preliminary ruling concerns only the scope of the first of those conditions, more specifically the requirement that the objective criteria for establishing a risk of absconding must, in accordance with Article 2(n) of the Dublin III Regulation, be 'defined by law'. It does not concern the substantive validity of those criteria, whether or not they are objective and consistent with the requirements of proportionality, or whether the detention is necessary.

36. For the reasons set out below, I believe that the objective criteria for assessing whether there is a risk of absconding must be defined in legislation, that is to say, in written rules of law that have been adopted by the legislature.

B – Minimum level of protection of the right to liberty of applicants arising from Article 5(1)(f) of the ECHR

37. Article 2(n) of the Dublin III Regulation does not itself lay down the objective criteria for assessing the risk of absconding, referring instead in that regard to the national legal systems of the Member States.

38. Certain language versions of that regulation, such as the Bulgarian, Spanish and German versions, use expressions in Article 2(n) which correspond to the French term 'loi' and, in principle, designate only legislation. Others, including the English, Polish and Slovak versions, use broader expressions corresponding to the French term 'droit', which covers, according to its usual meaning, not only legislation but also other rules of law.

14 — Taking charge applies where the person concerned has not yet lodged an application for international protection in the requested Member State (Articles 20 to 23 of the Dublin III Regulation), while taking back applies where, as in the present case, the person concerned has lodged such an application before moving to the requesting Member State (Articles 24 to 27 of that regulation).

15 — Articles 29 to 33 of the Dublin III Regulation.

16 — Article 28 of the Dublin III Regulation.

17 — Second subparagraph of Article 29(1) of the Dublin III Regulation.

39. In addition to this disparity between the various language versions of the same regulation, the referring court has emphasised, making reference to the case-law of the European Court of Human Rights, that even the word ‘law’ does not lend itself to one unequivocal interpretation. Accordingly, the written observations and oral submissions made in the present case have, to a large extent, addressed the question whether observance of the fundamental rights guaranteed by the ECHR and interpreted by the European Court of Human Rights — which, in accordance with Article 6(3) TEU, form part of EU law as general principles¹⁸ — demands that the objective criteria for assessing the risk of absconding be defined in legislation.

40. The Czech and United Kingdom Governments have argued that, according to the case-law of the European Court of Human Rights, the concept of ‘law’, as referred to in the ECHR,¹⁹ is not limited to legislation, but also includes other sources of law, provided that they possess the ‘substantive’ qualities of precision, foreseeability and accessibility.²⁰ They have asserted that established case-law and consistent administrative practice possess those qualities in the present case.²¹ The Greek Government and the Commission dispute those arguments.

41. In addition, the Czech Government maintained at the hearing that the condition of lawfulness arising from Article 5(1)(f) of the ECHR concerns, in any event, the sole *legal basis* for interference with the right to liberty of applicants, which is already present in Article 28(2) of the Dublin III Regulation. That condition does not, by contrast, apply to the *restrictions* imposed on that interference, which require the assessment of the risk of absconding to be supported by objective criteria.

42. Without it being necessary to verify the accuracy of that last argument, I consider that the concept of ‘law’ as referred to in Article 2(n) of the Dublin III Regulation, read in context and in the light of its specific purpose,²² has an independent meaning distinct from that of the concept of ‘law’ as referred to in the ECHR.

43. I would emphasise, in that regard, that the provisions of the ECHR merely establish a minimum level of protection of fundamental rights and do not affect the possibility that EU law may provide more extensive protection of those rights.²³

18 — See, inter alia, Opinion 2/13 of 18 December 2014 (EU:C:2014:2454, paragraph 179). I would also point out that, under Article 52(3) of the Charter, the rights affirmed by the Charter, where they correspond to rights guaranteed by the ECHR, have the same meaning and scope as those laid down by that convention. Accordingly, inasmuch as the rights provided for in Article 6 of the Charter are the rights guaranteed by Article 5 of the ECHR (see Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. [17])), the case-law of the European Court of Human Rights concerning Article 5 of the ECHR is to be taken into consideration for the purpose of interpreting Article 6 of the Charter (judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 44)). However, Article 52(3) of the Charter is not to prevent EU law providing more extensive protection of those rights.

