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Czech Litigation on Systematic Detention of Asylum Seekers: Ripple Effects across Europe

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Abstract: This article investigates the development of national litigation against the Czech Republic's governmental policy to detain asylum seekers under the Dublin III Regulation, as a means to address the so-called refugee crisis. The outcome of this litigation has been the preliminary ruling of the Court of Justice of the European Union in the *Al Chodor* case, which has been praised for enhancing domestic standards of protection of asylum seekers and returnees' right to liberty across the EU. The article demonstrates that this preliminary ruling has been a catalyst for domestic legislative and jurisprudential reforms across the EU, improving to a certain extent the protection of the right to liberty of asylum seekers. However, it is argued that in the Czech Republic the case has not initiated a change in the legislation, nor has it reduced the systematic use of asylum detention. The article identifies some important legal, political and social factors from within and beyond courtrooms that have contributed to this ambiguous outcome of the Czech litigation. It concludes by identifying circumstances that need to be taken into account when using the preliminary reference procedure as a tool for strategic litigation.

Keywords: detention, Dublin III Regulation, Return Directive, EU Charter of Fundamental Rights, European Convention of Human Rights, strategic litigation, Czech Public Defender of Rights (Ombudsman), Court of Justice of the European Union

1. Introduction

In 2015, during the so-called refugee crisis,[1] some Central and Eastern European Countries (CEEC)[2] experienced an unprecedented increase in numbers of asylum seekers[3] who were fleeing conflict and instability in the Middle East, and in North- and Sub-Saharan Africa. In response, these countries adopted increased migration containment measures ranging from: redirecting the refugee flow to the migrants' desired destination EU countries;[4] resorting to systematic detention of asylum seekers;[5] building walls and fences;[6] establishing low quotas for asylum seekers who were allowed to access asylum proceedings;[7] and ultimately refusing to comply with the EU obligation to share the responsibility of processing asylum applications with Italy and Greece.[8] The Czech Republic itself followed one of these measures, namely the systematic detention of asylum seekers subject to Dublin transfer procedures,[9] as a means of tackling the refugee crisis.[10] The Czech example is, however, not unique within the EU. In fact, administrative detention is one of the most commonly used migration control measures in the EU,[11] instead of being a last

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[1] Eurostat figures do not support the use of the term 'crisis', when compared with the number of asylum applications per population lodged in countries outside the EU, see Eurostat, News release No. 44/2016, 4 March 2016; and Chetail, V. (2016). Looking beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System. *European Journal of Human Rights*, Vol. 5, pp. 584-602.

[2] Namely, Croatia, the Czech Republic, Hungary, Poland, Romania, the Slovak Republic, and Slovenia.

[3] For precise numbers, see Goldner Lang, I. (2018). The Western Balkans Route as an Alternative to Breaching the EU Charter of Fundamental Rights, in: A. Crescenzi, R. Forastiero, G. Palmisano (Eds), *Asylum and the EU Charter of Fundamental Rights.* Napoli: Editura Scientifica, pp. 195-203.

[4] Such as: Austria, Germany, France, and Sweden. The redirection was also prompted by German willingness to take asylum seekers and examine their claims: see N. Kogov□ek □alamon, CJEU rulings on the Western Balkan route: Exceptional times do not necessarily call for exceptional measures*,* available at: *http://eumigrationlawblog.eu/cjeu-rulings-on-the-western-balkan-route-exceptional-times-do-not-necessarily-call-for-exceptional-measures/* .

[5] Grigonis, S. (2016). EU in the face of migrant crisis: Reasons for ine□ective human rights protection. *International Comparative Jurisprudence* 2(2), pp. 93-98.

[6] Benedicto, A. and Brunet, P. (2018). *Building Walls: Fear and Securitization in the European Union*. Transnational Institute Report.

[7] As happened for instance in Hungary: see Amnesty International Report (2015). *Fear and fences: Europe's approach to keeping refugees at bay*.

[8] ECJ, C-715/17 and C-718/17 *Commission against Hungary and Poland*, ECLI:EU:C:2020:257.

[9] Namely the procedure set out in the Dublin III Regulation (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 (recast), OJ L 180/31, 29 June 2013 ("Dublin III Regulation").

[10] As pointed out by the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, "[…] the Czech Republic is unique [among European countries] in routinely subjecting these migrants and refugees to detention." The High Commissioner called the violations of migrants' rights by the Czech government "an integral part of a policy by the Czech Government designed to deter migrants and refugees from entering the country or staying there". See UN High Commissioner for Human Rights, "Zeid urges Czech Republic to stop detention of migrants and refugees", (2015) available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16632&LangID=E.

[11] See Majcher, I; Flynn, M and Grange, M. (2020). *Immigration Detention in the European Union□: In the Shadow of the "Crisis"*. Springer International Publishing. For a similar approach to the Czech one see the Slovenian practice on Dublin III Regulation based detention, summarised in case: Administrative Court of the Republic of Slovenia, I U 1102/2016, 29.7.2016, available in English at: https://www.rejus.eu/db/cases/slovenia-administrative-court-republic-slovenia-29-july-2016-i-u-11022016

resort measure as envisaged by the Recast Reception Conditions Directive,[12] Dublin III Regulation, and the Return Directive.[13]

This article analyses the development of national litigation against the Czech Republic's governmental policy to detain asylum seekers under the Dublin III Regulation as a means to address the so-called refugee crisis. It focuses on a particular Czech case - the *Al Chodor case*[14] - which, although it did not start out as strategic litigation,[15] eventually resulted in transforming legislations in several jurisdictions across the EU. This Czech case is important for strategies to build litigation aimed at guaranteeing fundamental rights for vulnerable groups of migrants (e.g. asylum seekers and families with children). It illustrates the challenges and risks that might occur within strategic litigation, such as domestic courts taking unexpected decisions. In this case, the Czech Supreme Administrative Court decided to address a reference for a preliminary ruling to the CJEU, in opposition to the Czech Ombudsman and other stakeholders' opinions, the side-effect of which was to prolong the administrative detention of asylum seekers pending the delivery of the preliminary ruling.[16]

The *Al Chodor* case is thus an atypical case which challenges several of the findings of the literature on "legal mobilization".[17] Namely, it shows a different facet to the doctrine of courts and use of the preliminary reference procedure as enhancement of minorities' rights protection. This case shows that the use of Article 267 TFEU preliminary reference procedure can actually have detrimental side-effects on the rights of individuals falling under the scope of this procedure, when the reference considers only the interpretation of the law in abstract, without taking into consideration its practical effects on the ground pending the CJEU pronouncement. It also illustrates that the success of strategic litigation is not easily measurable and in certain cases its transformative effect is more visible in foreign jurisdictions rather than the jurisdiction in question.

After introducing the Czech social, political and legal context of the *Al Chodor* case (*section 2*), we analyse the development of litigation that challenged detention orders of asylum seekers under the Dublin III Regulation (*section 3*). We then assess the national impact of this litigation on jurisprudence, administrative practice and legislation. After a first litigation phase achieving numerous judicial annulments of administrative detention of asylum seekers (*section 3.2*), the course of this positive jurisprudence was halted by the Czech Supreme Administrative Court's reference for a preliminary ruling to the CJEU (*section 3.3*). The use of the normal instead of the urgent preliminary reference[18] is argued to have contributed to the prolongation of asylum

[12] See Articles 8-12 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection OJ L 180, 29.6.2013, p. 96–116 (Recast Reception Directive').

