# Voluntary return and the limits of individual responsibility in the EU Returns Directive

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# 10 The priority of voluntary return and the third-country national's entitlement to a voluntary departure period

## 10.1 Introduction

Having discussed all the key elements of the obligation to return in the previous chapters, attention now turns to the second set of questions about the responsibility associated with voluntary return. This relates to the application of the voluntary departure period. As discussed in the introductory chapter, the issue of the scope of the obligation to return and the application of the Directive's provisions on the voluntary departure period are closely connected. While the former sets out what third-country nationals can be expected to do to return voluntarily, the latter determines whether they have an effective possibility to do so in practice. This is the topic of the current and the next chapter. In this chapter, the focus will be on the nature and extent of the entitlement of third-country nationals to a voluntary departure period, in light of the priority of voluntary return, but also the grounds for exceptions to being granted such a period, as set out in the Directive (research question 2a).

As noted, the Directive defines voluntary departure as "compliance with the obligation to return within the time-limit fixed for that purpose in the return decision."[1] If no such time limit is given, this takes away third-country nationals' possibility to comply with any obligation voluntarily, and the issue of which actions they should take – discussed in the previous chapters – becomes a moot point. The time limit is regulated specifically by Article 7 of the Directive. Its first paragraph requires member states, when issuing a return decision, to "provide for an appropriate period for voluntary departure between seven and thirty days," which, in accordance with paragraph 2, should be extended where necessary. However, this requirement to provide for a voluntary departure period is subject to exceptions, which are covered in the fourth paragraph of Article 7. This paragraph provides that member states may refrain from granting a voluntary departure period, or grant one shorter than seven days, in three circumstances. These are: (1) if there is a risk of absconding; (2) if an application for legal stay has been dismissed as manifestly unfounded or fraudulent; or (3) if the person concerned poses a risk to public policy, public security or national security. Other provisions deal with measures that member states may take to prevent absconding.[2]

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1 RD Article 3(8).

2 See Article 7(3) and the discussion in 10.4.6 below.

Although the Directive aims to make the granting of a voluntary departure a priority, the way these exceptions are formulated are potentially wide-ranging. As such, they determine the extent to which a third-country national is in fact entitled to an opportunity of voluntary return or, put conversely, the extent of member states' discretion in denying such an opportunity.[3] As a result, it makes sense to first look more closely at the entitlement to a voluntary departure period. In contrast to other issues discussed in this dissertation, the question of the entitlement to a voluntary departure period is one that is shaped exclusively by the relationship between the third-country national and the EU member state. As a result, there is no need here to look at the other two, external, relationships in the triangle. It should be noted that the discussion in this chapter only focuses on whether third-country nationals would be entitled to a voluntary departure period as a general point. Questions about the appropriate length of such a period, which has a close link with the issue of readmission and the efforts third-country nationals must make, are dealt with in Chapter 11.[4] This separation between the granting of a voluntary departure period and its length is admittedly somewhat artificial, since they are part of the same decision by the member state.[5] However, analytically there is added value in discussing these separately, as it allows for a more detailed examination of each of the issues.

This chapter will proceed as follows. Section 10.2 will discuss the general principles governing the priority of voluntary return, looking specifically at how this priority is formulated in the Directive, and at the implications of the role of voluntary return as a way to safeguard fundamental rights. Section 10.3 will start the discussion of the specific exceptions outlined in Article 7(4) of the Directive, how these should be interpreted, and what limits exist to the member state's invocation of these possibilities to deny a voluntary departure period. For reasons to be explained below, this discussion starts with the denial of such a period for reasons of public policy, public security, and national security. Section 10.4 considers the denial of voluntary departure because there is a risk of absconding, in particular the extent to which certain indicators can legitimately be used to deduce such a risk. It will also briefly discuss the role of measures to prevent absconding, as outlined in Article 7(3). In section 10.5, the remaining ground for denial, namely that the third-country national's application for stay was dismissed as manifestly unfounded or fraudulent, is discussed.

3 If such an opportunity is denied, this obviously makes the question of responsibility to return voluntarily a moot point. This does not mean that the third-country national does not have certain residual obligations, but these are outside the scope of this analysis.

4 With the exception of the matter of providing periods shorter than seven days, which – for reasons explained there, is addressed in 10.6 below.

5 After all, according to Article 7(1) of the Directive, member states should normally provide for a period of between seven and thirty days in the return decision, implying that a decision to grant a voluntary departure period simultaneously implies an obligation to set out how long it should be.

While the discussion generally focuses on the possibility of denying a voluntary departure period, Article 7(4) also provides for the possibility of granting a period shorter than seven days. Section 10.6 addresses this possibility. Section 10.7 looks at whether certain provisions on the denial of a voluntary departure, in the current Directive but also particularly in the Commission's recast proposal, have to be considered prima facie incompatible with primary EU law, as they undermine the role of voluntary return as a mechanism to ensure proportionality and protect fundamental rights. Section 10.8 presents the conclusions for this chapter.

## 10.2 General principles governing the priority of voluntary return

This section discusses which general principles govern the priority of voluntary departure in the Directive. It will look at the way this priority is formulated in the Directive as a general principle and a right under EU law (10.2.1). It will also address the way in which fundamental rights impact on this priority (10.2.2).

### 10.2.1 Formulation of the priority for voluntary return in the Directive

As discussed in Chapter 1, the Directive sets out the general approach for the priority of voluntary return by stating the following:

> *"Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted."*[6]

Additionally, the operative part of the Directive sets out, in Article 7(1), that third-country nationals should be accorded a period for voluntary departure in the return decision, although this is without prejudice to the exceptions set out in Article 7(4) allowing for the shortening and denial of such a period.

