

‘COMPLETE JUDICIAL PROTECTION’

Asylum-seekers’ rights and Member States’ convenience under the Dublin III Regulation

A. Context

1. Since it took effect on 1st January 2014, Council Regulation 604/2013, the “Dublin III” Regulation, has laid down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection¹. It replaced Regulation No. 343/2003, the “Dublin II” Regulation.
2. The aim of the Dublin II Regulation was generally treated by the Courts as being to provide a speedy mechanism for the resolution of disputes between Member States. It had been designed on the basis of “mutual confidence” between Member States, in order “*to rationalise the treatment of applications for asylum and to avoid blockages in the system [...], and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum application and thus to avoid forum shopping*”². The “*principal objective of all these measures*” was said to be “*to speed up the handling of claims in the interests both of asylum seekers and the participating Member States*”³.
3. The reference to the interests of asylum seekers often seemed rather an afterthought in the judgments of the courts and, in its last judgment on Dublin II, the CJEU held that the rights of individuals to influence decisions pursuant to that Regulation were very limited indeed:

[...] in circumstances where a Member State has agreed to take charge of an applicant for asylum [...] as the Member State of the first entry of the applicant for asylum into the European Union [...] the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic

¹ Regulation 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 (recast).

² *Abdullahi v Bundesasylamt* C-394/12 §53.

³ *Abdullahi* §53.

*deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.*⁴

4. One of the main aims of the Dublin III Regulation was to ensure that the Dublin system did not override the rights of asylum-seekers. Recital 9 of the Preamble to Dublin III states that:

*In the light of the results of the evaluations undertaken of the implementation of the first-phase instruments, it is appropriate, at this stage, to confirm the principles underlying Regulation (EC) No 343/2003 [the Dublin II Regulation], while making the necessary **improvements**, in the light of experience, to the **effectiveness** of the Dublin system and the **protection** granted to applicants under that system. [...]*

5. At the back of the text of the Dublin III Regulation in the Official Journal, there is a detailed ‘Correlation Table’ between Dublin II and Dublin III. Some of the entirely new provisions in Dublin III include provisions on interviews, entitlement to information, appeal rights and detention, each of which appears to provide a protective right to individual asylum seekers. There is also an ‘override’ system, which provides for allocations of responsibility between Member States to be disapplied for humanitarian purposes. There are *no* new provisions which increase the powers of the member state in its dealings with an individual, a clear indication that the Commission and the legislators felt that Dublin III must tip the balance back in favour of protection.
6. This paper looks at the way in which the CJEU has begun to consider the balance between the ‘effectiveness’ of the Dublin system (as understood by Member States,

⁴ *Abdullahi* §62. This judgment, from December 2013, is controversial. Its restrictive approach to an individual asylum seeker’s rights within the Dublin II procedure, allowing only a narrow override to states’ determination of responsibility on grounds of ‘systemic deficiencies’ in another Member State’s asylum system, was incompatible with the approach of the Supreme Court in *R (EM (Eritrea) and others) v SSHD* [2014] AC 1321; [2014] UKSC 12 with that of the Grand Chamber of the ECtHR in *Tarakhel v Switzerland* (2015) 60 EHRR 28, and seemingly with that of the CJEU itself in cases such as *K v Bundesasylamt* C-245/11; [2013] 1 WLR 883. The advent of the Dublin III Regulation has meant that the issue has not required resolution (see for example paras 51-53 of Advocate-General Sharpston’s Opinion in *Ghezelbash v Staatssecretaris van Veiligheid en Justitie* (C-63/15), [2016] 1 WLR 3969 at 3983). There was a less extreme, but still very limiting, version of this approach in the domestic courts. A challenge could be brought on the basis of any applicable fundamental right, but a challenge could not be brought on the basis of a factual dispute about the application of the Dublin II Regulation: see *R (MK (Iran)) v SSHD* [2010] 1 WLR 2059 and *R (AR (Iran)) v SSHD* [2013] EWCA Civ 778.

including particularly the United Kingdom) and the protection to which asylum seekers are entitled.