19 — The word ‘law’ is used in Articles 8(2), 9(2), 10(2) and 11(2) of the ECHR, which require that any interference with the rights affirmed by those provisions must be ‘in accordance with the law’ or ‘prescribed by law’. According to the European Court of Human Rights, that condition has the same effect as the condition that any interference with the right to liberty protected by Article 5(1)(f) of the ECHR must be ‘in accordance with a procedure prescribed by law’ and ‘lawful’ (ECtHR, 25 June 1996, *Amuur v. France* (CE:ECHR:1996:0625JUD001977692, § 50), and 9 July 2009, *Mooren v. Germany* (CE:ECHR:2009:0709JUD001136403, § 76)).

20 — See, inter alia, ECtHR, 6 March 2001, *Dougoz v. Greece* (CE:ECHR:2001:0306JUD004090798, § 55); 21 October 2013, *Del Río Prada v. Spain* (CE:ECHR:2013:1021JUD004275009, § 125); and 1 September 2015, *Khlaifia and Others v. Italy* (CE:ECHR:2015:0901JUD001648312, § 64).

21 — I would observe that, in its judgment of 11 April 2013, *Firoz Muneer v. Belgium* (CE:ECHR:2013:0411JUD005600510, § 59 and 60), the European Court of Human Rights held that established case-law constituted a sufficient legal basis for prolonging the detention of a person under Article 5(1)(f) of the ECHR. However, I am unaware of any case-law in which the European Court of Human Rights has regarded consistent administrative practice as a sufficient legal basis for interference with a fundamental right.

22 — I would observe, in this connection, that where there is divergence between the language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of that text. See, in particular, judgment of 9 June 2011, *Eleftheri tileorasi and Giannikos* (C-52/10, EU:C:2011:374, paragraph 24 and the case-law cited).

23 — See Article 53 of the ECHR and Article 52(3) of the Charter.

44. I shall now endeavour to show that, by adopting the provisions of the Dublin III Regulation and the Reception Directive which restrict the Member States' freedom to detain applicants, the EU legislature chose to provide more extensive protection of the right to liberty of those applicants than that arising from Article 5(1)(f) of the ECHR, as interpreted by the European Court of Human Rights.

45. I shall then go on to set out the reasons why the requirement that the criteria for assessing the risk of absconding be defined 'by law' under Article 2(n) of that regulation forms part of that objective of more extensive protection and thus means that those criteria must be laid down in legislation.

C – Intention of the EU legislature to extend the protection of the right to liberty of applicants

46. One of the major advances brought about by the Dublin III Regulation and the Reception Directive is the extension of the guarantees which circumscribe the Member States' freedom to detain applicants. As is stated in recital 15 of that directive, the EU legislature intended that the detention of those persons — which constitutes a particularly serious interference with their fundamental right to liberty guaranteed by Article 6 of the Charter²⁴ — should be limited to 'exceptional circumstances'.²⁵

47. Accordingly, those legal instruments have significantly restricted the Member States' discretion to deprive applicants who are subject to a transfer procedure of their liberty.

48. Before those instruments entered into force, there was, under secondary EU law, only minimal regulation of the detention of such applicants. The regulation which preceded the Dublin III Regulation, namely Regulation (EC) No 343/2003 ('the Dublin II Regulation'),²⁶ contained no provisions on that subject. Consequently, the general guarantees laid down in Article 7(3) of the instrument which preceded the Reception Directive, namely Directive 2003/9/EC,²⁷ applied. That provision stipulated that, 'when it proves necessary, *for example* for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law' (*italics mine*). The grounds on which an applicant could be deprived of his or her liberty were not, therefore, harmonised. In addition, Article 18(1) of the directive which preceded Directive 2013/32/EU ('the Procedure Directive')²⁸, namely Directive 2005/85/EC,²⁹ specified that a person could not be held in detention for the sole reason that he or she was an applicant for asylum.

49. The freedom of the Member States to detain applicants pending their transfer was also restricted by their obligations under Article 5(1)(f) of the ECHR.³⁰ That provision authorises the Contracting Parties, in the exercise of their competence in the management of migratory flows, to restrict an individual's liberty either to prevent him from entering the country unlawfully (the first limb) or where action is being taken with a view to that individual's deportation or extradition (the second limb).