#### *10.2.1.1 A right under EU secondary law*

The way Article 7(1) is formulated makes clear that the granting of a voluntary departure period is not just a competence of the member state. Rather, it is formulated in a compulsory way ("shall provide"). Member states may have some discretion in applying the grounds for denial of a voluntary departure period. But where such grounds – which are exhaustively listed in Article 7(4) – do not apply, they must provide third-country nationals with an opportunity to meet their obligation to return voluntarily. The way in which this provision is formulated also means that it creates an entitle-

6 RD Recital 10.

ment for the individual. In her opinion in the *Zh. and O.* case, Advocate General Sharpston also identifies an opportunity for voluntary departure as a right conferred by EU law.[7] While the CJEU does not discuss this in detail, it appears to take this as a given.[8] Since voluntary departure is not a favour bestowed on the third-country national by the member state, but a clearly set out right in EU law, any exception to the general rule that a voluntary departure period is provided must be construed in a strict manner.[9] The fact that the third-country national is not lawfully staying in the EU member state does not change that.[10]

#### *10.2.1.2 Undermining of a return procedure: a relevant factor?*

While the opportunity to leave voluntarily is a right of individuals, it is a highly qualified one. The qualification is governed both by a general principle and by specific provisions in Article 7(4). As noted above, the general qualification can be found in the fact that the preamble notes that priority should be given to voluntary return unless this would "undermine the purpose of a return procedure." While the specific grounds for exceptions are discussed in more detail later in the chapter, it is worth considering what role this general statement of the priority of voluntary return might play, since it appears to set the overall framework for making exceptions. This requires, first of all, discussing what exactly is the 'purpose of a return procedure,' which might be undermined by the granting of a voluntary departure period. In addition to providing a measure of protection to the individual, discussed in detail below, the Directive mentions the need for "an effective removal and repatriation policy" or an "effective return policy" in the preamble.[11] An effective return procedure would appear to mean, first and foremost, one that leads to third-country nationals actually returning. From this perspective, if the granting of a voluntary departure period would somehow result in non-return, this would evidently undermine the purpose of the Directive's return procedure. Based on this conception of the purpose of a return procedure, several possible scenarios for the interplay between the general principle set out in the preamble, and the specific provisions in Article 7(4), can be imagined.

First, the principle that a voluntary departure period should be granted unless this would undermine the purpose of a return procedure could be seen as an additional element for states to take into account, on top of the specific grounds set out in Article 7(4). In other words, this would mean

7 CJEU, Opinion AG, C-554/13 *Zh. and O.* [2015], including in paragraphs 58-59 and 79.

8 It applies, for example, the same standard that any derogation of rights or principles set out in EU law must be interpreted restrictively. See CJEU C-554/13 *Zh. and O.* [2015], paragraphs 42 and 48.

9 *Ibid*.

10 Also see 10.2.2.4 below on the extent to which irregular third-country nationals' fundamental rights should be protected under the Directive.

11 RD Recitals 2 and 4. This also follows from the requirements of Article 79(2) TFEU.

that a voluntary departure period could only be denied if one of the three grounds is applicable *and* there is also reason to assume that the return procedure would be undermined. While theoretically this is defensible purely based on the text of the Directive, this approach would potentially have far-reaching consequences for the application of the three grounds in Article 7(4). The connection between the undermining of a return procedure and the risk of absconding, as a ground to deny a voluntary departure period, seems unproblematic. Notwithstanding the many reservations that can be put forward regarding the application of this ground,[12] if a risk of absconding is indeed established, and it may be presumed that the third-country national would escape from view of the authorities to circumvent his or her obligation to return, this would clearly amount to the undermining of the return procedure. The connection between the undermining of a return procedure and the other grounds listed in Article 7(4) is, in my opinion, much more debatable.[13] The fact that third-country nationals pose a risk to public policy, public security or national security, first of all, can of course be a legitimate concern for the member state.[14] It may even be the reason why third-country nationals lost their right to stay in the member state and are now under obligation to return. But this situation, in and of itself, does not say anything about whether the return procedure can and will be concluded successfully. Similarly, the rejection of an application as manifestly unfounded or fraudulent may give concern to a member state, but again, does not relate directly to the effectiveness of return. Of course, arguments can be made that certain 'bad behaviour' also indicates that the third-country national may not meet his or her return obligations, but this is not made explicit in these provisions. Furthermore, such factors are already considered with regard to the risk that the third-country national might abscond, which is a separate ground for denial of voluntary departure.[15]

Therefore, if Recital 10 would be read as implying that a voluntary departure period can only be denied if this is necessary to prevent the undermining of a return procedure, this would seriously call into question the extent to which member states could rely on at least two of the three concrete grounds for denial in Article 7(4). At most, when the criterion of undermining a return procedure would not be met, member states could still use the relevant provisions of Article 7(4) to provide a period shorter than seven days. After all, this would not clash, at least technically speaking, with the principle that a period for voluntary departure should be given.[16]

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12 See 10.4.

13 Also see Majcher 2020, p. 558, who notes that the connection between the reasoning in case of the other two grounds in relation to ensuring effective return is "less clear."

14 See, for example, my comments on the security concerns related to the granting of a voluntary departure period in Chapter 1, footnote 112.

15 See 10.4.

16 But see Chapter 11: if a voluntary departure period is too short, this may de facto deprive a third-country national from the opportunity to meet the obligation to return voluntarily.

The counterargument to this would be that it would lead to a situation that would be too restrictive for member states. An alternative scenario would be to focus on the fact that the co-legislators have included explicit provisions on the denial of a voluntary departure period in the operative part of the Directive, which would otherwise be deprived of their effect. In this respect, it is also noteworthy that neither the CJEU nor the Advocate General engage with Recital 10 in any substantive way when coming to their conclusions about the scope of (part of) Article 7(4) in *Zh. and O*. A way to reconcile the gap between Recital 10 and Article 7(4) would then be to simply regard the latter as the concrete operationalisation of the former. In other words, the three grounds in Article 7(4) are concrete expressions of situations in which a return procedure would be undermined, and they can thus be used by member states without having to justify this further in terms of undermining. It is not the prettiest solution from the perspective of giving effect to the text of Recital 10, but it is the one that is arguably closest to the overall purpose and context of the Directive. This appears to be the approach taken in *Zh. and O.* and previous cases. There, the CJEU refers not to the undermining of a return procedure, but simply infers from Recital 10 that "priority is to be given, *except otherwise provided for*, to voluntary compliance with the obligation resulting from that return decision."[17]

A third option could be formulated, which would not replace, but could be complementary, to the approach above. In the current version of the Directive, the denial of a voluntary departure period is an option for member states ("member states may refrain").[18] However, Recital 10 could be read as a principle that would make denial of a voluntary departure period obligatory in certain cases, namely if this would undermine the purpose of a return procedure. This would make sense, since the Directive contains several clear obligations on member states to ensure that return eventually takes place. A member state that would grant a voluntary departure period to third-country nationals in the knowledge that this will lead to their non-return, would be acting in contradiction not just with the principle elaborated in Recital 10, but with the effectiveness of the Directive as a whole. However, such a situation is not black and white and would be moderated by other requirements, including those discussed as regards fundamental rights.[19] In practice, however, this scenario does not appear to have too much relevance. As noted below, there is already a tendency to regard (and use) the exceptions to the general rule expansively. It is unlikely, for example, that a member state that considers that there is a risk of absconding in an individual case, would not seek to make use of the ground for denial in Article 7(4).