7. The final version of Dublin III was shaped by the crisis in the Greek asylum system in the late 2000s and onwards. Its form may be seen as including an attempt to save the Dublin principle in the face of the collapse of the presumption, at least in respect of one major member state, that the minimum standards provisions under the Directives would apply.
8. Hence the increase in references, in Dublin III, to ‘*solidarity*’ (see Recital 8 and 22) as a “*pivotal element*” of the CEAS, which goes “*hand in hand with mutual trust*”. Mutual trust may, the legislator appears to be saying, consist as much in preventing the overload of a sister Member State’s asylum system as in presuming that the sister Member State has no problems.
9. But the social and political problems engendered by the Dublin system have not gone away. The fundamental difficulties which remain with the Dublin system are increasingly highlighted in the opinions of Advocates-General. A-G Sharpston refers to the interpretation of Dublin III being “*fraught with unspoken political questions and rendered acutely uncomfortable by the tragic stories of people dying in attempts to cross the Mediterranean*”⁵, while for A-G Bot the evidence suggests that “*the system established at European level*” is “*ill equipped to deal with the realities on the ground*”, can “*give rise to an imbalance between the Member States when it comes to taking charge of applicants for international protection*”, and can “*have the effect of compelling the individuals concerned to reside in a single Member State*”⁶.
10. The starkest review of the functioning of Dublin III is in A-G Sharpston’s opinion in *A.S. v Republic of Slovenia* (C-646/16), which opens with a devastating consideration of the imbalance between the Dublin system and the geographical realities of Europe, in the context of the so-called ‘Refugee crisis’ of 2015:

1. If one looks at a map of Europe and superimposes upon it a map of the European Union, carefully marking in the EU’s external frontiers, certain obvious truths emerge. There is an extended land frontier to the east bordering

⁵ *Mengsteab v Bundesrepublik Deutschland* (C-670/16), Opinion of A-G Sharpston §48.

⁶ *Bundesrepublik Deutschland v Hasan* (C-360/16), Opinion of A-G Bot §§4-5.

nine EU Member States. As one moves into the Balkans the geography – like the history – becomes a little complicated. The essential point to stress is that a ‘land bridge’ leads directly from Turkey into the European Union. To the south of the territory of the European Union lies the Mediterranean – crossable by improvised craft if the conditions in one’s homeland are sufficiently appalling to lead one to attempt that desperate venture. The closest crossing points lead to landfalls in Greece, Malta or Italy – or, at the extreme western end, in Spain. The eastern and south-eastern borders of the European Union are therefore potentially open to overland migration; whilst the southern border is potentially open to migration across the Mediterranean.

2. The western edge of the European Union is significantly less open to migration. There is, first, the Atlantic seaboard along the entire western edge of the EU’s territory. Then, to the north, there is more sea – the Irish Sea, the Channel and the North Sea; the Skagerrak, the Kattegat and the Baltic Sea. As well as the Baltic Sea on its southern border, Sweden has a land border to the north with its neighbour, Norway. Finland has both sea frontiers and land frontiers. To the west and north, therefore, geography and climate combine to render migration significantly more difficult.

3. The ‘Dublin system’ does not take the map of Europe that I have just described as its starting point. Rather, it tacitly assumes that all applicants for international protection will arrive by air. Were they to do so, there would in theory be something closer to an equal chance that (very roughly) equal numbers of applicants would arrive in each of the 28 Member States. Against that background, the system put in place makes very reasonable sense.

4. Another essential element of the Dublin system is that it focuses on the individual applicant for international protection. It is that individual applicant (as defined in Article 2(c) of the Dublin III Regulation) who is assessed by reference to the criteria set out in its Chapter III in order to determine which Member State is responsible for considering his application for international protection. The whole regulation is cast in terms of the individual. That is self-evidently right and proper. Individual human beings seeking protection are not statistics; they are to be treated humanely and with respect for their fundamental rights. In normal times, giving effect to the approach enshrined in the Dublin III Regulation may require administrative coordination and cooperation between the competent authorities of different Member States, but it presents no intrinsic or insurmountable difficulties.

5. Between September 2015 and March 2016, the times were anything but normal.

11. The suggestion that Dublin III could ever operate without “intrinsic or insurmountable difficulties” may be over-optimistic, but the Dublin system has proved incapable of regulating recent events humanely. At the same time, proposals for another recast, presumably the embryonic Dublin IV, are on the table. What will

become of the draft recast (which is, at first sight, a back-tracking instrument), and what part if any the UK will play in it, will be another chapter.