24 — See judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 56), and, by analogy, judgment of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 42).

25 — The idea that detention should be exceptional is also apparent from the Guidelines of the United Nations High Commission for Refugees (UNHCR) on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention, in the version adopted during 2012, referred to by the Commission in its Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (COM(2008) 815 final, p. 6, [second subparagraph of Section 3.4]).

26 — Council Regulation of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

27 — Council Directive of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18).

28 — Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

29 — Council Directive of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13).

30 — I would reiterate that fundamental rights, as guaranteed by the ECHR and the constitutional traditions common to the Member States, form part of EU law as general principles (see point 39 of this Opinion).

50. In some of its judgments,³¹ the European Court of Human Rights has likened the detention of an applicant in the context of a procedure for his transfer to the Member State responsible for examining his application to the detention of a person against whom action is being taken with a view to his deportation or extradition, as provided for in the second limb of Article 5(1)(f) of the ECHR.³²

51. According to the case-law of the European Court of Human Rights, the detention of a person in the context of a deportation or extradition procedure is not subject to the condition that that measure is ‘necessary, for example to prevent the individual from ... absconding’.³³ The compliance of a detention measure with Article 5(1)(f) of the ECHR is therefore not conditional on the existence of a risk of absconding or on the absence of other less restrictive measures enabling the removal of the person concerned. All that is required in that regard is that action is being taken diligently with a view to removal.³⁴

52. By adopting the Dublin III Regulation and the Reception Directive, the EU legislature has decided in favour of providing more extensive protection of the right to liberty of applicants who are subject to a transfer procedure than that arising from Article 5(1)(f) of the ECHR, as interpreted by the European Court of Human Rights.³⁵

53. This is because, in the first place, Article 28(2) of the Dublin III Regulation permits the detention of such applicants only where there is a significant risk of their absconding. The detention of an applicant on the sole ground that a transfer procedure is underway is therefore prohibited, as is also apparent from Article 28(1) of that regulation.³⁶

54. In addition, the Reception Directive now sets out, in Article 8(3) thereof, an exhaustive list of the reasons why applicants may be held in detention. Those reasons include, in Article 8(3)(f), detention for the purposes of transfer in accordance with Article 28 of the Dublin III Regulation.

55. In the second place, Article 28(2) of that regulation and Article 8(2) of the Reception Directive provide that detention is a measure of last resort that may be taken only in the absence of less coercive alternative measures.

31 — ECtHR, 11 April 2013, *Firoz Muneer v. Belgium* (CE:ECHR:2013:0411JUD005600510, § 53), and 12 July 2016, *A. M. and Others v. France* (CE:ECHR:2016:0712JUD002458712, § 64 and 65).

32 — For arguments in support of the opposing view that the detention of applicants in the context of a transfer procedure does not fall within the scope of either of the limbs of Article 5(1)(f) of the ECHR, see European Council on Refugees and Exiles, ‘The Legality of Detention of Asylum Seekers under the Dublin III Regulation’, *AIDA Legal Briefing* No 1, June 2015, p. 7, and Costello, C., *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, Oxford, 2016, pp. 296 and 297.

33 — See, inter alia, ECtHR, 15 November 1996, *Chahal v. United Kingdom* (CE:ECHR:1996:1115JUD002241493, § 112 and 113); 10 July 2014, *Rakhimov v. Russia* (CE:ECHR:2014:0710JUD005055213, § 119 and 120); and 27 November 2014, *Khomullo v. Ukraine* (CE:ECHR:2014:1127JUD004759310, § 52).

34 — The European Court of Human Rights recently refined that case-law, adding that ‘exceptionally, when a child is present, ... the deprivation of liberty must be necessary to achieve the objective pursued, namely the family’s deportation’ (ECtHR, 12 July 2016, *A. B. [and Others] v. France* (CE:ECHR:2016:0712JUD001159312, § 120)).