[13] Article 15 of Directive 2008/115/EC 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 L 348, 24.12.2008, p. 98–107 ('Return Directive').

[14] ECJ, C-528/15, *Al Chodor*, ECLI:EU:C:2017:213.

[15] By strategic litigation this article refers to litigation intended to have a national impact on policy(ies), legislation or jurisprudence, see more in: Equinet (2017). *Strategic Litigation Handbook*, avaialable at https://equineteurope.org/wp-content/uploads/2018/05/equinet-handbook_strategic-litigation_def_web-1.pdf [last accessed 15 April 2021].

[16] The referral suspended domestic litigation which had obtained annulment of detention orders before domestic courts in individual cases, see more in section 3.2.

[17] Soennecken, D. (2008). The growing influence of the courts over the fate of refugees. *Review of European and Russian Affairs* 4(2), pp. 10–43; Alter, K.J. and Vargas, J. (2000). Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy. (33) *Comparative Political Studies,* pp.452-482.; Kelemen, D.R. (2011). *Eurolegalism: The transformation of law and regulation in the European Union* Harvard University Press, Cambridge; Cichowski, R.A. (2013). Legal Mobilization, Transnational Activism, and Gender Equality in the EU. (28) *Canadian Journal of Law & Society*, pp. 189 - 208 at p.209.

[18] See Article 23a of the Statute of the Court of Justice of the European Union (Protocol 3).

seekers' detention. We argue that, while the CJEU Chamber judgment did not affect the restrictive practice and legislation on asylum detention in the Czech Republic, the judgment did trigger a positive transformation of legislation and jurisprudence beyond the Czech Republic (*section 3.4*). We conclude by arguing that, within the current political context, the key issue of the definition of "objective criteria" will not be solved by more prescriptive norms adopted at the EU level[19], but rather by a close administrative compliance with the judicially developed principles of individual assessment and proportionality when considering the application of asylum detention.

2. The Legal, Social and Political Context of the Czech Litigation against Asylum Seekers' Detention

Under EU law, the use of administrative detention to contain the migration of asylum seekers and irregular migration is a last resort measure, justified only if precise requirements are fulfilled.[20] For instance, Article 28 of the Dublin III Regulation permits the detention of asylum seekers only as an exceptional measure for the purpose of "secure[ing] transfer procedures" and only where there is a "significant risk" that the asylum applicant will abscond. In addition, the adoption of a detention measure under the Dublin procedure has to be necessary and proportionate, in the sense that no other less coercive measure can effectively be applied. The "risk of absconding" is defined as the "existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of Dublin procedures may abscond".[21] Notably, the definition includes two cumulative requirements: 1) an objective, general requirement ("objective criteria defined by law"), which must be defined in the laws of the Member States; and 2) a fact-based requirement ("in an individual case"), whereby competent authorities - namely the administrative or judicial authorities - are required to examine on a case-by-case basis all the individual, specific circumstances which characterise each applicant's situation.[22] These requirements give effect to the European Court of Human Rights (ECtHR)'s well-established case law that "no one should be dispossessed of their right to liberty in an arbitrary fashion".[23]

Initially, the introduction of "the significant risk of absconding" had no impact on certain Member States which continued to routinely detain asylum seekers subject to transfer proceedings under the Regulation on the basis of pre-Dublin III practice. This was also the case of the Czech Republic which, like some other Member States,[24] did not define the "significant risk of absconding" in a national legislative provision but continued to detain asylum seekers on the basis of established administrative and judicial practice.[25]

Within this legal context, the Czech media coverage of the refugee crisis, supported by statements by the Czech Government and the Czech President, depicted the refugees coming to Europe in general, and the Czech Republic in specific, as a significant security threat, exaggerating the

[19] As the current proposals of the European Commission envisage, see in particular Article 6 of the Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) Brussels, 12.9.2018 COM(2018) 634 final 2018/0329 (COD).

[20] See: Article 8 of the Recast Reception Conditions Directive; Article 28 of the Dublin III Regulation; and Article 15 of the Return Directive.

[21] See Article 2(n) of the Dublin III Regulation.

[22] See also the AG's Opinion in C-528/15, *Al Chodor* (2016) ECLI:EU:C:2016:865, points 59 and 60.

[23] See ECtHR, *Medvedyev and Others v. Fran*ce, ECtHR Grand Chamber Judgment (29 March 2020) Appl. No. 3394/03, para. 73.

[24] Such as Austria, France, Germany, Slovenia, and UK, according to the *AIDA Legal Briefing* No. 1, June 2015.

[25] See the declaration of the UN High Commissioner for Human Rights, *op.cit*., note 10.

negative aspects of immigration and supporting xenophobic and Islamophobic views of the incoming refugees.[26] The media coverage "resulted in [a] highly politicized image of the crisis"[27] and an escalation of fear and anti-immigration hysteria among the general public, creating public support for the policy of systematic detention of incoming asylum seekers. At the same time, there were clear indications that the detention conditions at that time were poor and constituted degrading treatment in breach of Article 3 ECHR, especially with regard to the detention of families with children.[28]

The *Al Chodor* case originated in this turbulent context. The Al Chodors, a father and his two sons, were Iraqi nationals of Kurdish origin who left their village after it was occupied by the Islamic State terrorist organization. Fearing persecution, they embarked on a journey taken by many other asylum seekers in 2015, which involved coming through the Eastern Mediterranean route and continuing on the Western Balkan route, mostly entering the EU territory through Hungary.[29] Some of them crossed into the Czech Republic and, when detected, were systematically detained.[30]

While following the above-described route, the Al Chodors were stopped by the police in Hungary, where they were fingerprinted, required to sign documents whose content and purpose were not fully explained to them,[31] and then sent to a refugee camp. They left the refugee camp with the aim of joining their family in Germany. They were stopped by the Czech Foreigners' Police Section which, after consulting the Eurodac database, found they had lodged an asylum application in Hungary. It should be noted that the precise geographical frontiers within the EU were not common knowledge for asylum seekers coming from a different continent. Often they were not even aware of having crossed an EU external border or of the fact that Hungary had registered them as asylum seekers, a fact which would require them to remain in Hungary until their asylum claims were resolved.[32] Al Chodors were thus subjected to the transfer procedure under Article 18(1)(b) of the Dublin III Regulation. In addition, they were detained for 30 days pending their transfer to Hungary on the basis that there was a significant risk they would abscond as they had fled Hungary before the finalization of their asylum application and had no residence permits or accommodation in the Czech Republic.[33] There were many other similar

[26] Urbániková, M. and Tkaczyk, M. (June 2020). Strangers Ante Portas: The Framing of Refugees and Migrants in the Czech Quality Press. *European Journal of Communication*; Jelínková, M. (2019). A Refugee Crisis Without Refugees: Policy and Media Discourse on Refugees in the Czech Republic and Its Implications. (13) *Central European Journal of Public Policy* pp.33-45.