Related instruments

12. The Dublin II Regulation was accompanied by Commission Regulation (EC) No 1560/2003, which laid down “*detailed rules for the application of*” the Dublin II Regulation. This is often referred to (rather inaccurately) as the ‘Implementing Regulation’; it should really be referred to as the ‘Dublin Procedures’ Regulation, or something like that. When the Dublin III Regulation came into effect at the start of 2014, the old Implementing Regulation was, very unhelpfully, not recast with it. Instead, it was amended, in part, by Regulation 118/2014. Reading the two of them together is not straightforward.
13. The Dublin III Regulation forms part of the Common European Asylum System (CEAS), which the EU has been seeking to develop since the European Council of Tampere in 1999. That system was originally made up of four principal instruments: Regulation 343/2003 (“the Dublin II Regulation”); Council Directive 2003/9/EC (“the Reception Directive”); Council Directive 2004/83/EC (“the Qualification Directive”); and Council Directive 2005/85/EC (“the Procedures Directive”). In the heady days of the 2000s, Cool Britannia opted in to all four. Each of these instruments has been “recast”. The UK has not opted into the three recast directives, the original enactments of which continue to apply. That in itself adds a further layer of complexity to the interpretation of the Dublin III Regulation in the UK.
14. It is obvious that the different provisions are intended to hang together. The Dublin Regulations will fall under immense pressure if there are, in fact, massive differences between the treatment which asylum seekers and refugees can expect in different states. Similarly, the idea of the CEAS will not work unless there is some way of ensuring a workable division of resources and needs.

B. Rights to participate in the Dublin III process, and rights of appeal

15. The first issue which arose for litigation in the Dublin III context is the extent to which any or all of its provisions are directly effective and justiciable.
16. The first draft of the Dublin III Regulation was introduced by the Commission on 3rd December 2008 (COM(2008)820 final)⁷. The Commission stated [p.5] that the main aim of the proposal was “*to increase the system’s efficiency and to ensure higher standards of protection for persons falling under the ‘Dublin procedure’*” [emphasis added]. While the Dublin III Regulation will generally have the character of a regulation laying down the Member States’ obligations towards each other, it is “*proposed that the existing procedural safeguards be ameliorated so as to ensure a higher degree of protection and that new legal safeguards be included so as to better respond to the particular needs of the persons subject to the Dublin procedure, while at the same time seeking to avoid any loopholes in their protection*” [p.6; emphasis added].
17. The Commission’s proposal thus includes a separate section on ‘*Legal safeguards for the persons falling under the Dublin procedure*’ [page 8; emphasis added]. Under that rubric, the Commission introduced the provisions which later became Articles 4, 5, 27 and 28 of the Dublin III Regulation:
- (i) Provisions specifying in greater detail the content, form and the timing for providing information to applicants for international protection. These are reflected in Articles 4 and 5 of the draft and final versions of Dublin III.
 - (ii) The laying down of provisions for the “*right to appeal against a transfer decision*”, and minimum standards for the fair conduct of such appeals. These are reflected in Article 26 of the draft version of Dublin III, which ultimately became Article 27 of the final version.
 - (iii) 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*” [page 8]. The Commission emphasised that “*moreover, in order to ensure that detention of asylum seekers under the Dublin procedure is not arbitrary, limited specific grounds for such detention are proposed*” [emphasis added]. These detention provisions are reflected in Article 27 of the draft Dublin III, which, in amended form, became Article 28 of the final version.

⁷ 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.

18. One of the most striking innovations of the Dublin III Regulation is the introduction of a free-standing appeal right. Recital 9 provides that:

In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred.

19. This is reflected in free-standing Article 27, which provides (at 27(1)) that “*the Applicant [...] shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal*” [emphasis added]⁸. Despite the apparently clear terminology, Member States have argued that nothing has changed since Dublin II; or that the ‘appeal or review, in fact and law’ should in reality be restricted to challenges based on the Charter of Fundamental Rights of the European Union⁹; more recently, the UK has argued that there is a distinction between Dublin ‘procedure’ and the substantive decision about which Member State is responsible for the examination of an asylum claim, and that appeal rights only cover the latter¹⁰.

20. These arguments have been rejected in a series of CJEU judgments.

21. First, in *Karim v Migrationsverket* (C-155/15) and *Ghezelbash v Staatssecretaris van Veiligheid en Justitie* (C-63/15), the Court built upon strongly argued opinions of A-G Sharpston to emphasise the fundamental importance to the Dublin III Regulation of individual asylum-seekers’ access to justice.

22. In each case, an initial Member State had originally been responsible for the assessment of the asylum-seeker’s asylum claim. But in each case, the asylum-seeker relied upon one of the provisions now in Article 19 of the Dublin III Regulation,

⁸ Contrast Art. 19(2) of the Dublin II Regulation, which provided that a transfer decision “*may be subject to an appeal or a review*”. Note the absence of any reference to a right, and the absence of any reference to the necessary contents of the appeal or review.

⁹ For the arguments, see A-G Sharpston’s Opinion in *Ghezelbash* §§ 60-62.