35 — I would nevertheless point out that, where the domestic law of a Contracting Party or EU law requires the observance of guarantees which go beyond the Contracting Party’s obligations under the ECHR, as is permitted by Article 53 thereof, the European Court of Human Rights ‘incorporates’ the observance of those guarantees into the condition that interference with that right must be lawful and itself endeavours to verify that they have been observed (see, inter alia, ECtHR, 2 October 2008, *Rusu v. Austria* (CE:ECHR:2008:1002JUD003408202, § 54 to 58); 22 September 2015, *Nabil v. Hungary* (CE:ECHR:2015:0922JUD006211612, § 31 and § 39 to 42); and 5 July 2016, *O. M. v. Hungary* (CE:ECHR:2016:0705JUD000991215, § 47 to 52)).

36 — Article 28(1) of the Dublin III Regulation thus differs from Article 27(1) of the Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (COM(2008) 820 final). The provision as proposed went no further than reiterating the principle, set out in Article 18(1) of Directive 2005/85, that no one may be held in detention ‘for the sole reason that he/she is an applicant for international protection’. The provision as adopted appears to be stricter, inasmuch as neither the status of applicant (see recital 20 of the Dublin III Regulation) nor even the fact that a transfer procedure is underway justifies such a measure.

56. All the aforementioned provisions thus reflect the desire of the EU legislature to limit the detention of applicants to exceptional circumstances, as is apparent from recital 15 of the Reception Directive and as was emphasised by the Court in the judgment *N*.³⁷

57. In my view, those considerations justify a restrictive interpretation of the provisions authorising the Member States to detain applicants. From that perspective, if there is any uncertainty as regards the interpretation of the term ‘law’ used in Article 2(n) of the Dublin III Regulation, preference should be given to the interpretation which results in greater protection of the right to liberty of applicants.

58. As I shall explain below, listing the criteria for assessing the risk of absconding in a legislative text seems to me to be likely to increase the protection of applicants against arbitrary interference with their right to liberty. It also seems to me that this is necessary in order to achieve the dual objectives which, to my mind, are served by the requirement that those criteria be defined ‘by law’.

D – Need for legislation which defines the criteria for assessing the risk of absconding in the light of the objectives pursued by Article 2(n) of the Dublin III Regulation

1. The dual objectives of the requirement that the criteria for assessing the risk of absconding be defined ‘by law’

59. As defined in Article 2(n) of the Dublin III Regulation, the risk of absconding comprises a subjective, fact-based aspect (‘in an individual case’)³⁸ and an objective, general aspect (‘[on the basis of] objective criteria defined by law’).

60. That definition thus expresses two cumulative requirements: the competent authorities — namely the administrative or judicial authorities³⁹ — are required to examine on a case-by-case basis all the individual, specific circumstances which characterise each applicant’s situation,⁴⁰ while ensuring that that examination is based on objective criteria defined generally and in the abstract.

61. In that context, the requirement that the criteria for assessing the risk of absconding be defined ‘by law’ indicates, in my view, a dual objective.

62. First, it is intended to ensure that those criteria offer sufficient guarantees in terms of legal certainty. On this point, it is apparent from the case-law of the Court that measures taken by a Member State pursuant to a regulation, even where they relate to the exercise of the discretion conferred on the Member State by that regulation, must be consistent with the principle of legal certainty, as a general principle of EU law.⁴¹ In my view, that principle applies in the present case because, when defining those criteria, the Member States are implementing Article 28(2) of the Dublin III Regulation, read in conjunction with Article 2(n) thereof, in order to exercise the freedom to detain applicants conferred on them by the former provision.

37 — Judgment of 15 February 2016 (C-601/15 PPU, EU:C:2016:84, paragraphs 52, 56 and 63), concerning the detention of an applicant for reasons of public order or public security pursuant to Article 8(3)(e) of the Reception Directive.

38 — The expression ‘on the basis of an individual assessment’ used in Article 28(2) of the Dublin III Regulation also reflects this requirement.

39 — In accordance with Article 9(2) of the Reception Directive, detention measures are to be ordered in writing by administrative or judicial authorities.

40 — Accordingly, even where one or more of the criteria laid down in domestic law for assessing a risk of absconding have been fulfilled, that is not sufficient to establish a risk of the person in question absconding if his or her situation has not been assessed individually on a case-by-case basis (see, by analogy, judgment of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraphs 70 to 74)).