17 CJEU C-554/13 *Zh. And O*. [2015], paragraph 44; also see CJEU C-61/11 PPU *El Dridi* [2011], paragraph 36 (my emphasis).

18 Although the Commission's recast proposal seeks to make this mandatory, see 10.7.

19 It is also important to note that a clear distinction needs to be made between the failure of the third-country national to return voluntarily within the time limit provided to him and not returning *at all*, see 10.4.3.2.

### 10.2.2 The priority of voluntary return and fundamental rights

Another avenue to explore is that of the link between the priority of voluntary return and fundamental rights. This link may arise in two ways. First, it may be wondered whether being granted an opportunity to return voluntarily is an integral part of a specific fundamental right. Second, we may conceive of the voluntary departure period as a mechanism to protect fundamental rights more generally.

#### *10.2.2.1 The right to leave as a right to voluntary return?*

As regards the first point, allusions to being granted time to leave when no longer permitted to stay in the host state can be found in certain human rights documents, although these cover very specific groups. Article 32(3) of the 1951 Refugee Convention, for example, requires contracting states to "allow such refugees [subject to expulsion after lawful stay] a reasonable period within which to seek legal admission into another country."[20] A more generally applicable entitlement to return voluntarily in case of expulsion could be read into the right to leave any country. As noted in Chapter 2, the right to leave needs to be given meaning in expulsion cases too. Furthermore, beyond requiring states to refrain from unduly interfering with the departure of an individual, the right to leave also contains additional guarantees, for example in relation to the choice of destination.[21] In this way, the right to leave can be construed as also guaranteeing a certain measure of autonomy as regards the manner in which third-country nationals arrange and implement their departure. It could be argued that a way to give effect to this would be to provide persons faced with expulsion, at least in principle, an opportunity to leave of their own accord, rather than immediately resorting to removal. Such a reading of the right to leave would, however, not necessarily expand the substantive scope of the right to voluntary return. After all, the right to leave may be subject to legitimate interferences, which would have to be in line with the provisions of the ECHR and ICCPR. The incorporation of the exceptions in Article 7(4) would satisfy the legality of such interferences, while the objective of the interference – ensuring effective return – has been repeatedly accepted as being in pursuit of legitimate aims. However, it would create clearer focus on the need to respect the principles of necessity and proportionality. Despite the possibility of the right to leave encompassing a right to voluntary return, this remains theoretical, and no acknowledgement of this in relevant case law can be found. This does not mean there is not an important connection between the priority of voluntary return and fundamental rights. However,

20 Refugee Convention, Article 32(3), first sentence.
21 See 7.2.2.

this connection lies in the way voluntary return can protect fundamental rights more generally, rather than necessarily being part of a specific fundamental right itself, as explained below.

#### *10.2.2.2 Voluntary departure as a mechanism to safeguard fundamental rights*

In addition to the pursuit of effective return, the Directive seeks to guarantee effective protection of the interests of individuals.[22] This particularly includes ensuring that third-country nationals are treated in a humane and dignified manner during its procedure by safeguarding fundamental rights. The priority for voluntary return is an important instrument to balance effectiveness with the protection of fundamental rights. This is clear, for example, from the discussion about the role of voluntary return in the run-up to the adoption of the Directive.[23] Despite this history, the Directive itself is not very explicit about this link. It makes repeated references to the importance of protecting fundamental rights during the return procedure, but this generally covers the whole procedure and does not single out voluntary departure as a key means to do so.[24] The preamble, however, does refer to the Council of Europe Twenty Guidelines on Forced Return, which were considered a "golden bridge" for reaching agreement during the negotiations on the Directive.[25] The first of these Guidelines also emphasises that voluntary return should be preferred over forced return. The commentary to this Guideline stresses that this is the case because voluntary return "presents far fewer risks with respect to human rights."[26]

This is also recognised by the CJEU, particularly in the *Zh. and O.* case that will be discussed in more detail in section 10.3 below. The CJEU emphasises that the granting of voluntary departure is designed, "inter alia, to ensure that the fundamental rights of those nationals are observed in the implementation of a return decision," and to ensure third-country nationals are returned in a humane manner and with full respect for their fundamental rights and dignity.[27] The CJEU does not make explicit which rights are at stake, but according to Peers it takes account of the "dramatic impact of forced removal on individual migrants."[28] Presumably it primarily had the right to liberty (Article 6 of the Charter for Fundamental Rights) in mind, which would be affected by a decision to detain

22 RD Recital 11.
23 See 2.2.1.
24 RD Recitals 2, 17 and 24, and Article 1.
25 RD Recital 3; Lutz 2010, p. 28.
26 Council of Europe 2005, Guideline 1 and the commentary thereto. The risks involved in forced returns are also emphasised the report of the UN Special Rapporteur on the human rights of migrants, Felipe González Morales, Human Rights Council, thirty-eighth session, 18 June-6 July 2018, A/HRC/38/41, 4 May 2018.
27 CJEU C-554/13 *Zh. And O.* [2015], paragraph 47.
28 Peers 2015.

the individuals. Furthermore, the right to dignity (Article 1), to integrity of the person (Article 3), the freedom from inhuman or degrading treatment (Article 4), and even the right to life (Article 2), could all be affected by coercive measures applied in the context of the enforcement of the return decision. As suggested in Chapter 1, voluntary departure can thus act as a mechanism to ensure that coercive measures, and any associated interferences with fundamental rights, are applied, as much as possible, as a last resort. As such, voluntary return acts as a proportionality mechanism with regard to any interferences associated with enforcement. But for it to have this function, the exceptions outlined in Article 7(4) will themselves have to be applied in a proportionate manner. This would add another layer of restrictiveness to the application of these exceptions, since the consideration of denial of a voluntary departure period by a member state should then go beyond merely finding that the situation of a third-country national fits one of the grounds provided for in Article 7(4).