¹⁰ See the unsuccessful attempt of the UK to argue this point in *Mengesteab v Bundesrepublik Deutschland* (C-670/16) §§56-58.

which provided that if the asylum-seeker leaves the territories of the EU under certain circumstances, or for certain periods, the responsibility of that initial Member State ceases. So, for example, Art. 19(2) provides:

The obligations specified in Article 18(1) [to take back an asylum-seeker or to take charge of his/her claim] shall cease where the Member State responsible can establish, when requested to take charge or take back an applicant [...] that the person concerned has left the territory of the Member States for at least three months, unless the person concerned is in possession of a valid residence document issued by the Member State responsible. [...]

23. The claimants in *Karim* and *Ghezelbash* wished to argue that the responsibility of the initial Member State had ‘ceased’ (and that responsibility had thus passed from the initial Member State to a second Member State). The Member States, by contrast, argued that this was an issue which only concerned the states party, and that the individual concerned effectively had no locus to bring a challenge to a decision about transferral based upon the application of Art. 19.

24. The core of A-G Sharpston’s reasoning is at 44-84 of *Ghezelbash*. The A-G concludes that:

- (i) The CJEU’s judgment in *Abdullahi* (C-394/12) cannot be “*simply transposed so as to determine the scope of the right of review*” [49];
- (ii) this was in part because “*the terms of Article 27(1) of the Dublin III Regulation, which the Court is now being asked to interpret, differ significantly from the wording of Article 19(2) of the Dublin II Regulation which the Court rules on in Abdullahi*” [53];
- (iii) Article 27(1) creates “*in unequivocal terms, a ‘right to an effective remedy’*” [57] which is mandatory, is to cover both fact and law, and is to provide independent judicial oversight [58].
- (iv) Article 27(1) should be read as conferring “*a wider right of appeal or review, ensuring judicial oversight of the competent authorities’ application of the relevant law (including the Chapter III criteria) to the facts presented to them*” [62; 84].
- (v) The reasons for this conclusion are set out at [70-83]. Of particular relevance is A-G Sharpston’s view that it is “*oversimplistic to describe the Dublin III Regulation purely as an inter-State instrument*” (contrast Dublin II) because

“the legislator has introduced and reinforced certain substantive individual rights and procedural safeguards” (as compared with Dublin II) [70]. Examples of these include Articles 4 (an applicant’s right to information) and 5 (the right to a personal interview) [70].

- (vi) As for the approach which should be taken to the facts relevant to factual review of the correctness of a ‘transfer decision’, the A-G emphasised at [84-91] the normal EU law principle of procedural autonomy, *“subject always to the principle of effectiveness”* [90] which requires as a minimum *“an assessment of the lawfulness of the grounds which were the basis of the transfer decision and whether it was taken on a sufficiently solid factual basis”* [91].

25. The CJEU’s final judgments in *Ghezelbash v Staatssecretaris van Veiligheid en Justitie* C-63/15 and *George Karim v Migrationsverket* C-155/15 were handed down in June 2016 build directly on A-G Sharpston’s approach.

- (a) It was important to understand (para. 45) *“the general thrust of the developments that have taken place in the system for determining the Member State responsible for examining an asylum application made in one of the Member States”* by the introduction of the Dublin III Regulation.
- (b) *“[V]arious rights and mechanisms guaranteeing the involvement of asylum seekers in the process for determining the Member State responsible”* (46) had been introduced. The CJEU gave two examples:
 - (i) Article 4, which confers a *“right on the applicant to be informed of, inter alia, the criteria for determining the Member State responsible and the relative importance of those criteria, including the fact that an application for international protection lodged in one Member State may result in that Member State becoming the Member State responsible, even if that designation of responsibility is not based on those criteria”* (47).
 - (ii) Articles 5(1), (3) and (6), which *“provide[...] that the Member State carrying out the determination of the Member State responsible must, in a timely manner and, in any event, before a transfer decision has been taken, conduct a personal interview with the asylum seeker and ensure that the applicant or the counsellor representing him has access to a written summary of the interview. Pursuant to Article 5(2) of the regulation, the interview does not have to take place if the applicant has already provided the information relevant to the determination of the Member State responsible and, in that case, the Member State in question must give the applicant the opportunity to present any further information which may be relevant for the correct determination of the Member State responsible before a decision is taken to transfer the applicant” (48).*