41 — See, inter alia, judgments of 20 June 2002, *Mulligan and Others* (C-313/99, EU:C:2002:386, paragraph 46); of 5 May 2011, *Kurt und Thomas Etling and Others* (C-230/09 and C-231/09, EU:C:2011:271, paragraph 74); and of 5 November 2014, *Cypra* (C-402/13, EU:C:2014:2333, paragraph 26).

63. Second, that requirement is intended to ensure that the discretion enjoyed by the individual authorities responsible for applying the criteria for assessing a risk of absconding is exercised within a framework of certain pre-determined markers.

64. Those objectives are also apparent from the preparatory work for Directive 2008/115/EC ('the Return Directive'),⁴² Article 3(7) of which contains a definition of the risk of absconding that is almost identical to the definition given in Article 2(n) of the Dublin III Regulation (except that those provisions concern, respectively, persons subject to a 'return procedure' and persons subject to a 'transfer procedure').

65. Although the Return Directive does not apply to applicants for international protection⁴³ and although detention for the purposes of removal under that directive and the detention of applicants for international protection thus fall under different legal rules,⁴⁴ I believe that the preparatory work relating to that directive may help to shed some light on how to interpret Article 2(n) of the Dublin III Regulation. That provision was clearly inspired by Article 3(7) of the Return Directive, which it reproduces almost verbatim. Indeed, there is no evidence in the preparatory work for the Dublin III Regulation of any debate having taken place concerning the definition of the risk of absconding set out in Article 2(n) of that regulation.⁴⁵

66. I would add that the level of risk that must be reached in order to justify a detention measure varies depending on which instrument applies. Article 15(1)(a) of the Return Directive makes detention for the purposes of removal conditional on the existence of a 'risk of absconding'. Article 28(2) of the Dublin III Regulation, by contrast, requires there to be a 'significant risk of absconding' if an applicant is to be deprived of his or her liberty pending a transfer.

67. In addition, unlike the return procedure, the transfer procedure applies to applicants whose presence in the territory of the requesting Member State is lawful. Under Article 9(1) of the Procedure Directive, as recalled in recital 9 of the Return Directive, an applicant has the right to remain in the territory of the Member State in which he or she has made an application until the adoption of a decision at first instance on that application or, as the case may be, until the outcome of any action brought against that decision is known.⁴⁶ That is the case even if the Member State in question considers that it is not responsible for processing the application and, pursuant to the Dublin III Regulation, requests another Member State to take charge of the applicant.⁴⁷

68. In those circumstances, the guarantees provided for in the Return Directive which circumscribe the detention of persons who are to be removed should, to my mind, apply *a fortiori* to the detention of applicants who are subject to a transfer procedure.

42 — Directive of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

43 — This is true, more specifically, from the making of an application for international protection until the adoption of a decision at first instance on that application or, as the case may be, until the outcome of any action brought against that decision is known (judgment of 30 May 2013, *Arslan* (C-534/11, EU:C:2013:343, paragraph 49)) (see point 67 of this Opinion).

44 — Judgment of 30 November 2009, *Kadzoev* (C-357/09 PPU, EU:C:2009:741, paragraph 45).

45 — However, the [European] Economic and Social Committee has made certain observations concerning that definition (Opinion of the European Economic and Social Committee, SOC/333, 16 July 2009, p. 7).

46 — Judgment of 30 May 2013, *Arslan* (C-534/11, EU:C:2013:343, paragraphs 48 and 49). Applicants are not, therefore, 'staying illegally' within the meaning of the Return Directive and consequently cannot be deported from the Union unless and until their application has been rejected. That is also a consequence of the principle of non-refoulement affirmed by Article 33 of the Geneva Convention of 28 July 1951 relating to the status of refugees, to which Article 18 of the Charter refers.

47 — Applicants have the right to remain not only in the Member State in which their application is being examined, but also in the Member State in which the application was lodged (judgment of 27 September 2012, *Cimade and GISTI* (C-179/11, EU:C:2012:594, paragraph 48)).