The Directive itself contains several elements to ensure proportionality. It requires, for example, that any decisions taken should be adopted on a case-by-case basis, based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay.[29] This is an important element that comes into play when applying specific grounds for making exceptions to the priority of voluntary return. It would also require, generally, that the seriousness of the reasons for denying a voluntary departure period would be weighed against the impact on the individual. In this respect, member states must further take account of specific issues, such as the best interests of the child, family life, or the health of third-country nationals.[30]

## 10.3 Denying a voluntary departure period for reasons of public policy, public security or national security

Having discussed the priority of voluntary return and the third-country national's entitlement to a voluntary departure period in more general terms, this section starts the closer inspection of each of the specific grounds for denial (and shortening) of a voluntary departure period listed in Article 7(4). Although the possibility to deny a period for voluntary departure for reasons of public policy, public security or national security is only the third ground listed in Article 7(4), it will be the first discussed here. This is because the limited case law of the CJEU has mainly dealt with this reason for denial. Although focusing on the issue of public policy specifically, it has broader implications for the interpretation of Article 7(4) and the scope of

29 RD Recital 6.

30 RD Article 5. Although other issues may also be relevant when making decisions on voluntary departure periods, see 11.3.2.

the discretion of member states in applying it. This section, therefore, will start with an overview of this case, *Zh. and O.* (10.3.1). This is followed by a discussion of the scope of the concepts of public policy, public security and national security in the Court's case law (10.3.2), and, crucially, how member states should assess a risk to such interests in relation to the denial of a voluntary departure period (10.3.3).

### 10.3.1 The *Zh. and O.* case: the CJEU's first engagement with the voluntary departure period

In June 2015, the CJEU delivered its first, and so far only, judgment dealing directly with the interpretation of the Directive's provisions related to the voluntary departure period.[31] The case has already been referred to above, but is introduced here in more detail. In the *Zh. and O.* case, the Court deals with different aspects of the refusal of a period for voluntary departure on the grounds of public policy. It concerns the refusal of such a period in two separate cases of Mr Zh. and Mr O. by the Netherlands. In particular, the referral sought to get more clarity on the practice in the Netherlands that any person suspected or convicted in respect of an act punishable as a criminal offence under national law is automatically deemed to pose a risk to public policy, and could thus be refused a voluntary departure period on that basis.[32]

Mr Zh. had been arrested at the international airport while trying to make his way to Canada, because he was travelling with a false travel document. He was subsequently given a custodial sentence of two months for the possession of a travel document he knew to be false. At the end of his sentence, he was ordered to leave the Netherlands and a period for voluntary departure was denied. When Mr Zh. appealed this decision, the District Court in The Hague found that the Dutch government had been justified in considering Mr Zh. a risk to public policy, since he had been found to be residing illegally in the Netherlands, had no ties with any citizen of the EU and, in addition, had been given a custodial sentence. Based on this, a risk to public policy within the meaning of Article 7(4) of the Directive could legitimately be presumed.[33]

Mr O. was in the Netherlands on a short-term visa but was arrested and detained on the ground that he was suspected of domestic abuse. He was ordered to leave the Netherlands and was refused a period for voluntary departure because he posed a risk to public policy.[34] This decision was annulled by the District Court, inter alia, because there were no policy guidelines on shortening the period for voluntary departure in the

31 CJEU C-554/13 *Zh. And O.* [2015]
32 *Ibid.*, paragraph 17. It is noted that, in case of a suspicion (rather than a conviction) this must be capable of being confirmed by the chief of police.
33 *Ibid.*, paragraph 20.
34 *Ibid.*, paragraph 24.

interest of public policy[35] and because the government had failed to provide adequate reasons for its decision. A report which stated that Mr O. had been detained on suspicion of domestic abuse was found to be inadequate, taking into account that there was no documentation substantiating the alleged abuse. Both cases went to the Council of State, the Netherlands' highest administrative court. The Council of State decided to refer preliminary questions to the CJEU on the refusal of a period for voluntary return under Article 7(4) of the Directive.

### 10.3.2 *Zh. and O.* and the denial of a voluntary departure period due to a risk to public policy

The *Zh. and O.* judgment covers various issues related to the denial of a voluntary departure period on public policy grounds. This includes setting the framework for when a risk to public policy can be assumed to exist, the specific circumstances that should be taken into account, and the matter of whether such a risk needs to be re-examined at the moment a decision of denial of a voluntary departure period is made. The Court's findings in relation to each of these issues are outlined below.

#### *10.3.2.1 Requirements for considering a risk to public policy*

The referring court asks, first of all, about the circumstances under which a member state can consider a third-country national a risk to public policy within the meaning of Article 7(4).[36] In particular, whether this can be found merely on the basis of persons being suspected of having committed a criminal offence under national law, or that it is necessary that they were actually convicted. And if so, whether such a conviction should have become final and absolute. The CJEU frames this question mainly as whether Article 7(4) would preclude a national practice that would deny a voluntary departure period on the sole ground that the third-country national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law. In this respect, the CJEU first observes that the 'risk to public policy' is not defined in the Directive and must, according to settled case law, be determined by considering its meaning in everyday language, taking into account the context and the purpose of the rules of which it is part. In particular, when an undefined term appears in a provision which

35 The policy that a suspicion or conviction of a criminal offence automatically gave rise to a presumption that the person posed a risk to public policy, described above, was only laid down in policy guidelines after Mr O. had already been removed from the Netherlands. However, the (unwritten) practice had been in place before, as evidenced from the Dutch submission, *ibid.*, paragraph 40.