[27] Urbániková and Tkaczyk 'Strangers Ante Portas' ibid.

[28] See the reports of the Czech Public Defender of Rights' visits to the B□lá-Jezová detention facility in 2015: report on visit to the Facility for Detention of Foreigners B□lá-Jezová of August 2015 (available in English at: https://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/ZARIZENI/Zarizeni_pro_cizince/Report_Bela-Jezova-august-2015.pdf) and report of the evaluation visit of October 2015 (available in English at: https://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/ZARIZENI/Zarizeni_pro_cizince/Report_Bela-Jezova.pdf). Press release summing up the findings in English of 20 November 2015 is available at: https://www.ochrance.cz/en/news/press-releases-2016/systematic-visit-to-the-facility-for-detention-of-foreigners-in-bela-jezova/.

[29] See European Stability Initiative, "The Refugee Crisis through Statistics" (30 January 2017), p 13, available at: https://www.esiweb.org/pdf/ESI%20-%20The%20refugee%20crisis%20through%20statistics%20-%2030%20Jan%202017.pdf.

[30] See the declaration of the UN High Commissioner for Human Rights, *op.cit.,* note 10.

[31] See the Opinion of the Czech Public Defender of Rights delivered before the Supreme Administrative Court in the *Al Chodor* case on 31 August 2015, No. 29/2015/SZD/LJ, available in Czech at: http://eso.ochrance.cz/Nalezene/Edit/6644).

[32] At that time, Hungary suffered from a lack of interpreters and information provided to register asylum seekers: see Opinion of the Czech Public Defender of Rights, note 30; see also; ECtHR, *Ilias and Ahmed v. Hungary*, ECtHR Judgment (14 March 2017) Appl. No. 47287/15, where the Court highlighted the lack of access to information regarding the Hungarian asylum procedure.

[33] For a detailed description of the facts, see the AG's Opinion in the Al Chodor case, *op.cit.*, note 22, point 20.

cases of detention in the Czech Republic, including detention of children, for between 30 and 90 days, in conditions described by the UN Commissioner for Human Rights and the Czech Public Defender of Rights as degrading.[34]

In effect, the Czech Foreigners' Police was thus detaining people merely because they were subject to Dublin transfer proceedings, which is expressly prohibited by Article 28(1) of the Dublin III Regulation. As the Czech Public Defender of Rights pointed out, "the asylum seekers had in fact no chance of avoiding detention on the Czech territory".[35] The use of alternatives to detention was almost non-existent,[36] clearly deviating from the Dublin III Regulation requirement to prioritise less coercive measures. The Czech practice of systematic detention attracted criticism from domestic actors[37] as well as international human rights bodies.[38]

In addition, the detainees' right of access to courts was severely impaired by Czech authorities, since the Government's funding of free legal aid provided in the detention facility was significantly cut at that time.[39] As a result, only a few of the detained asylum seekers actually had the chance to communicate with a lawyer and to challenge the legality of their detention before a court.

Against this background, the *Al Chodor* case had few chances of developing into a strategic litigation that could change the Czech detention policy and force the adoption of domestic legislation that would define the risk of absconding according to the Dublin III Regulation's terms. Nevertheless, the case catalysed at least a temporary success on the right to liberty of asylum seekers in the Czech Republic and in the long term triggered legislative and jurisprudential reforms in other Member States. The next section explores the factors and main phases that have turned the *Al Chodor* case into a strategic case with ripple effects across the EU.

3. The Development of Strategic Litigation

3.1. *Phase #1: Litigation Strategies to Challenge the Detention of Asylum Seekers*

The "legal mobilization" literature has noted that EU law has been used by lawyers and interest groups before courts to prompt domestic policy change.[40] However, as was already explained, the case of Al Chodors did not start out as strategic litigation, since the case occurred in the year

[34] There was only one detention camp in operation in 2015, the B□lá-Jezová Facility for Detention of Foreigners. Its original maximum capacity before the influx was 270 beds. This was provisionally increased to 700 beds during 2015. On 31 August 2015 there were 659 persons detained of whom 147 were children and on 3 October 2015 there were 397 detainees of whom 100 were children (see the press release of the Czech Public Defender of Rights substantiating the breach of Article 3 of the ECHR of 13 October 2015, available in Czech at: https://www.ochrance.cz/aktualne/tiskove-zpravy-2015/mimoradna-tiskova-konference-k-situaci-v-zarizeni-bela-jezova/).

[35] Opinion of the Czech Public Defender of Rights, note 31.

[36] The use of alternatives to detention in the Czech Republic ranged between approx. 1 % to 3 % of cases in the preceding several years, in 2015 reaching its lowest point with the use of alternatives in only 0.7 % of detention cases. The data were obtained from the Public Defender of Rights' Office for the purpose of this article.

[37] See the public statement of the Consortium of Migrants Assisting Organizations, an umbrella organization bringing together 20 Czech NGOs working with migrants, of 3 September 2015, available in Czech at: https://www.migrace.com/cs/clanky/888_prohlaseni-k-nezakonnosti-a-bezucelnosti-zajistovani-uprchliku-v-zarizenich-pro-zajisteni.

[38] See the declaration of the UN High Commissioner for Human Rights, *op.cit.,* note 10.

[39] Without the funding, some lawyers were occasionally providing legal assistance on a voluntary basis only. See more in the Czech Government Council for Human Rights' resolution of 8 October, available in Czech at: https://www.vlada.cz/cz/ppov/rlp/cinnost-rady/zasedani-rady/zasedani-rady-dne-8--rijna-2015-140967/

[40] Kelemen, D.R. *op.cit.,* note 17; Alter, K. and Vargas, J. *op.cit.*, note 17.

when the funding of legal aid was suspended. Those lawyers who occasionally accessed the detention facility filed separate, uncoordinated complaints before various regional courts across the Czech Republic. They used different legal arguments[41] without intentionally planning a national strategy to achieve a change in the governmental policy or administrative practice.[42] Therefore, even though the use of EU law had its place in this type of cases, it was not initially perceived as a general winning litigation strategy that could change the Czech policy of systematic detention.

Some of the lawyers who relied on EU law argued that the detention orders issued to asylum seekers subject to Dublin transfer procedures were unlawful since the Czech Republic had not adopted a legislative provision setting out "objective criteria" for assessing the "risk of absconding", as required by Article 2(n) of the Dublin III Regulation. Indeed, the Czech Aliens Act,[43] like some other Member States' legislation,[44] did not provide objective criteria for assessing the existence of a significant risk of absconding, which is the sole ground for detention allowed by Article 28 of the Regulation.

This EU law argument was first raised by the Al Chodors in the appeal against their detention order, together with supporting foreign domestic judgments. The Al Chodors[45] argued that the German Federal Court of Justice [46] and the Austrian Administrative Court[47] had previously ruled that it is not possible to detain a person in accordance with Articles 2(n) and 28 of the Dublin III Regulation, when the national legislation did not define the "risk of absconding" as ground for asylum detention.[48] The Al Chodors did not ask the Court to address a preliminary reference to the CJEU since, similarly to the Austrian and German courts, they considered the EU law issue to be sufficiently clear for the domestic court to decide.