69. However, I would observe that, during the procedure for adopting that directive, the Commission's initial proposal contained no definition of the risk of absconding.⁴⁸ The definition was introduced in the report of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs ('the LIBE Committee'), which nevertheless confined itself to requiring that the risk should be assessed on the basis of 'individual and objective criteria'.⁴⁹ The Parliament's position at first reading, as approved by the Council, replaced this with the expression 'objective criteria defined by law'.⁵⁰

70. That choice of words, when the Commission's proposal placed no restrictions on the assessment of the risk of absconding and the LIBE Committee's report referred only to 'individual and objective criteria' without specifying the source of those criteria, cannot be regarded as insignificant.⁵¹ In my view, it constitutes evidence of a desire to ensure that the criteria used in any individual assessment of the risk of absconding are foreseeable and to counterbalance the powers of the authorities responsible for making that assessment by requiring their assessment to be based on objective criteria of a general and abstract nature.

2. Need for legislation which defines the criteria for assessing the risk of absconding in order to achieve those objectives

71. The achievement of either of the objectives I have mentioned is dependent, in my view, on the objective criteria for assessing the risk of absconding being defined in a legislative text.

a) Objective of ensuring legal certainty

72. The principle of legal certainty means, in essence, that measures adopted by the Member States in order to implement EU law must enable the individuals concerned to ascertain the scope of their rights and obligations and to foresee the consequences of their actions.⁵² As the Court has previously held,⁵³ the observance of that principle depends not only on the content of the measures adopted, but also, where appropriate, on the nature of the instrument chosen for that purpose.

73. Since it seems to me neither appropriate nor even possible to assess in the abstract the relative merits, in terms of legal certainty, of legislation, case-law and administrative practice, I shall focus my analysis on the specific circumstances which characterise the case in the main proceedings.

48 — Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (COM (2005) 391 final) ('the proposal for the Return Directive').

49 — Report of 20 September 2007 on the proposal for the Return Directive, A6-0339/2007, 2005/0167(COD), PE 374.321, [Amendment 19]. Various amendments had been suggested, referring to 'serious grounds, to be defined on an individual and objective basis and assessed by the courts' (Opinion of 22 June 2007 of the Committee on Development for the LIBE Committee on the proposal for the Return Directive, 2005/0167(COD), PE 386.728, [Amendment 19]), 'criteria defined by national law' (draft report of 13 June 2006 of the LIBE Committee on the proposal for the Return Directive, 2005/0167(COD), PE 374.321v02-00, p. 9) and 'objective criteria laid down by law' (amendment of 27 September 2006 to the draft report of the LIBE Committee, 2005/0167(COD), PE 378.672v01-00, p. 23).

50 — Position of the European Parliament of 18 June 2008 adopted at first reading, EP-PE_TC1-COD(2005)00167, PE 400.777, p. 13.

51 — I would point out in this connection that, in clause 2 of the framework agreement on fixed-term work concluded on 18 March 1999 and set out in the annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43), to which the United Kingdom Government has made reference, the EU legislature chose to refer, for the purposes of defining a certain concept, to both legislation and other sources of domestic law, without making any distinction. On that occasion, the legislature referred not merely to 'law' but to the 'law, collective agreements or practice' in each Member State.

52 — See, to that effect, judgments of 20 June 2002, *Mulligan and Others* (C-313/99, EU:C:2002:386, paragraph 47), and of 25 March 2004, *Azienda Agricola Ettore Ribaldi and Others* (C-480/00, C-482/00, C-484/00, C-489/00 to C-491/00 and C-497/00 to C-499/00, EU:C:2004:179, paragraph 85).

53 — Judgment of 20 June 2002, *Mulligan and Others* (C-313/99, EU:C:2002:386, paragraph 48).

74. As I have explained in point 25 of this Opinion, the established case-law to which the national court refers consists in a series of judgments delivered by that court, each of which lays down one or more criteria for assessing whether there is a risk of absconding. The presentation of those criteria is therefore fragmentary.