36 It should be noted that, in her Opinion, Advocate General Sharpston devoted considerable attention to the question whether 'public policy' in the English language version should be considered similar to 'ordre public' in the French and other versions, see CJEU, Opinion AG, C-554/13 *Zh. And O.* [2015].

constitutes a derogation from a principle, it must be interpreted strictly. The preamble of the Directive may also shed light, in particular the fact that it sets out a general priority of voluntary return.[37] The Court also notes that Article 7(4) only provides for particular circumstances, such as a risk to public policy, that allow denying or shortening a voluntary departure procedure. And to rely on such a provision, the member state must be able to prove that the person concerned constitutes such a risk.[38] Importantly, as noted in 10.3.1 above, it also reiterates that the provisions on voluntary departure seek to ensure the protection of the fundamental rights of third-country nationals.[39]

The Court further observes that member states essentially retain the freedom to determine the requirements of public policy in accordance with national needs, which may vary. However, there is nonetheless a need for strict interpretation, so that the scope of these requirements cannot be determined unilaterally by each member state without any control by the EU institutions.[40] In this respect, it also reiterates the need for fair and transparent procedures, which involve decisions being adopted on a case-by-case basis, on objective criteria, going beyond the mere fact of illegal stay.[41] Drawing on its judgment in *El Dridi*, the CJEU reiterates the fact that the principle of proportionality must be observed throughout all stages of the return procedure, including in relation to Article 7. This implies that member states must assess a risk to public policy on a case-by-case basis, to ascertain whether the personal conduct of the individual poses a genuine and present risk to public policy. Relying on any assumption in order to determine such a risk, without properly taking into account the individual's personal conduct, fails to observe the principle of proportionality. The mere existence of a suspicion of or conviction for a criminal offence is thus not sufficient to satisfy these requirements of Article 7(4).

This does not mean, however, that the public policy exception in Article 7(4) can only be applied when a conviction becomes final and absolute. Such a requirement does not follow from the Directive's wording and would run counter to the purpose of Article 7. As such, a mere suspicion of a criminal offence may be sufficient, provided this is taken with other relevant factors relating to the case that indicate a risk to public policy. While this is further to be determined by the national court, the CJEU does clearly find that a practice of denying a voluntary departure period on the sole basis of the existence of a suspicion or conviction for a criminal offence to be incompatible with the Directive.

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37 CJEU C-554/13, *Zh. And O.* [2015], paragraphs 41-42.

38 *Ibid.*, paragraph 46, also see CJEU, Opinion AG, C-554/13 *Zh. And O.* [2015], point 43, and CJEU C-61/11 PPU *El Dridi* [2011], paragraph 37.

39 CJEU C-554/13 *Zh. And O.* [2015], paragraph 47; CJEU C-146/14 PPU *Mahdi* [2014], paragraph 38.

40 CJEU C-554/13 *Zh. And O.* [2015], paragraphs 48; CJEU C-430/10 *Gaydarov* [2011], paragraph 32 and case law cited.

41 CJEU C-146/14 PPU *Mahdi* [2014], paragraph 38.

It should be noted that, in the lead up to its question, the referring court also devotes significant attention to the fact that the risk to public policy is also used in other EU migration legislation relating to legally staying EU citizens or third-country nationals. In this respect, it suggests that the bar for finding a sufficient risk in the case of the Directive may be lower than in other such cases, since individuals would be irregularly staying in the member state and the consequences would only be the denial of a voluntary departure period and not, as in other situations, the discontinuation of their legal presence in the member state. The CJEU does not engage with this issue as such. However, Advocate General Sharpston, in her opinion, makes a strong and convincing argument against this. She notes the "unfortunate connotations" of making distinctions on the basis of legal status, as this would create a hierarchy of protection, with irregularly staying third-country nationals at the bottom.[42] She concludes that "[t]he fundamental rights guaranteed by EU law that do apply to third-country nationals should be observed with equal rigour to those applying to EU citizens."[43] Although not pronouncing itself specifically on this issue, the CJEU's clear recognition of the protective function of voluntary return would appear to be in support of this approach, also in view of its previous findings that the protection of the fundamental interests of a member state may not vary depending on the legal status of the person concerned.[44]

*10.3.2.2 Circumstances to be taken into account*

In its second question, the referring court asked what other facts or circumstances of the case, in addition to a suspicion or a conviction, such as the severity or type of offence, the time elapsed since the offence, and the intention of the person concerned, should be taken into account. In this respect, the CJEU first observes that the factors relevant to determining a risk to public policy are not materially the same as those related to the risk of absconding, on which it pronounced itself in *Mahdi*.[45] Additionally, it re-emphases its point above that such a risk requires a case-by-case assessment of the personal conduct, which must lead to a genuine and present risk to public policy. Finding that various language versions of the Directive use both 'risk' and 'danger' in this respect, the context of this rule requires this to be understood in the sense of a 'threat.'[46] In this light, the appraisal that needs to be made of the interests in protecting public policy does not necessarily coincide with elements that form the basis of a criminal conviction.

42 CJEU, Opinion AG, C-554/13 *Zh. And O.* [2015], point 58.
43 *Ibid.*, point 59.
44 CJEU C-373/13 *H.T.* [2015], paragraph 77. Also see Terlouw 2016, p. 136.
45 CJEU C-146/14 PPU *Mahdi* [2014], and further see 10.4 below.
46 CJEU C-554/13 *Zh. And O.* [2015], paragraph 58.

Rather, such a risk must presuppose, "in addition to the perturbation of the social order which any infringement of the law involves" also a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."[47] Any factual or legal matter regarding the that can shed light on whether the personal conduct of the third-country national indeed poses such a threat can be considered relevant. In the case of a suspicion of a criminal offence, such factors include (but are not necessarily limited to) the nature and seriousness of the act, and the time that has since elapsed.[48]

The Court also notes, in relation to Mr Zh., that he was in the process of leaving the Netherlands. While it is for the national court to determine how this should be applied to the case, it is under obligation to assess all the facts and evaluate the weight attributed to that circumstance.[49] As regards Mr O., the Court also notes the lack of documentation substantiating the accusation of abuse, which is also relevant because it relates to the credibility of the suspicion, which in turn may clarify whether his personal conduct poses a risk to public policy. As such, other factors beyond the suspicion or conviction of a criminal offence are relevant in applying this ground for denying a voluntary departure period, including all the ones discussed above.[50]