In the end, of the various legal argumentation used (i.e. based on the Czech Charter of Basic Rights and Freedoms, ECHR, EU law), the argument of the incompatibility with EU law proved to be the most successful in convincing regional courts to annul the administrative detention of asylum seekers subject to Dublin proceedings, due to the Czech Republic's failure to transpose Articles 2(n) and 28 of the Dublin III Regulation into national law.

3.2. *Phase #2: Czech Lower Courts to Act as EU Law Courts?*

[41] They often relied on the European Convention on Human Rights (ECHR), challenging the legality of detention on the basis of a violation of Article 3 ECHR due to the degrading conditions of detention (especially in relation to families with children) and of Article 5(1)(f) ECHR, due to the absence of a real prospect of their transfer to Hungary because of that country's lack of cooperation with the Czech authorities at that time (between January and August 2015 only 2 % of the transfers to Hungary were realized, see the statistics available at: https://www.mvcr.cz/clanek/statisticke-zpravy-o-mezinarodni-ochrane-za-jednotlive-mesice-v-roce-2015.aspx?q=Y2hudW09Mw%3d%3d).

[42] There was no possibility in domestic law for a class action on behalf of all these asylum seekers, who were in fact seeking the same remedy: annulment of their detention order issued in Dublin proceedings.

[43] Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Czech Republic, as amended.

[44] See ECRE Report, *The Implementation of the Dublin III Regulation in 2018* (March 2019), p. 14.

[45] "Al Chodors" were not formally legally represented at this stage, they stood for themselves before the court in the proceeding, and had only a written pleading from a lawyer.

[46] See the judgment of German Federal Court of Justice, Bundesgerichtshof, 26 June 2014, V ZB 31/14 23.7.2014.

[47] See the judgment of Administrative Court of Austria, Verwaltungsgerichtshof, 19 February 2015, RO 2014/21/0075-5.

[48] This being an exception to the general rule that Regulations enjoy direct applicability in accordance with Article 288 TFEU.

It has been argued that one of the clearest manifestations of the impact of strategic litigation can be found in changes in jurisprudence.[49] Although not originally envisaged as a strategic litigation case, the *Al Chodor* case managed to make such a change before Czech regional courts.

The argument developed by the Al Chodors relying on failure to transpose EU law and comparative reasoning resonated favourably with the regional judge, who further elaborated on the plaintiffs' use of comparative reasoning. The Regional Court in Ústí nad Labem also assessed foreign domestic legislation (i.e. Belgian, Italian, Hungarian, Bulgarian and Slovak) to establish how other legislators interpreted the requirements of Articles 2(n) and 28 of the Dublin III Regulation.[50] It found that the respective national laws contained a definition of the relevant objective criteria for assessing the risk of absconding. Following a textual interpretation of these provisions, the Court emphasized that Member States were required to adopt domestic legislative provisions to define the "risk of absconding". The Court remarked that the Czech legislator had incorrectly considered Articles 2(n) and 28(2) of the Dublin III Regulation as having direct applicability, since these provisions were an exception to the general rule that EU regulations do not require transposition into national law. The Court then turned to the analysis of Article 129(1) of the Czech Aliens Act and found that it lacked the required list of objective criteria. Furthermore, following a teleological interpretation of that Article, the Court found that it had not been amended to give effect to the Dublin III Regulation's newly introduced obligations on detention and that a mere irregular entry and residence were considered a sufficient objective criterion for detention under the Czech administrative practice. This administrative practice was found by the Court to be in stark contradiction to the prohibition to detain "for the sole reason that [the asylum seeker] is subject to the procedure established by this Regulation"[51]. After engaging in textual and teleological analysis of Article 129(1) of the Czech Aliens Act, the Czech regional Court concluded that the detention order issued to the *Al Chodor* family was unlawful and annulled the Foreigners' Police decision to detain the family.

The judgment delivered by the Ústí nad Labem Regional Court in the *Al Chodor* case is quite a remarkable example of judicial reasoning for a first instance court from a Central and Eastern European country, since it relied on teleological interpretation and extensive comparative reasoning to assess the legality of Czech administrative detention orders, instead of merely using literal interpretation and domestic legal sources.[52] The Regional Court's heavy reliance on comparative reasoning might be explained by the fact that it was the first court in the Czech Republic to consider the legality of Czech detention orders on the basis of compliance with the Dublin III regulation requirements regarding the definition of objective criteria. Comparative reasoning thus offered both inspiration to solve a complex and politically sensitive issue and offered legitimacy before other domestic courts and branches of State power.[53]

Following this judgment, the government did not release all other asylum seekers detained under the Dublin provisions. Since the Czech law does not provide for class actions, the remaining individual administrative detention orders had to continue to be legally challenged one by one. The litigation strategy used in the *Al Chodor* case was replayed by lawyers before various Czech

[49] Open Society Justice Initiative, (2018) Report 'Strategic Litigation Impact Insights from Global Experience', p. 54.
[50] Judgment of the Ústí nad Labem Regional Court of 1 June 2015, no. 42 A 12/2015 – 78 (available in Czech at: http://nssoud.cz/files/EVIDENCNI_LIST/2015/42A_12_2015_20150615085958_prevedeno.pdf).
[51] See Article 28(1) Dublin III Regulation.
[52] Kühn, Z. (2011). *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* Martinus Nijhoff; Lambert, H. and Goodwin-Gill, G.S. (2010). *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*. Cambridge: Cambridge University Press.
[53] On the strategic use of EU law and judicial dialogue by domestic courts to strengthen the legitimacy of their rulings before other branches of powers and courts, see Mayoral, J.A. (2019). Judicial Empowerment Expanded: Political Determinants of National Courts' Cooperation with the CJEU. (25) *European Law Journal* pp. 374-393, 378.

Regional Courts. The Courts in Prague, Brno and the Central Bohemia Region reacted positively to these actions and followed similar reasoning to that of the Ústí nad Labem Court.[54]

This line of litigation has demonstrated the importance of three factors in developing successful strategic litigation based on EU law arguments. First, litigation must find a domestic court that would adequately fulfil its obligation to enforce EU law.[55] In this case it was, remarkably, a lower court from a remote region which rarely heard immigration cases.[56] Secondly, the use of foreign domestic precedent supporting the interpretation of EU law put forward by the litigants can significantly convince the domestic court to endorse the particular EU legal argument. Thirdly, the existence of a national domestic case law adopting the suggested interpretation of EU law might prove compelling. The Regional Court in Ústí nad Labem thus created a favourable precedent, putting pressure on other domestic courts and branches of State power to change their doctrinal interpretation of asylum detention and elicit policy change. One by one, the Czech Regional Courts started to accept that the government's detention policy was unlawful on the basis of EU law.