- (c) The Dublin III Regulation set out “*at considerable length the arrangements for the notification of transfer decisions and the rules governing the remedies available in respect of such decisions*” (at para. 49). The importance of those procedural protections was emphasised at para. 50: “*It is apparent from Article 27(3) to (6) of [the Dublin III Regulation] that, in order to ensure that those remedies are effective, the asylum seeker must, inter alia, be given the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal and have legal assistance*”.
- (d) Crucially, and marking a departure from its approach to the Dublin II Regulation, the CJEU concluded (at 51) that “*the EU legislature did not confine itself [the Dublin Regulation] to introducing organisational rules simply governing relations between Member States for the purpose of determining the Member State responsible, but decided to involve asylum seekers in that process by obliging Member States to inform them of the criteria for determining responsibility and to provide them with an opportunity to submit information relevant to the correct interpretation of those criteria, and by conferring on asylum seekers the right to an effective remedy in respect of any transfer decision that may be taken at the conclusion of that process.*”
- (e) And the CJEU thus concluded (at 53) that **the substantive rights and the procedural rights go hand in hand**: the latter are necessary to protect the former. So the Court gave an important example (53): “*the requirements laid down in Article 5 of the regulation to give asylum seekers the opportunity to provide information to facilitate the correct application of the criteria for determining responsibility laid down by the regulation and to ensure that such persons are given access to written summaries of interviews prepared for that purpose would be in danger of being deprived of any practical effect if it were not possible for an incorrect application of those criteria — failing, for example, to take account of the information provided by the asylum seeker — to be subject to judicial scrutiny.*”
- (f) In other words, where a state breaches substantive provisions of the Dublin III Regulation, which are intended to create directly enforceable rights, that breach must be capable of challenge if breached; otherwise those rights would be deprived of practical effect.

C. Delays, time limits, and justiciability

26. Further references to the CJEU have raised the question of time limits under the Dublin III Regulation, or which there are many. These are clearly important because a breach of those time limits often results in a specific effect (for example, that

responsibility for an asylum claim is transferred to the state which has breached the time limit).

27. In *Mengesteab v Bundesrepublik Deutschland* (C-670/16), the applicant had arrived by sea in Italy and had been fingerprinted there. He subsequently travelled to Germany, where he claimed asylum on 14th September 2015, and a ‘certificate of registration’ as an asylum seeker was issued to him and transferred to the authority competent for examining his claim, no later than 14th January 2016. Mr Mengsteab was summoned to the Office of the competent authority on 22nd July 2016, and was “able to lodge an official application for asylum”¹¹. Having established through the Eurodac system that Mr Mengsteab had been fingerprinted in Italy, the German authority made a request to Italy on 19th August 2016 that Italy ‘take him back’. The Italian authorities did not reply (and were therefore deemed to have accepted the request).

28. The dates are important, as are the provisions of Article 21(1) of Dublin III: that a Member State must make a ‘take back’ request “*as quickly as possible and in any event within three months of the date on which the application was lodged [...]*”, or “*within two months*” of receiving a Eurodac ‘hit’, failing which responsibility for examining the asylum application “*shall lie with the Member state in which the application was lodged*”.

29. The CJEU held:

(a) That an individual asylum-seeker must be entitled to challenge a decision to transfer him/her on the basis that the time period laid down in Article 21(1) had expired. There was no reason to suppose that the right to a remedy established by Article 27 of the Dublin III Regulation, and which formed a part of the “*effective and complete judicial protection enjoyed by asylum seekers*”¹², should exclude the right to challenge Member States’ failures to comply with mandatory time limits. A “*restrictive interpretation of the scope of the remedy provided for in Article*

¹¹ *Mengesteab* §§29-30.

¹² *Mengesteab* §§41-62; see particularly 46 and 62.

27(1) of the Dublin III Regulation might thwart the attainment” of the objective of complete judicial protection¹³.

- (b) As a result, the attempt of the UK and of the Commission to rely on a distinction between ‘procedural’ and substantial elements of the Dublin III Regulation, could not be accepted. Article 27 made no distinction between two types of rule; and the restriction “*would not be consistent with the objective [...] of strengthening the protection of applicants for [asylum], since that strengthened protection is manifested principally by the grant, in essence, of procedural safeguards for those applicants*”¹⁴.
- (c) The fact that Italy had accepted (or was deemed to have accepted) the transfer request, made no difference: Article 21(1) “*provides, in the case of the expiry of the periods laid down [by that Article] for a full transfer of responsibility to the Member State in which the application for international protection was lodged, without making that transfer subject to any reaction by the requested member state*”¹⁵.
- (d) The 2-month Eurodac timeframe shortened, rather than lengthened, the normal 3-month timeframe for a take back request (the German authorities had extremely optimistically suggested that the clock restarted with a Eurodac hit).
- (e) Finally, and very importantly, Germany (supported by the United Kingdom government) could not escape the relevant timeframes by adopting a system in which initial ‘registration’ of an asylum claim was different from the ‘making’ of an asylum claim. The Court concluded that “*an application for international is deemed to have been lodged if a written document, prepared by a public authority and certifying that a third-country national has requested international protection, has reached the authority responsible for implementing the obligations arising from [the Dublin III Regulation] and, as the case may be, if only the main information contained in such a document, but not that document or a copy thereof, has reached that authority*”.