#### *10.3.2.3 Automatic application of Article 7(4), denial and the need for a fresh examination*

In relation to the third question, the CJEU considers whether the application of Article 7(4) requires a fresh examination of the matters which have already been examined to establish the existence of a risk to public policy in the first place. In this context, the CJEU, drawing on *Boudjlida*, reiterates that the right to be heard before the adoption of a return decision implies an obligation on member states "to enable the person concerned to express his point of view on the detailed arrangements for his return, such as the period allowed for departure, and whether return is to be voluntary or coerced."[51] And that, according to general principles of EU law and as reiterated in the preamble of the Directive, decisions taken must be adopted on a case-by-case basis, taking properly into account the person's fundamental rights. Automatically denying, in law or practice, a voluntary departure period is not compatible with that, although the Directive clearly leaves space, if required in light of all the relevant circumstances, to member states to protect their public policy interests. If a member state, taking into account

47 *Ibid.*, paragraph 60; CJEU C-430/10 *Gaydarov* [2011], paragraph 33 and case law cited.
48 CJEU C-554/13, *Zh. And O.* [2015] paragraphs 61-62.
49 *Ibid.*, paragraph 63.
50 *Ibid.*, paragraphs 64-65.
51 *Ibid.*, paragraph 69; CJEU C-249/13 *Boudjlida* [2014], paragraph 51.

all safeguards mentioned above, considers that an individual indeed poses a risk to public policy, it is not required to conduct a fresh examination of matters that were found to be relevant in establishing that risk.[52]

In its third question, the referring court had also specifically asked about the freedom of member states to choose between denying a voluntary departure period, or granting one that is shorter than seven days, in case of a risk to public policy. As this pertains to the application of Article 7(4) more generally, I will come back to this issue in 10.6.

### 10.3.3 Implications of the judgment beyond the risk to public policy

The judgment has important implications for the other elements set out in this limb of Article 7(4), namely the risk to public security and to national security, as well as for the other grounds for denial of a voluntary departure period.

#### *10.3.3.1 Risks to public security and national security*

The judgment focuses only on the denial of a voluntary departure period as regards the risk to public policy. However, the risk to public security and the risk to national security are grouped together with public policy within the same limb of Article 7(4). In this light, it must be assumed that the CJEU's findings are equally relevant for these other elements. Just as with public policy, while not leaving this entirely to member states, the CJEU would likely leave considerable space to member states to ascertain when these essential interests are impact by a third-country national's conduct. In this respect, the CJEU has only set out broad parameters for some of these concepts too.[53] At any rate, the borders of the three concepts public policy, public security and national security remain amorphous.[54] However, since they are grouped together, the requirements for considering such a risk sufficient to deny a voluntary departure period must at any rate be considered the same. It may, however, be possible to discern a difference in the severity of the risk posed in each case, where risks to national security would arguably have to be weighed more heavily than those to public policy, but this also depends, as noted below, on the specific risk involved.

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52 The judgment remains somewhat vague on this point. Presumably it means there is no need for the authority deciding on a voluntary departure period to itself re-examine substantive elements leading to the suspicion or convicting of a criminal offence, but only that it needs to weigh this suspicion or convicting in an appropriate manner as set out above.

53 See, for example, CJEU, C-145/09 *Tsakouridis* [2010] and case law cited.

54 Koutrakos 2016, for example, speaks of the "marginalisation of the distinction between public policy and public security," which he considers "troubling and by no means conducive to the clarification of these elusive concepts." Similarly, Peers 1996, has noted that "national security derogations inevitably form part of or overlap with *public* security … exceptions" (emphasis in original).

The exceptions to each of these grounds must be interpreted strictly and in relation to their autonomous meaning in EU law, rather than merely on the basis of national provisions. They must be forward-looking in that they constitute a "genuine and present threat." They must further conform to the more general requirements that should considered applicable to Article 7(4) in its entirety, as discussed below.

*10.3.3.2 Implications for the application of Article 7(4) generally*

The judgment reiterates, and in some cases sets out, important general principles related to the balancing of the interests of the member state and those of individuals, especially their fundamental rights. In this respect, they should be considered applicable in all cases in which member states seek to make exceptions to the general rule that a voluntary departure period between seven to thirty days should be granted. In particular, this implies that such a step must be assessed by taking an individualised approach (a case-by-case basis), as well as fully contextualised, taking into account "any factual or legal matter related to the situation of the third-country national."[55]

The principle of proportionality further requires this to be weighed against the interests of the individual, including (but not necessarily limited to) those of which member states must take account under Article 5 of the Directive (the best interests of the child, family life and the state of health of the individual). In this regard, the judgment also reiterates the importance of the right to be heard, as a means to ensure third-country nationals can put forward all elements relevant to making such a decision. All this is particularly connected to the clear recognition of ensuring that third-country nationals' fundamental rights are protected regardless of their irregular status in the member state, and, importantly, that granting a voluntary departure period is a key mechanism for the adequate protection of those rights. Furthermore, the CJEU's findings are important in reiterating the fact that the burden of proof that it is necessary and proportionate to deny a voluntary departure period lies firmly with the member state, which, after all, is the one that is opting to deprive the third-country national of this opportunity. Automatic application of the denial of voluntary departure as a 'check-the-box' exercise is clearly not compatible with the Directive.[56]

In this way, the *Zh. and O.* judgment is particularly important for a proper understanding of the way in which the grounds for denial (or shortening) of a voluntary departure period should be operationalised. It sets important parameters for the way member states should consider such a step, even if the substantive grounds for denial under the other limbs of Article 7(4) are different. More specifically, this requires an approach that is forward-looking and not just considering past actions, individualised and

55 CJEU C-554/13 *Zh. And O.* [2015], paragraph 61.
56 Also see Majcher 2020, p. 566.

not automatic, and contextualised, taking into account all relevant facts, whilst ensuring these are weighed against the interests of the individual.