75. That also suggests that the criteria in question have been acknowledged by that court on a case-by-case basis, depending on the individual circumstances of each of the cases brought before it. In that regard, the Czech Government admitted at the hearing that administrative practice and case-law could develop as experience brings to light other criteria relevant to the assessment of a risk of absconding. Thus, criteria initially identified in the course of administrative practice might subsequently be endorsed in case-law.

76. That being so, I doubt whether the administrative practice and the case-law in question, even if well established, offer sufficient guarantees in terms of foreseeability. That is all the more debateable having regard to the particularly serious nature of the interference with the fundamental rights of applicants which a detention measure represents — interference which, moreover, the EU legislature intended should be limited to exceptional cases.⁵⁴

77. Indeed, if the criteria for assessing the risk of absconding could be derived from an administrative practice or, as the case may be, from case-law endorsing that practice, then those criteria might fluctuate as that administrative practice develops. They might even, in such a situation, lack the stability necessary to be regarded as being ‘defined’, as is required by Article 2(n) of the Dublin III Regulation.

78. In addition, the Czech Government expressed doubts at the hearing as to whether the administrative practice giving rise to those criteria had been publicised. In the absence of publicity measures, it cannot be guaranteed that the individuals concerned would have access to that administrative practice. Indeed, the Court has held in that regard that mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, do not have the clarity and precision necessary to satisfy the requirement of legal certainty.⁵⁵

79. Admittedly, as has been observed by the United Kingdom Government, defining the criteria for assessing the risk of absconding in a written law does not provide an absolute guarantee of legal certainty either, given that an individual, specific assessment of the risk is required. Nevertheless, laying down criteria in legislation to guide that assessment does, in my view, offer better guarantees in terms of stability and therefore legal certainty. Moreover, I believe it was precisely in order to limit the risk of individual administrative and judicial authorities exercising their discretion arbitrarily that the EU legislature called for that discretion to be circumscribed by statutory criteria.⁵⁶

80. Furthermore, some might object that the rights of applicants would be better protected by established case-law or an established administrative practice which has identified criteria that are precise and rigid than by a piece of legislation laying down criteria that are vague and lax. In order to avoid any confusion in that regard, I would reiterate that the question referred for a preliminary ruling concerns only the requirements relating to the normative source of the criteria for assessing the risk of absconding. It does not therefore concern the separate issue of the content of those criteria.⁵⁷

⁵⁴ — See point 46 of this Opinion.

⁵⁵ — Judgment of 20 June 2002, *Mulligan and Others* (C-313/99, EU:C:2002:386, paragraph 47 and the case-law cited). In another context, the Court held that a restriction of the right to an effective remedy, affirmed in Article 47 of the Charter, infringed that provision because it was set out in an administrative committee’s manual (judgment of 17 September 2014, *Liivimaa Lihaveis* (C-562/12, EU:C:2014:2229, paragraph 74)).

⁵⁶ — See points 81 to 84 of this Opinion.

⁵⁷ — See point 35 of this Opinion.

b) Objective of circumscribing the administrative and judicial authorities' discretion

81. The adoption of legislation, in addition to providing advantages in terms of legal certainty, offers additional assurances in terms of external control of the discretion of the administrative and judicial authorities responsible for assessing the risk of absconding and, where appropriate, ordering the detention of applicants.

82. Given the particularly serious nature of the interference with the fundamental right to liberty represented by a detention order and the EU legislature's desire to limit that interference to exceptional circumstances,⁵⁸ the discretion of those authorities should be circumscribed in such a way as will best guard applicants against arbitrary deprivations of liberty. From that perspective, I believe it is important that the content of the criteria in the abstract and their actual application in a specific case be determined by institutionally separate authorities.

83. That is, in my view, the true significance of the two-fold requirement (for an individual assessment and for that assessment to be based on pre-defined, objective criteria) arising from Article 2(n) of the Dublin III Regulation. First, that provision requires the administrative and judicial authorities to take the circumstances of each specific case into consideration. Second, it ensures that the discretion of the individual authority concerned is channelled by means of general, abstract criteria that have been determined in advance by a third authority.