¹³ *Mengesteab* §47.

¹⁴ *Mengesteab* §58.

¹⁵ *Mengesteab* §61. This is important in the domestic context; the Courts had previously held (in the context of Dublin II) that acceptance by a Member State put an end to any Dublin challenge: see for example *R (AR (Iran)) v SSHD* [2013] EWCA Civ 778.

30. Many cases have raised the question of the 6-month time limit, set down in Article 29(1) of the Dublin III Regulation, between the “*acceptance of the request by another Member State to take charge or to take back the person concerned*” and the transfer itself. Article 29(2) provides that, where the time limit is not observed, responsibility “*shall then be transferred to the requesting member state*”. The onset of the 6-month time limit is, however, deferred until “*the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3) [of Dublin III]*”.
31. Two main sets of questions about this Article have arisen at the moment:
- (i) Does a person who is not removed within the 6-month time limit have a right to challenge any subsequent decision to transfer him/her?
 - (ii) What triggers the operation of the 6-month time limit?
32. The first question may remain live, despite *Mengesteab*, because of the way in which the Dublin III Regulation is set out. Art. 28 (on detention pending transfer) and Art. 29 (on time limits for transfer) come after Art. 27 (on rights of appeal and review). The UK’s suggestion is that Art. 27 is only intended to provide for an appeal or review of a decision about which country is responsible for an asylum claim; it is not supposed to provide for review of what happens to the person once that decision is made. On the face of it, this is an unattractive position in light of *Mengesteab* and the Court’s emphasis on the need for judicial protection of asylum seekers. The Outer House of the Court of Session accepted it, however, in *BM v SSHD* [2017] CSOH 17 §26: “*the time limits in Regulation 29 are solely intended to regulate the matter between member states*”; the Inner House had hinted that it might reach the same conclusion in *MIAB v SSHD* [2016] CSIH 64 §§67-68.
33. The question arises for consideration in the case of *Shiri v Bundesamt für Fremdenwesen und Asyl* C-201/16; a number of English cases are stayed behind the CJEU’s judgment. A-G Sharpston’s opinion is available; judgment is awaited. The Advocate-General’s strongly expressed view is that a person *can* challenge a breach of the Article 29 time limits breach by way of an Article 27 appeal or review. She opens her Opinion with some apparent frustration at the need for repeated emphasis on the right to a remedy (“*In this reference the Court is asked yet again to give*

guidance as to the scope of the effective remedy provided in Article 27(1) of the Dublin III Regulation”). The following are important

33. *The issue in Ghezelbash was whether the relevant Chapter III criteria for determining the Member State responsible had been applied correctly. [...]*

34. *It is true that both Ghezelbash and Karim concerned elements of the process under the Dublin III Regulation which apply before a Member State’s authorities issue a transfer decision. Mr Shiri’s case is different, in so far as it concerns the process after such a decision has been issued. However, that does not imply, in my view, that the right to an effective remedy ceases to apply.*

35. *Such a difference does not alter the point of principle, namely that the right to an effective remedy encompasses the right to challenge a failure to apply the Dublin III Regulation properly. That view is fully consistent with the Court’s case-law.*

[...]

37. *It is moreover necessary to give effect to the aims of the Dublin III Regulation by ensuring that it is applied in a manner which enables Member States to act consistently with their obligations under international law. The regulation also serves to guarantee that fundamental rights are observed. **The rights to good administration and to an effective remedy (Articles 41 and 47 of the Charter) provide standards which are particularly relevant to the correct interpretation of Article 27(1) of the Dublin III Regulation.***

38. *The **United Kingdom** puts forward a number of arguments to support the contrary interpretation. First, it stresses that a purposive approach should be applied in interpreting the Dublin III Regulation. The key objective is that **one Member State should be responsible for examining any application for international protection** as set out in Article 3(1). I agree with that submission; but I do not consider that allowing judicial scrutiny of a Member State’s failure to comply with the time limits set out in the Dublin III Regulation contradicts that fundamental principle of the Dublin system.*

39. *Second, the United Kingdom expresses the concern that if applicants can challenge transfer decisions on the grounds that the period for implementing such decisions has expired, that is **incompatible with the avowed aim of the Dublin III Regulation to prevent ‘forum shopping’**. However, in so far as that expression connotes multiple applications for international protection made in a number of Member of States by the same applicant, the Dublin III Regulation itself makes specific provision to deal with that issue.*

40. [...]*If an applicant in Mr Shiri’s position applies for international protection in more than one Member State, the EU legislature has deliberately chosen to provide an incentive for the requesting Member State to implement*

the transfer swiftly. If the requesting Member State fails to meet that key objective, the consequence is that the applicant remains in the requesting Member State. That is precisely how the legislation is designed to work. That is neither the same as nor equivalent to 'forum shopping'.