## 10.4 Denying a voluntary departure period and the risk of absconding

As noted in 10.2.1, the fact that member states would be able to deny or shorten a voluntary departure period if there is a risk of absconding seems to flow logically from the overall goals of the Directive, and arguably gives the purest meaning to the notion that voluntary return should be preferred unless this would undermine the purpose of a return procedure. Nevertheless, this ground for denial raises a multitude of questions regarding its scope and application. These are particularly important as, of the three grounds set out in Article 7(4), the risk of absconding, if not further clarified, leaves the widest possibilities for denying a voluntary departure period. In this respect, Baldaccini has argued, in relation to the priority of voluntary return, that "[i]t is clear that the implementation of this principle can entirely be frustrated by a wide application of the 'risk of absconding' exception."[57] In the next paragraphs, therefore, the focus will be on potential limits to this exception, focusing on general principles to be applied (10.4.1), the setting of objective criteria defined by law (10.4.2), the meaning of absconding in relation to non-cooperation and non-return (10.4.3), the avoidance of criteria that replicate the mere fact of illegal stay (10.4.4), criminal proceedings and absconding (10.4.5), and the relationship with measures to prevent absconding under Article 7(3) (10.4.6).

### 10.4.1 General principles to be applied to the risk of absconding

The risk of absconding serves a dual role in the Directive. It acts both as a ground to deny or shorten a voluntary departure period, and as one of the reasons why a member state may detain a third-country national during the enforcement stage.[58] In the original proposal for the current Directive, the existence of a risk of absconding was the only ground for denial or shortening of the voluntary departure period mentioned.[59] In contrast to the other derogation grounds, the risk of absconding is the only one explicitly defined in the Directive. Article 3(7) defines a risk of absconding

57 Baldaccini 2009, p. 8. Also see PICUM 2015, p. 15. Similar concerns were raised by the LIBE Rapporteur on the recast proposal, EP doc. PE648.370v01-00, justification of amendment 46.

58 RD Article 15(1)(a).

59 COM(2005) 391 final, 1 September 2005, Article 6(2). The fact that the other grounds were added later in the process may also explain the above-mentioned discrepancies between the reference to the undermining of a return procedure and the possibility to deny a voluntary departure period due to a risk to public policy, public security or national security, or on the basis of a fraudulent or manifestly unfounded application.

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 return procedures may abscond." This definition is somewhat cyclical: a risk of absconding exists because there are reasons to believe a person may abscond. Importantly, this does not clarify what the term 'absconding' actually means.[60] Rather, the definition focuses on the establishment of objective criteria defined in law, which should provide indicators for it. As noted above, the denial of a voluntary departure period on the basis that there is a risk of absconding would need to conform to the same general principles as identified in relation to the risk of public policy, public security or national security.

As a general point, the CJEU has established the need to ensure that the principle of proportionality is applied at all stages of the return procedure.[61] The need for an individual examination is further reiterated in several CJEU judgments.[62] The Return Handbook also warns against the automatic denial of a voluntary departure period due to the applicability of one of the objective criteria set out in national law.[63] Although the CJEU has clarified that the concept of 'risk' in the risk of absconding is distinct from that in relation to the risk of public policy,[64] the requirement that member states employ a forward-looking approach would appear to be relevant to the former as well. Particularly in the case of a risk of absconding, the member state must make an assessment of a future possibility. While past conduct may be relevant in that respect, a forward-looking approach would require justification why that past behaviour is likely to have effect in the future, such as the possibility that the third-country national will abscond.

### 10.4.2 'Objective criteria defined by law'

As noted, the main element of the definition of a risk of absconding in the Directive is that such a risk must be found on the basis of objective criteria defined by law. The requirement that member states set such objective criteria has not yet been subject to the CJEU's case law in relation to the Directive. However, it has dealt with this in relation to a similar provision in Regulation 604/2013 (the Dublin III Regulation), in the *Al Chodor* case.[65] That case dealt with the detention of an asylum seeker for the purpose of implementing a Dublin transfer by the Czech Republic. However, the Czech Republic had never explicitly set out in its immigration laws any objective criteria of a risk of absconding that would justify such detention.

60 See 10.4.3 below.
61 CJEU C-554/13 *Zh. And O.* [2015], paragraph 49; CJEU C-61/11 PPU *El Dridi* [2011], paragraph 41.
62 CJEU C-146/14 PPU *Mahdi* [2014], paragraph 70; CJEU C-430/11 *Sagor* [2012], paragraph 41.
63 C(2017) 6505 final, 16 November 2017, Annex, paragraph 1.6.
64 *Ibid.*, section 6.3, at p. 37.
65 CJEU C-528/15 *Al Chodor* [2017].

Rather, the Czech government argued, these objective criteria had been set out in the case law of domestic courts, which confirmed a consistent administrative practice. The CJEU considered this insufficient. It found that any deprivation of liberty, within the meaning of Article 6 of the Charter of Fundamental Rights, should be accessible, precise, and foreseeable. This, the CJEU found, could only be achieved by adopting a binding provision of general application. [66] Lacking this, a decision – in this case to detain – could not be lawful.

Whilst dealing with detention under the Dublin III Regulation, this finding by the CJEU should also apply to the question of denying or shortening a voluntary departure period under the Directive as well. First of all, the definition of the risk of absconding in the Dublin III Regulation is materially the same and pursues a similar objective, that is, to ensure that the third-country national is available for a transfer or removal, making it translatable to the Returns Directive. Furthermore, the issue of deprivation of liberty applies in both cases. In the case of voluntary departure, as noted, this is particularly an instrument to prevent undue deprivation of liberty during the removal stage.[67] Furthermore, the Directive's definition of a risk of absconding in regard of voluntary return applies in the same way to detention decisions under the Directive. As a result, any denial or shortening of a voluntary departure period on the basis of the risk of absconding, in the absence of a binding provision of general application in the domestic law of the member state setting out objective criteria, should be considered as non-compliant with the Directive.[68]

Although this clarifies at least what member states must do to set out objective criteria defined by law, it says nothing about the content of those criteria. The Directive does not set any explicit substantive requirements for such criteria.[69] Indeed, it reiterates that the elaboration of those criteria is a matter for national law.[70] It has been noted that this has led to "diverse approaches to the type and number of objective criteria" set by member states, with some using single criteria as sufficient for finding a risk of absconding and others having "significantly expanded the scope of the risk of absconding, by including a long list encompassing all possible objective criteria."[71] A list of frequently used criteria in national law is provided in the Return Handbook. This list clearly acted as inspiration for the Commis-