3.3. *Phase #3: The Czech Supreme Administrative Court's Decision to Refer to the CJEU*

The developing litigation was starting to show its effects in the form of consistent judicial decisions annulling the administrative detention of asylum seekers, which was forcing the government to release unlawfully detained asylum seekers. However, this positive judicial and administrative change was short-lived. The Foreigners' Police lodged a complaint before the Supreme Administrative Court (SAC) against the decision of the Regional Court in *Al Chodor* case (as well as against other similar subsequent decisions of the Czech regional courts). The Police argued that the inapplicability of Article 28(2) of the Dublin III Regulation could not be justified by the mere absence of objective criteria defining the "risk of absconding" in the Czech legislation, since "that regulation is directly applicable in the Member States and therefore it does not require prior transposition into national law".[57] It further argued that it had satisfied the three requirements set out in Article 28(2) of Dublin III, namely the making of an individual assessment taking account of the circumstances of the case, the proportionality of the detention and the impossibility of using a less coercive measure.

In reaction to the parties' arguments, the SAC found that the notion of the "law" that would lay down the objective criteria for assessing the risk of absconding was unclear. The SAC argued that the EU notion of "law" should be interpreted as including not only legislation, but also other sources of law, such as judicial and administrative practice, provided that they possessed the "substantive" qualities of precision, foreseeability and accessibility as required by Article 5(1)(f) ECHR.[58] However, this interpretation of the notion of 'law' is questionable in light of the ECtHR

[54] See e.g. judgment of the Central Bohemian Region Regional Court in Prague of 25 June 2015, No. 44 A 46/2015-25; judgment of the Central Bohemian Region Regional Court in Prague of 9 July 2015, No. 1 A 47/2015-21; judgment of the Brno Regional Court, No. 32A 54/2015 of 9. September 2015; judgment of the Municipal Court in Prague of 14 September 2015, No. 1A 59/2015-29.
[55] See Article 4(3) EU Treaty as legal basis for the mandate of domestic courts to enforce EU law.
[56] For a similar case see ECJ, Case C-556/17, *Torubarov*, ECLI:EU:C:2019:626.
[57] Argument reproduced in C-528/15, *Al Chodor*, *op.cit.*, note 15, para. 26.
[58] See, *inter alia*, ECtHR, *Dougoz v.Greece*, ECtHR Judgment (6 March 2001), Appl. No. 40907/98, para. 55; *Del Río Prada v. Spain*, ECtHR Judgment (Judgment 21 October 2013), Appl. No. 42750/09, para. 125.

judgments delivered in *Khlaifia and others* and the *Ilias and Ahmed* cases, whereby Member States' *de facto* detention that was not based on legislation but administrative practice was found to be contrary to Article 5(1) ECHR.[59]

The SAC further pointed out that whereas some language versions of Article 2(n) of the Dublin III Regulation (German, Austrian, Bulgarian and Spanish) refer to "legislation", several other language versions (English, Polish and Slovak) referred to "law" in a broader sense. According to the SAC, the practice of the Czech Foreigners' Police with regard to the detention of asylum seekers under Article 28 of the Dublin III Regulation satisfied the requirements of precision, foreseeability and accessibility required by the ECtHR for a "law" introducing limitations on the right to liberty. The SAC argued that it would be overly formalistic to require a legislative definition of the "significant risk of absconding" and, moreover, that such a definition, even if provided in a legislative provision, would not necessarily increase legal certainty for foreign nationals, as the objective criteria for assessing the "risk of absconding" could already be inferred from the SAC's previous case law.[60] However, being unsure whether the notion of "law" should be interpreted as broadly as also to include established case law of a high court and administrative practices or just "legislation", the 10th panel of the SAC decided of its own motion to address a preliminary reference to the CJEU on 24 September 2015.

The SAC's referral to the CJEU led to the suspension of all pending domestic litigation before the Czech courts on similar issues until the CJEU would deliver its preliminary ruling. Following this suspension, the Foreigners' Police continued its practice of systematic detention of asylum seekers subject to Dublin proceedings, and the detainees' possibility to achieve a remedy was thus halted.

It should be noted that the SAC's referral to the CJEU took place in a context in which the Czech Public Defender of Rights,[61] the majority of Czech Regional Courts,[62] academics and expert lawyers,[63] as well as several foreign domestic courts[64] all considered that the risk of absconding had to be defined into national legislation before the state can lawfully detain a person in

[59] See, *Khlaifia v. Italy*, Appl. No. 16483/12, Grand Chamber, Judgment of 15 December 2016, para. 91; *Ilias and Ahmed v. Hungary*, *op.cit*, note 32.

[60] This SAC jurisprudence included situations such as: a previous infringement of a Member State's laws together with an infringement of EU law (Judgment of 10 June 2015, no. 2 Azs 49/2015-50); entry of the person into the Schengen area without leave to remain, combined with contradictory statements about that person's entry into the Czech Republic and his general lack of credibility (Judgment of 4 December 2014, no. 9 Azs 199/2014-49); or lack of documents proving the identity of the person concerned (Judgment of 9 October 2014, no. 2 Azs 57/2014-30). However, even though the SAC listed this case law in its decision as an explicit example of the definition of the criteria of the risk of absconding, it is not that clear that the Court actually identified these circumstances for the precise purpose of defining the criteria of risk of absconding under the Article 2(n) of the Dublin III Regulation (see the AG's Opinion, *op.cit.*, note 22, point 27).

[61] See the Opinion of the Czech Public Defender of Rights delivered to the Supreme Administrative Court in the *Al Chodor* case, *op.cit.*, note 31.

[62] The approach of Regional Courts became partly divided only with the Brno Regional Court's decision of 11 August 2015, No. 33 A 40/2015-32. However, this approach was not followed by other Regional Courts. Instead, the other regional courts and judges continued to find Article 28 of the Dublin III Regulation inapplicable. See, for instance, judgment of the Brno Regional Court, No. 32A 54/2015 of 9 September 2015; judgment of the Municipal Court in Prague of 14 September 2015, No. 1A 59/2015-29.

[63] There was a rather extensive discussion on the issue involving various legal experts, academics and judges during the *Current Legal Questions of Asylum and Aliens Law* conference organised by the Czech Public Defender of Rights on 10 September 2015 in Brno. Several representatives of the Supreme Administrative Court were also present. The preliminary reference was submitted two weeks later.

[64] The highest courts of Austria and Germany had previously established that the conditions of the *acte claire* doctrine had in this case been fulfilled and a correct interpretation of EU law here obviously required a strict interpretation of the notion of "law" as it concerns a restriction of the right to liberty. See the judgment of German Federal Court of Justice, *op.cit*, note 46, and the judgment of Administrative Court of Austria, Verwaltungsgerichtshof, *op.cit*, note 47.

accordance with Articles 2(n) and 28 of the Dublin Regulation. At the same time, they considered this issue to fulfil the terms of *acte claire*[65] which would mean that a referral to the CJEU from the SAC, as a court of last resort, was not needed.