41. Third, although the distinction which the United Kingdom seeks to draw between substantive and procedural issues is at first sight attractive, it does not withstand closer scrutiny. That distinction does not resolve the matter at issue. The time limits laid down in the Dublin III Regulation certainly cover procedural matters, but they also have substantive implications for both applicants and the Member States concerned. For applicants, the time limits provide a degree of certainty and also have substantive implications as to which Member State will examine the application for international protection. The substantive and procedural aspects of the time limits laid down are likewise intertwined as regards the Member States.

[...]

34. The next issue raised in *Shiri* is the question what triggers the '6-month' period. Does it bite automatically, when 6 months are expired; or does the receiving state have to give formal notice that it no longer accepts the return of the asylum-seeker? Predictably, the UK argued the latter. A-G Sharpston did not agree:

48. The text of Article 29(2) of the Dublin III Regulation ('where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State ...') contains no words indicating that the legislature introduced an additional condition into the process between the requesting Member State and the requested Member State. The United Kingdom relies on the words 'responsibility shall then be transferred to the requesting Member State' as showing that the requested Member State must take positive action before it is relieved of its obligations. However, I read those words as meaning simply that responsibility is placed with the requesting Member State after the six month period has expired. The text does not indicate that there is a subsequent (unspecified) step in the process in addition to the expiry of the six month period laid down in Article 29(1) that must be fulfilled in order for responsibility for examining the application for international protection to lie with the requesting Member State. That transfer of responsibility results from the application of Article 29(2) itself.

49. That view is entirely consistent with the purpose of the provision. Inserting an additional condition into the process between the requesting and requested Member States is incompatible with the aim of determining swiftly the Member State responsible. It would also be inconsistent with a key aim of the Dublin system, namely ensuring that an applicant is not left in a position

where no State accepts responsibility for examining his application for international protection.

35. But A-G Sharpston's Opinion also makes clear that, where a person has brought and appeal or challenge to a transfer decision, the position is rather unclear, and the Judgment of the CJEU is awaited on that point.
36. A final question, which is the subject of a number of claims, some with permission, in the Administrative Court, is what constitutes a decision to accept (or refuse) transfer. Examples have arisen where Germany has send back holding responses to transfer requests, and then done nothing for many months. The Secretary of State has suggested that these responses were 'conditional' responses, which do not trigger any time limit at all, or that they were 'refusals' which the UK was entitled to challenge. Litigation on this point requires interpretation of the two Implementing Regulations.
37. The issues raised by these circumstances are quite complex. Some may be answered in the case of (*X v Staatssecretaris van Veiligheid en Justitie*) C-47/17 and C-48/17, which is the subject of a reference from the Netherlands.

D. Detention

38. The other core element of the Dublin III Regulation with which the CJEU has been occupied is its provisions of detention. Dublin III also introduces provisions (which did not appear in the Dublin II Regulation) which specifically regulate the detention of people who are in within the 'Dublin' process in accordance with principles of legality and proportionality.
39. Article 28 reads:
- 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). L 180/46 Official Journal of the European Union 29.6.2013 EN

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.*

40. Further, article 2(n) of the Dublin III Regulation, another new provision, defines a ‘risk of absconding’ as meaning ‘*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*’. In order to justify detention, that ‘risk’ must be ‘significant’.
41. The interpretation of these provisions is the subject of ongoing litigation in the UK: the Court of Appeal will determine the Secretary of State’s appeals from the successful judicial review claim in *R (SS) v SSHD* [2017] EWHC 1295 (Admin) and from the unsuccessful claims in *R (HK and others) v SSHD* [2016] EWHC 1394 (Admin) and *R (Abdulkadir and others) v SSHD* [2016] EWHC 1504.

42. There are now final judgments in two Luxembourg cases about Article 28. These are *Policie CR v al Chodor* (C-528/15) and *Amayry v Migrationsverket* (C-60/16).

Chodor

43. In its judgment in *al Chodor v Police of the Czech Republic* (C-528/15), handed down on 15th March 2017, the CJEU considered the meaning of the phrase (in Art. 2(n)) “based on **objective criteria defined by law**”.

