

EXPLANATORY MEMORANDUM TO

**THE TRANSFER FOR DETERMINATION OF AN APPLICATION FOR
INTERNATIONAL PROTECTION (DETENTION) (SIGNIFICANT RISK OF
ABSCONDING CRITERIA) REGULATIONS 2017**

2017 No. 405

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The Regulations place on the face of legislation objective criteria for determining when an individual poses a risk of absconding with reference to the provisions on detention in Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 (“the Dublin III Regulation”). The Dublin III Regulation determines responsibility for examining applications for international protection.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Regulations commence at 12pm on 15 March, the date upon which they are made. They therefore commence prior to being laid before Parliament. This also breaches the convention that the Regulations should not come into effect until a minimum of 21 calendar days after laying.
- 3.2 The urgency arises from the handing down on 15 March 2017 of a ruling by the Court of Justice of the European Union in the case of *Al Chodor C-528/15* on the interpretation of the Dublin III Regulation. Given the terms of the Court’s ruling, the urgency could not be avoided due to the adverse impact of delay on the ability of the Secretary of State to detain third-country nationals or stateless person in order to transfer them to the State responsible for examining their applications for international protection in accordance with the Dublin III Regulation, including the need to regularise the position of those already detained for this purpose as quickly as possible.

Other matters of interest to the House of Commons

- 3.3 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The Regulations are made to reflect the judgment of the Court of Justice of the European Union in *Al Chodor C-528/15*. The case concerns the interpretation of provisions in the Dublin III Regulation that determine the Member State responsible

for examining an application for international protection lodged in one of the Member States. Iceland, Liechtenstein, Norway and Switzerland also participate in the Dublin III Regulation by virtue of separate Agreements.

- 4.2 In the case of *Al Chodor* the Czech Republic asked if the fact that defined objective criteria for assessing a significant risk that a third country national may abscond had not been placed into national law meant that detention for the purpose of securing a transfer under the the Dublin III Regulation was inappropriate. The Court followed the earlier Opinion of the Advocate General given on 10 November 2016 and ruled that Article 28 of the Dublin III Regulation, read in conjunction with Article 2(n), requires a “binding provision of general application” setting out objective criteria for determining when an individual poses a risk of absconding in order for detention of someone subject to the Dublin III Regulation to be lawful, and that “settled case-law confirming a consistent administrative practice . . . cannot suffice.” This is contrary to the United Kingdom’s approach towards implementing these provisions to date, which is based on common law and administrative practice. This is the same approach taken by some other common law countries.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is all of the United Kingdom
- 5.2 This instrument applies to all of the United Kingdom

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 The Dublin III Regulation sets out the criteria and mechanisms for determining which of the Member States or other States which participate in the instrument (Iceland, Liechtenstein, Norway and Switzerland) should be responsible for examining an application for international protection lodged in one of those States by a third country national or a stateless person. It also sets out the transfer procedure which applies.
- 7.2 Article 28 of the Dublin III Regulation provides that a person who has made an application for international protection may only be detained where they present a significant risk of absconding. Article 2(n) provides that “risk of absconding” means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that the individual who is subject to a transfer procedure may abscond.
- 7.3 Having considered the implications of the ruling, the Home Office is making these Regulations in order to reflect in legislation the current policy and administrative practice as to the criteria which should be considered to determine whether an individual who is subject to the Dublin III procedure poses a significant risk of

absconding, relying on the powers conferred by section 2(2) of the European Communities Act 1972. The regulations do not apply retrospectively.

Consolidation

- 7.4 This is the first set of regulations dealing with this issue and so the need for consolidation does not arise.

8. Consultation outcome

- 8.1 No consultation exercise was conducted as this instrument does not change the existing criteria which are currently relied on to assess a significant risk of absconding in Dublin III Regulation cases.

9. Guidance

- 9.1 Guidance for Home Office decision makers will be updated to reflect the Regulations and will be published on www.gov.uk so that it is available to claimants, immigration practitioners and other stakeholders.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
10.2 There is no impact on the public sector.
10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 The Regulations do not change the policy or administrative approach towards the consideration of the risk of absconding in Dublin III Regulation cases. Compliance will be monitored by the Home Office in line with existing practice. As the Regulations make no substantive changes, no other monitoring is planned.

13. Contact

- 13.1 Kerry Giles at the Home Office can answer any queries regarding the instrument. Telephone: 020 7035 8424 or email kerry.giles@homeoffice.gsi.gov.uk