Nevertheless, for the SAC the EU law issue was not an *act claire* and so it referred preliminary questions to the CJEU. While, in principle, this referral sought to clarify an important issue of EU constitutional law – the applicability and direct effect of a Regulation provision, in practice it indirectly triggered detrimental effects on the national litigation by suspending the possibility of detained asylum seekers to challenge their detention orders. Moreover, the way the request for preliminary ruling was phrased by the SAC meant that it had minimal potential to advance or influence legislative transformation on the issue in the Czech Republic. Firstly, at the moment the referral was made, the Czech Ministry of Interior had already tabled a legislative proposal defining the 'risk of absconding' in the Aliens' Act. Therefore the lack of legislative transposition would have been nevertheless remedied in a short time, shorter than the timing normally taken by the CJEU to deliver a preliminary ruling in ordinary proceedings.[66] Secondly, the legislative proposal did not hold promise for ending the systematic detention of asylum seekers subject to Dublin proceedings, as the proposed list of objective criteria included circumstances that were questionable from the perspective of conformity with EU law.[67] Although the legislative proposal was known to the Court, the problematic issue of defining the objective criteria was not part of the reference for a preliminary ruling. As a result, the reference for a preliminary ruling was a missed opportunity for clarifying another contentious aspect of the definition of the "risk of absconding", namely the content and number of objective criteria for assessing the risk of absconding. As shown by the continuing debate on the definition of the risk of absconding within the framework of pre-removal detention and the Dublin III Regulation, the substantive definition of the risk of absconding is considerably more complex and pressing legal issue than the determination of the type of legislation in which the definition should be provided.[68] However, the SAC did not use the opportunity to engage the CJEU in a dialogue concerning the actual formulation of the individual criteria.

The reasons why domestic courts use the preliminary reference procedure are varied.[69] Some may want to trigger change in the case law of supreme domestic courts, legislative amendment or policy shifts. Others may want to voice an opinion in defence of the challenged national policy and thus influence a change in the CJEU's jurisprudence.[70] Other courts may be obliged to refer preliminary questions to the CJEU if they question the validity of EU secondary legislation or if they are a court of last resort[71] and the doctrines of *acte claire* and *acte éclairé* do not apply.[72] The SAC might thus have considered it had an obligation to refer on the basis of Article 267(3)

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[65] See ECJ, C-283/81*, CILFIT*, ECLI:EU:C:1982:335.

[66] An average of 15.3 months for the ordinary procedure, see the CJEU Annual Report 2015.

[67] Among the objective criteria, the proposal referred to the impossibility of lawfully traveling to the country of origin on his/her own, and a lack of residence on the territory of the Czech Republic, whose conformity with Article 28 of the Dublin III Regulation is questionable, to say the least.

[68] For a comparative discussion of various domestic judicial approaches to the implementation of the "risk of absconding" see Moraru, M. (2020). Making sense of the 'risk of absconding' in return proceedings: judicial dialogue in action. In: Moraru, M., Cornelisse, G. and de Bruycker, P. (2020). *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* Oxford:Hart Publishing, pp.125-149.

[69] See Alter, K.J. (1996). The European Court's political power. 19(3) *West European Politics*, pp. 458-87; Wind, M., Martinsen, D.S. and Rotger, G.P. (2009). The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe. 10(1) *European Union Politics*, pp. 63–88.

[70] Saurugger, S. and Terpan, F. (2016). *The Court of Justice of the European Union and The Politics of Law.* Macmillan International Higher Education, pp. 106-135.

[71] Article 267(3) TFEU.

[72] See ECJ, C-283/81*, CILFIT*, ECLI:EU:C:1982:335; C-160/14, *Ferreira da Silva*, ECLI:EU:C:2015:565, para. 43 and C□72/14 and C□197/14, *X and Van Dijk,* ECLI:EU:C:2015:564. On the consequences of violating the duty of refer, see also ECtHR, *Schipani v Italy*, ECtHR Judgment (21 October 2015), Appl. No. 38369/09.

TFEU. Following the relaxation of the *CILFIT* requirements by the CJEU's judgment in *Ferreira da Silva*, a court of last resort is required to refer a preliminary question to the CJEU only if, in addition to conflicting lines of case law at national level, "there are differences of interpretation also among the Member States".[73] Since the SAC intended to depart from the consistent national and foreign case law that interpreted the EU legal notion of "law" restrictively, perhaps the SAC sought to have its broad interpretation of the notion of "law" confirmed first by the CJEU.

In *Al Chodor*, the SAC's apparent reason was to persuade the CJEU to adopt the SAC's 10th panel's broad interpretation of the notion of "law" as including also settled judicial and administrative practice on asylum detention under the Dublin procedure. This interpretation of the notion of "law" reflected the scholarly view of one of the sitting judges.[74] While the preliminary reference procedure is undisputedly an essential instrument for the protection of rights that individuals derive from EU law[75], in this particular referral it rather worked against the fundamental rights of detained asylum seekers, as it had a side-effect of suspending the positive outcomes of the *Al Chodor* litigation before the Czech regional courts and thus effectively allowed the government to continue its arbitrary and systematic detention policy.

The referral's suspensive effect on national litigation challenging the systematic detention could have been shortened had the SAC posed the preliminary question under the expedited or urgent preliminary reference procedure,[76] which would have significantly shortened the delivery time of the preliminary ruling.[77] Although the Al Chodors had already been released from detention by that time, the preliminary question encompassed much more than the circumstances of this individual case, as it was directly relevant for the assessment of the legality of the deprivation of liberty of hundreds of other asylum seekers subject to Dublin proceedings[78] who found themselves in the same situation, namely that of being detained in the Czech Republic at that time.

Unfortunately, the SAC did not ask the CJEU to use the expedited or urgent preliminary reference procedure, hence the reference followed the normal delivery time of 15.3 months. The reasons why the SAC did not use the specialised preliminary reference procedure are unclear, but they were definitely not because of lack of EU legal knowledge.[79] Nevertheless, the practical result of using the ordinary preliminary reference procedure was that hundreds of asylum

[73] See Daniel Sarmiento, "CILFIT shows its teeth", *Despite of Differences* Blog (10 September 2015) available at: https://despiteourdifferencesblog.wordpress.com/2015/09/10/cilfit-shows-itsteeth/?fb_action_ids=10153571122710782&fb_action_types=news.publishes

[74] The broad interpretation of the "law" as including also established case law was developed earlier (however not in the specific context of deprivation of liberty measures) by one of the sitting judges of the 10th panel, which referred the preliminary questions: see Kühn, Z. (2002) *Aplikace práva ve slo□it□ch pr□ípadech: k úloze právních principu□ v judikatur□e*, Karolinum, and, by the same author, (2015). Towards a Sophisticated Theory of Precedent? Prospective and Retrospective Overruling in the Czech Legal System in Steiner, E. (ed). *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions.* Switzerland: Springer International Publishing.

[75] Alter, K. *op.cit.*, note 17. See, for instance, C-179/11, *Cimade and GISTI* (2012) ECLI:EU:C:2012:594, regarding respect for human dignity during Dublin transfer proceedings: C-411/10, *N.S. and others* (2011) ECLI:EU:C:2011:865.

[76] See Article 23a of the Statute of the Court of Justice of the European Union.

[77] From an average of 15.3 months for the ordinary procedure to an average of three to six months for the expedited procedure (see Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* delivered in a record time of two months and six days) or an average of 66 days for an urgent preliminary ruling. See also Report on the use of the urgent preliminary ruling procedure by the Court of Justice delivered to the Council in accordance with the statement annexed to its decision of 20 December 2007 (OJ L 24 of 29 January 2008, p. 44).

[78] See the report of the Czech Public Defender of Rights on a visit to the B□lá-Jezová Facility for Detention of Foreigners, op. *cit.,* note 28.