84. In my view, those considerations permit a finding that the requirement that the objective criteria for assessing the risk of absconding be defined 'by law' remains unsatisfied where those criteria are established not in legislation but under an administrative practice or in case-law.⁵⁹

85. In corroboration of that view, I would add, first of all, that the approach I am recommending is consistent with that followed by the Commission in its 'Return Handbook' regarding the interpretation of Article 3(7) of the Return Directive.⁶⁰

86. Next, most of the Member States seem to acknowledge that Article 2(n) of the Dublin III Regulation requires them to define the criteria for assessing the risk of absconding in their legislation if they wish to have recourse to detention measures, as can be seen from the answers to two questionnaires sent to the 'NCPs' (national contact points) of the Member States in surveys carried out by the European Migration Network.⁶¹ The majority of respondents stated that, in 2014, their national legislation either already defined the objective criteria for assessing the risk of absconding for the purposes of Article 2(n) of the Dublin III Regulation, or was in the process of being amended to that effect. That was the case for the Czech Republic, whose legislation was amended in this way after the present request for a preliminary ruling was submitted.⁶² Only the United Kingdom's NCP disputed the requirement for those criteria to be defined in legislation.

58 — See point 46 of this Opinion.

59 — Whereas my assessment of the first of the objectives pursued by this requirement (legal certainty) is closely linked to the specific context of the present case, my conclusion concerning the second objective (circumscribing the discretion of individual administrative and judicial authorities) applies regardless of the characteristics of the administrative practice or case-law in question.

60 — Annex to the Commission Recommendation of 1 October 2015 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks (C(2015) 6250 final, p. 11). Regarding the relationship between the Return Directive and the Dublin III Regulation so far as detention measures are concerned, see points 65 and 66 of this Opinion.

61 — Ad-Hoc Query on detention in Dublin III cases, available at the following address: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/590_emn_ahq_on_detention_in_dublin_cases_en.pdf, and Ad-Hoc Query on objective criteria to identify risk of absconding in the context of reception directive art 8 (recast) and Dublin regulation no 604/2014 art 28 (2), available at the following address: http://emn.ypes.gr/images/docs/EMN_QUERIES/EMN_QUERIES_2014/2014_619_emn_ahq_on_objective_criteria_to_identify_risk_of_absconding_%28wider_diss%29.pdf. The European Migration Network was set up by Council Decision 2008/381/EC of 14 May 2008 establishing a European Migration Network (OJ 2008 L 131, p. 7).

62 — See point 16 of this Opinion.

87. Lastly, several national courts subscribe to that interpretation. In particular, the Bundesgerichtshof (Federal Court of Justice) has held that that provision requires the grounds on which it may be concluded that there is a risk of absconding to be determined by legislation in a manner which is foreseeable and subject to scrutiny (case-law being insufficient in that regard).⁶³ The Verwaltungsgerichtshof (Administrative Court) also delivered a judgment to that effect, expressly stating in addition that there was no need to refer a question for a preliminary ruling because no other interpretation was possible.⁶⁴ Similarly, the Cour administrative (Higher Administrative Court, Luxembourg) has emphasised that Article 2(n) of the Dublin III Regulation refers to provisions of a legislative nature.⁶⁵ The Raad van State (Council of State, Netherlands), for its part, held that the risk of absconding within the meaning of Article 3(7) of the Return Directive⁶⁶ had to be based on objective criteria defined by legislation, an administrative practice being insufficient in that regard.⁶⁷

V – Conclusion

88. Having regard to all of the foregoing, I propose that the answer to the question referred for a preliminary ruling by the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) should be as follows:

Article 2(n) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, read in conjunction with Article 28(2) of that regulation, is to be interpreted as meaning that a Member State may not detain an applicant for international protection for the purpose of securing a procedure for his or her transfer to another Member State if the former Member State has not defined in its legislation the objective criteria for assessing the risk of absconding, even if those criteria are apparent from the case-law or the administrative practice of that Member State.

63 — Bundesgerichtshof, 26 June 2014, V ZB 31/14.

64 — Verwaltungsgerichtshof, 19 February 2015, RO 2014/21/0075-5.

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

66 — Regarding the relationship between Article 3(7) of the Return Directive and Article 2(n) of the Dublin III Regulation, see points 65 and 66 of this Opinion.

67 — Raad van State, 21 March 2011, BP9284, 201100555/1/V3.