44. The Court rejected the Czech government’s submission that those criteria could be provided by “settled case-law” (para. 22). It concluded (i) that “criteria such as those listed in Article 2(n) of the Dublin III Regulation require implementation in the national law of each Member State” (para 28); (ii) that “a purely textual analysis of the notion of 'defined by law' cannot determine whether case-law or a consistent administrative practice are capable of coming within that concept” (para. 31); but (iii) that by reference to the “general scheme” of the rules contained within the Dublin III Regulation (para. 33), the “high level of protection afforded to applicants covered by the Dublin III Regulation” (para. 34), and the fact 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” (para. 40), it followed (para. 45) that:

Article 2(n) and Article 28(2) of the Dublin III Regulation, read in conjunction, must be interpreted as requiring that the objective criteria underlying the reasons for believing that an applicant may abscond must be established in a binding provision of general application. In any event, settled case-law confirming a consistent administrative practice on the part of the Foreigners Police Section, such as in the main proceedings in the present case, cannot suffice.

45. The Court concluded (para. 46) that “[i]n the absence of those criteria in such a provision, as in the main proceedings in the present case, **the detention must be declared unlawful**” [emphasis added]. This Judgment is binding on the UK; it appears clearly inconsistent with the conclusion of the Administrative Court in a series of 2016 judgments, that Article 28 of the Dublin III Regulation has no direct

effect (and this was the finding of John Howell QC, giving judgment in *R (SS) v SSHD* [2017] EWHC 1295 (Admin)).

46. On 15th March 2017, a matter of hours after the handing down of the *al Chodor* judgment, the UK enacted the *Transfer for Determination of an Application for International Protection (Detention) (Significant Risk of Absconding Criteria) Regulations 2017*, which is expressly designed to provide the ‘*objective criteria*’ required by Article 2(n). It appears that the Regulations came into force before they were laid before Parliament. Despite this haste, the Secretary of State argues that they were unnecessary.
47. There is, further, an argument that the criteria included in those Regulations are too broad in scope, and too generalised and lacking in specific detail to satisfy the requirements of ‘*law*’ as explained in the *al Chodor* judgment. Litigation on these points is pending in the Administrative Court.

Amayry v Migrationsverket C-60/16 (13 September 2017).

48. The case of *Amayry* directly concerns the time limits for the detention of a person pursuant to Article 28, but gives guidance on the aims of that provision. The CJEU emphasises that the protections in the recast Reception Directive also apply to detention under the Dublin III Regulation (and this must apply even in the UK: see Art. 28 (4) of Dublin III). Article 9 of the recast Reception Directive provides that “*Administrative procedures relevant to the grounds for detention [...] shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention*”.
49. The Court concluded that the “*specific periods*” set out in Article 28(3) were intended to give “*specific expression*” to the principle that “*detention is to be for as short a period as possible and is to be for no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer is carried out*”¹⁶. On the other hand, it identified the purpose of the power to detain (at all) as being “*to secure transfer procedures by avoiding [the] person absconding and*

¹⁶ *Amayry* §§26-27.

*thus preventing a possible transfer decision made in respect of him from being carried out*¹⁷.

50. There is a perhaps unrecognised tension between these two principles, which leads the CJEU to treat what is, on the face of it, a worst case scenario provision (6 weeks is the longest it should ever take to fulfil the required administrative procedure) into a best practice provision, or at least a best estimate: *“the legislature took the view that such a period could be necessary in order for the transfer of a person to be carried out”*¹⁸.

51. On the other hand, the CJEU held clearly (§27) that where the time limits were exceeded, the person was *“no longer to be detained”*. That is, again, incompatible with any idea that Article 28 rights have no direct effect, or are otherwise non-judicial.

52. Against that background, the CJEU concludes:

- (i) That the mandatory 6-week time limit for transfer in Art. 28(3) only applies when a person is already in detention at the date when the requested member state accepts the request to take back or take charge;
- (ii) Where a person is detained after that, the 6-week time limit does not apply. Nonetheless, the person concerned *“may not be detained for a period vastly in excess of six weeks”* (§45).
- (iii) In those circumstances, Swedish legislation, which permitted detention for up to 2 months, was not *“necessarily excessive”* (§47). Legislation which authorised detention of 3 to 12 months, however, *“exceeds the period of time which is reasonably necessary for the required administrative procedures with due diligence until the transfer is carried out to be satisfied”* (§46). Presumably, therefore, 3 months is ‘vastly’ in excess of 6 weeks. Such legislation was *“precluded”* by Article 28(3) (§49)

53. The CJEU also gives specific guidance about the interrelationship between the 6-week time limit, on the one hand, and suspensive appeals and reviews on the other. Quite how this would bear on the case of a person who is detained while exercising a

¹⁷ *Amayry* §31.

¹⁸ *Amayry* §32

suspensive appeal or review (i.e which bits of Article 28 bite in those circumstances)
is very unclear.

DAVID CHIRICO
1 PUMP COURT