[79] One of the sitting judges of the SAC 10th panel is a renowned EU law professor, who has written extensively on this topic in both Czech and English: see notes 54 and 88.

seekers[80] continued to be held in what later proved to be arbitrary detention according to the CJEU.

3.4. *Phase #4: The CJEU's Preliminary Ruling Triggering Ripple Effects across the EU*

The next phase of the *Al Chodor* case started with the CJEU's delivery of its preliminary ruling. As it will be argued, this ruling has triggered legislative and jurisprudential transformation across the EU, as there were other Member States like the Czech Republic that had also not defined the risk of absconding in their national legislation but have done so following the CJEU's judgment.

The CJEU essentially endorsed the argument developed by the Al Chodors and the Czech Regional Court. The CJEU first noted that while, in general, regulations have immediate effect in the national legal system, without the need for domestic transposition, "nonetheless, some of [Regulations'] provisions may necessitate, for their implementation, the adoption of measures of application by the Member States".[81] This is also the case for Article 2(n) of the Dublin III Regulation, the Court held, which explicitly requires definition "by law". Since the objective criteria for assessing the risk of absconding are not provided either in the Dublin III Regulation or in any other relevant EU enactment, the Court held that these criteria must be listed in the national law of each Member State.[82]

The Court proceeded to examine whether the settled case law of domestic high courts, including objective criteria for detention, can be interpreted as "law", as suggested by the referring court and the Czech Government. Given the divergent translations of the EU notion of "law" by certain Member States,[83] the Court argued that only a teleological and contextual interpretation would solve the interpretational issue. The CJEU emphasized that the Dublin III Regulation provided for a higher level of protection of asylum seekers compared to the previous Dublin Regulation.[84] This objective was taken into consideration for determining the appropriate type of legal act that should enshrine the objective criteria for assessing the risk of absconding as a ground for detention under the Dublin III procedure.

Citing *ex officio* the right to liberty enshrined in Article 6 of the EU Charter, the CJEU held that Article 52(3) of the EU Charter requires an interpretation of this right in conformity with Article 5(1) ECHR. According to the ECtHR, a limitation of the right to liberty has to fulfil the following standards: clear legal basis; predictability; accessibility; and protection from arbitrariness.[85] Therefore, the CJEU concluded that "only [by] a provision of general application"[86] fulfil these standards. The Court thus dismissed the referring court's argument that "settled case-law confirming a consistent administrative practice on the part of the Foreigners' Police Section, such as in the present case" could meet the safeguards required by Article 6 of the EU Charter, in particular protection against arbitrariness. The Court therefore endorsed the approach shared by the majority of Czech Regional Courts and dismissed the interpretation proposed by the SAC. The consequence is that detention on the basis of a "risk of absconding", where the objective criteria are not set in a "provision of general application", cannot be based directly on Article 28(2) of the Dublin III Regulation. Subsequently, the CJEU followed the same interpretation of the notion of 'law' in relation to the definition of the risk of absconding under Article 8 of the

[80] See Opinion of the Czech Public Defender of Rights, *op.cit.*, note 28.
[81] C-528/15, *op.cit.*, note 14, para. 27.
[82] *Ibid*., para. 28.
[83] *Ibid*, para. 31.
[84] *Ibid*, paras. 34 and 35.
[85] *Ibid*, para. 40.
[86] *Ibid*, para. 43.

Reception Conditions Directive jurisprudence.[87] It should be noted that the CJEU did not follow the opinion of the Advocate General, whereby only "legislation" would fulfil the requirement of legal certainty,[88] instead the Court adopted a broader formulation – "provision of general application" – thus allowing accommodation to the variety of domestic typologies of legislative acts.

The CJEU's preliminary ruling is thus protecting the right to liberty of asylum seekers subject to detention under Dublin proceedings, as well as the rule of law. However, in the Czech Republic as the originating jurisdiction, the preliminary ruling did not trigger legislative transformation or change in the administrative practice of systematic detention of asylum seekers. As was already explained, the immediate practical side-effect of the SAC's referral on the ongoing (and until then mostly successful) litigation against the practice of systematic detention of asylum seekers was rather detrimental to the right of liberty, since all the pending actions questioning the legality of detention in individual cases on the basis of EU law were suspended by the Czech courts until the CJEU's ruling was delivered. Moreover, by the time the CJEU delivered its preliminary ruling, the Czech Government had already adopted a law introducing a definition of the "risk of absconding".[89] Therefore, the preliminary ruling had neither the effect of prompting the adoption of a new Czech law implementing Articles 2(n) and 28 of the Dublin III Regulation.

It should be noted that even the adoption of the new Czech legislation did not substantively improve the previous practice of systematic detention of asylum seekers. The new definition in section 129 of the Czech Aliens Act is so broad[90] that it basically incorporates all the possible scenarios which could trigger the Dublin procedure. The definition contains a non-exhaustive list of circumstances which constitute (individually) a serious risk of absconding.[91] Several of these criteria raise questions as regards their compatibility with Article 28(1) of the Dublin III Regulation. Especially the first criterion of 'being present without permission on the territory of the Czech Republic' is broad enough to cover any possible situation falling under the Dublin III Regulation. Therefore, this comes to show that the adoption of a legislative definition of the risk of absconding without reforming also the substance of definition of 'objective criteria' in light of the Dublin III Regulation requirements[92] will not effectively change systematic detention of asylum seekers. The Czech Aliens Police's systematic detention of asylum seekers under the Dublin III Regulation should thus be further litigated before the courts for violating Dublin III Regulation rules and principles of necessity and proportionality.

As regards remedies provided to the unlawfully detained asylum seekers, unfortunately there was no positive effect of the preliminary ruling on the Czech authorities' course of action either. By the time the preliminary ruling was delivered, hundreds of asylum seekers had been unlawfully detained in the Czech Republic during their Dublin proceeding. They never received a monetary compensation for the unlawful detention, since the prerequisite under the Czech law is that the unlawfulness of the detention is pronounced by a court in the individual case, which was impossible for many of the detained asylum seekers to pursue owing to the absence of legal aid in

[87] See C□36/20 PPU *VL* ECLI:EU:C:2020:495.
[88] AG's Opinion, ECLI:EU:C:2016:865, para. 62.
[89] This proposal was tabled by the Czech Ministry of Interior already in autumn 2014. It was approved by the Parliament on 11 November 2015 and came into force on 15 December 2015, only three months after the SAC lodged the request for a preliminary ruling with the CJEU.
[90] That is effectively incorporating the previous practice of the police approved by the majority case law of administrative courts.
[91] For the content of Section 129 para. 4 of the Aliens Act see ECJ, *Al Chodor*, *op.cit*., note 14, para. 12. Similar non-exhaustive definitions of the 'risk of absconding' can be found in the Greek legislation, see Papapanagiotou-Leza, A. and Kofinis, S. (2020). Can the Return Directive Contribute to Protection for Rejected Asylum Seekers and Irregular Migrants in Detention?The Case of Greece, Chapter 12 in: Moraru, M., Cornelisse, G. and de Bruycker, P. *op.cit*., note 68.
[92] Namely, detention should be a last resort and exceptional measure.

the detention facility in 2015. Alternatively, public apologies could have been provided at the very least, however, none of the competent public authorities (the Czech Government, Foreigners' Police or the Ministry of Interior) apologised for the unlawful detentions in a general public statement on the issue after the CJEU ruling was delivered.

By contrast, the CJEU's preliminary ruling in the *Al Chodor* case has generated positive spill-over effects well beyond the Czech Republic, requiring all countries operating the Dublin system to define the criteria for a "significant risk of absconding" in their domestic law. Following the judgment, the French Court of Cassation[93] and the Administrative Court of Slovenia[94] annulled detention orders issued within the Dublin proceedings for a lack of domestic legislation defining the "risk of absconding". These courts cited the *Al Chodor* preliminary ruling as an authoritative source for their decision to find the administrative detention of asylum seekers under Dublin III procedure unlawful. Furthermore, the strategic litigation following *Al Chodor* case also led to legislative amendments in the United Kingdom, Belgium and Cyprus aimed at introducing definitions of the "risk of absconding".[95]

4. Conclusion: Lessons Learned from the *Al Chodor* Case for Successful Strategic Litigation in Europe

This article demonstrated that litigation not intended to be strategic can develop into successful pan-European strategic litigation, such as the *Al Chodor* case. Moreover, it showed that the use of the preliminary reference procedure in strategic litigation can be a double-edged sword, since its practical effects on fundamental rights' of asylum seekers may vary based on the individual national context and procedural specificities. In the Czech Republic, the litigation has not produced concrete positive effects for asylum seekers' fundamental rights following the CJEU's preliminary ruling, either by way of a legislative change or concrete remedies for arbitrary detention. Nevertheless, it has triggered judicial dialogue and led to positive spill-over effects in many other jurisdictions, prompting domestic courts across the EU to annul administrative detention imposed in the absence of domestic legislative definition of the risk of absconding. This facilitated implementation of Articles 2(n) and 28 of the Dublin III Regulation into some EU Member States' legislations. Furthermore, the Czech litigation helped to send a powerful message to national governments tempted to rely on obscure administrative practices during the refugee crisis,[96] stressing that immigration detention is an *exceptional* measure which has to be interpreted restrictively and adopted on the basis of grounds enshrined in a legal provision that is sufficiently clear, precise and foreseeable for the individuals concerned. The *Al Chodor* case reminded the Member States that they "may not hold a person in detention for the sole reason that he or she is an applicant for international protection".[97]

The *Al Chodor* case offers several important lessons on how to build human rights strategic litigation and, more generally, on the functioning of EU asylum law. Regardless of whether or not the reader chooses to see the *Al Chodor* case as a victory for strategic litigation, it provides a useful insight into the ways the human rights strategic litigation on asylum can be improved.

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[93] See Cour de Cassation, judgment No. 1130 of 27 September 2017 [Pourvoi n 17-15.160].
[94] Administrative Court, Decision I U 1102/2016, 29 July 2016; see the English commentary of the judgment in (2018) *ReJus Casebook on Effective Justice in Asylum and Migration*, available online, pp.155-159.
[95] See AIDA Update on the implementation of the Dublin III Regulation in 2018, available at http://www.asylumineurope.org/sites/default/files/aida_2018update_dublin.pdf
[96] See for instance, the Slovenian Administrative Court, Decision I U 1102/2016, 29 July 2016.
[97] See the AG's Opinion, *op.cit.*, note 22, para. 34.

The first lesson concerns the origin of human rights violations during the refugee crisis. While commentators[98] have argued that the leading source of domestic human rights violations and the failure of the Common European Asylum System is an ill-conceived Dublin system, the *Al Chodor* case shows that human rights violations also result from the persistent reluctance of some countries to adequately transpose EU legislation into national law. The refugee crisis only amplified the already existent problem of the systematic detention of asylum seekers under the Dublin proceeding. Focusing on the case of the Czech Republic, the entry into force of the Dublin III Regulation did not bring about immediate positive change, since the Czech government nonetheless continued its detention policy on the basis of previous administrative practice. This practice continued even after the adoption of a legislation defining the 'risk of absconding'.

The second lesson of the *Al Chodor* case confirms the general theory of human rights strategic litigation, notably that the outcome of strategic litigation cannot be assessed solely on the basis of a "win or lose" perspective. Such a binary - and narrow - perspective cannot fully explain all the relevant dimensions of strategic litigation. In the *Al Chodor* case, the litigation went through several stages, producing various outcomes. A multi-dimensional perspective, which takes account of different phases of the process with their varying impacts, is thus preferable to conceptualize strategic human rights litigation.

The third lesson of the *Al Chodor* case concerns the capacity of strategic litigation to secure a systemic change of domestic policies. While this litigation has achieved a short-lived justice for several individual asylum seekers in the Czech Republic and a systemic change in other Member States, it changed little at the systemic level in the referring jurisdiction.

There are still many pressing legal questions relating to the use of detention within the Dublin proceedings and to the concept of "risk of absconding", which the *Al Chodor* preliminary ruling did not clarify as they were not raised by the referring court (e.g. interpretation of 'objective criteria'). It will therefore be for the civil society to embark on strategic litigation aimed at challenging the Czech broad legislative definition of objective criteria, which has been used by the Aliens' Police to continue the systematic detention of asylum seekers subject to Dublin proceedings. The Czech legislative model for a broad, all-encompassing definition of the risk of absconding is not unique, though. Several Member States follow a similar approach, in relation to detention not only under the Dublin III Regulation but also under the Return Directive. Furthermore, this legislative model risks to be applied also at the EU law level should the Commission's proposal for the definition of the risk of absconding as a ground for pre-removal detention be adopted.[99]

However, the future of strategic litigation to safeguard migrants' rights, particularly in the Central and Eastern European countries, is under threat, given some of the governments' recent initiatives to substantially reduce legal assistance services and thereby also asylum seekers' access to independent and impartial courts.[100] In any case, the success of a future strategic litigation depends on a thorough knowledge of the arsenal of EU legal tools[101] as well as on a reflective assessment of their added value in the specific circumstances of the case. As shown by the *Al*

[98] Maarten den Heijer, Jorrit J. Rijpma and Thomas Spijkerboer, "Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System" 53(6) Common Market Law Review (2016), 607-642.

[99] See Article 6 of the Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) Brussels, 12.9.2018 COM(2018) 634 final 2018/0329 (COD).

[100] See e.g. the Hungarian Bill No. T/333 amending certain laws relating to measures to combat illegal immigration, or the Austrian Ministerial Draft of the Amendment to the Asylum Law, available in German at: https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00127/index.shtml.

[101] For more details, see Moraru, M. and others, *(2017) ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter*, MODULE 2 – Judicial Interaction Techniques available online.

Chodor case, the use of the reference for a preliminary ruling needs to take into account also the procedural effects it produces on the individuals pending the delivery of the preliminary rulings. Finally, within the current context of broad, all-encompassing definition of the risk of absconding as ground for pre-removal detention,[102] the *Al Chodor* case might be just the start of litigation on asylum detention.

[102] See the Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum COM/2020/609 final published on 23 September 2020.