66 *Ibid.*, paragraph 43.
67 CJEU C-554/13 *Zh. And O.* [2015]. Also see 10.2.2.2.
68 A 2017 study suggests that, in regard of defining objective criteria in law, member states' practices, at least at that time, varied considerably. This included, in additions to member states clearly transposing the relevant provisions of the Directive, some member states that did not have a domestic legal definition of a risk of absconding at all, some that provided such a definition in administrative acts, and others where objective criteria were additionally developed by jurisprudence. See Moraru 2017, p. 30-31.
69 Baldaccini 2009, p. 8.
70 CJEU C-528/15 *Al Chodor* [2017], paragraph 28.
71 Moraru 2017, p. 32.

sion's 2020 recast proposal, which, faced with the diversity of criteria used in member states, seeks to provide some uniformity. The recast proposal suggests including a list of no fewer than 16 criteria, which member states should "at least" incorporate into their national laws.[72] These criteria are:

> *"(a) lack of documentation proving the identity;*
> *(b) lack of residence, fixed abode or reliable address;*
> *(c) lack of financial resources;*
> *(d) illegal entry into the territory of the Member States;*
> *(e) unauthorised movement to the territory of another Member State;*
> *(f) explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive;*
> *(g) being subject of a return decision issued by another Member State;*
> *(h) non-compliance with a return decision, including with an obligation to return within the period for voluntary departure;*
> *(i) non-compliance with the requirement of Article 8(2)*[73] *to go immediately to the territory of another Member State that granted a valid residence permit or other authorisation offering a right to stay;*
> *(j) not fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures, referred to in Article 7;*[74]
> *(k) existence of conviction for a criminal offence, including for a serious criminal offence in another Member State;*
> *(l) ongoing criminal investigations and proceedings;*
> *(m) using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints as required by Union or national law;*
> *(n) opposing violently or fraudulently the return procedures;*
> *(o) not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3);*[75]
> *(p) not complying with an existing entry ban."* [76]

The Return Handbook acknowledges that "[f]requently it will be a combination of several of the above listed criteria that will provide a basis for legitimately assuming a risk of absconding,'" and that automatically assuming such a risk on the basis of one of such criteria, such as illegal entry, must be avoided. In this respect, the Commission's recast proposal also sets out an approach that gives differential weight to some criteria. If one of the final four criteria applies, there should be a presumption that there is a risk of absconding, "unless proven otherwise."[77] These criteria would thus result in a reversal of the burden of proof. At any rate, "[t]he existence of a risk of absconding shall be determined on the basis of an overall assessment of the specific circumstances of the individual case, taking into account the

72 COM(2018) 634 final, 12 September 2018, Article 6(1).
73 This mirrors the same requirement in Article 6(2) of the current Directive.
74 Proposed Article 7 introduces a new obligation on third-country nationals to cooperate with the member state's authorities. See 1.2.3.
75 This mirrors Article 7(3) in the current Directive.
76 COM(2018) 634 final, 12 September 2018, Article 6(2).
77 *Ibid.*

objective criteria," which is clearly a codification of standing case law of the CJEU.

Although these criteria remain, for the moment, just proposals that will be subject to further negotiation, they are useful since they indeed mirror many member states' current practices. Whilst being aware that the new proposal would also allow member states to set additional criteria, the list proposed by the Commission is a useful starting point for further reflection, since it captures many currently used criteria in member states (and thus helps draw conclusions about the current Directive), and may be part of any new Directive. Whilst incorporating this list in national laws would satisfy the requirement that objective criteria to indicate a risk of absconding are defined in law, the big question remains whether this means that member states can use any criterion they consider appropriate. This, I argue, is not the case. In the following paragraphs, some substantive limitations to those criteria are discussed.

### 10.4.3 The meaning of absconding and its relation to non-cooperation and non-return

The definition of a risk of absconding in the Directive leaves considerable freedom for member states to define criteria on which a risk of absconding is assumed. Nevertheless, this cannot mean that the notion of a risk of absconding is just an empty vessel in which member states can pour any issue they want. This would fundamentally undermine the protection of the right to voluntary departure that the Directive is supposed to offer. As a general point, member states should set out objective criteria in good faith, with the genuine intention of assessing a risk of absconding in individual cases, rather than giving themselves the tools to deny a voluntary departure period to large numbers of third-country nationals. This is exactly the danger if the substance and use of the objective criteria is not further circumscribed. One way to circumscribe the scope of appropriate criteria is by looking at the meaning of 'absconding' itself.

#### *10.4.3.1 Towards a definition of 'absconding'*

Since the Directive itself provides only a self-referential explanation, it is no wonder that there has been criticism of this definition being "vague"[78] and "surrounded by confusion."[79] However, unless otherwise defined (see the use of 'voluntary'), terms in EU legislation should be interpreted in line with their usual meaning in everyday language.[80] In this ordinary meaning, absconding is most commonly used for escaping a certain place and hiding to try to evade capture or arrest. Indeed, in other language

78 PICUM n.d.
79 Moraru 2017.
80 CJEU C-554/13 *Zh. And O.* [2015], paragraph 29.

versions of the Directive, this is more explicit. In French, for example, the Directive mentions a "*risque de fuite*," that is, a risk of flight. Similarly, the German version speaks of "*Fluchtgefahr*," which would be the case if there is a risk that the third-country national would flee in order to evade or elude ("*sich entzieh*en"). In the Dutch version the phrase "*risico op onderduiken*" would roughly translate as "going underground," whilst this risk relates to the fact that the third-country national will try to evade the supervision of the state ("*zich onttrekken aan het toezicht*"). In its normal meaning, which finds support in different language versions of the Directive, therefore, absconding should be interpreted as having to do with the third-country national staying on the member state's radar, so that he can be removed when the time comes. This also makes sense from the structure of the Directive's return procedure, in which removal is a safeguard to ensure that effective return is realised, regardless of whether the third-country national opts to return voluntarily. Although the CJEU has not specifically confirmed this in relation to the Directive, there are indications that it would accept such an interpretation. In *Mahdi*, for example, mention is made of Bulgarian law considering a risk of absconding to be established if, for a person who is the subject of a coercive administrative measure, there is reason to believe they "will attempt to circumvent the implementation of the measure ordered."[81] The CJEU does not engage with that provision of domestic law specifically, but appears content to proceed its consideration on this basis.

A similar conclusion can be drawn by looking at other EU instruments related to asylum and migration. Under the Dublin III Regulation, this may be a ground for detention, although, in contrast to the Returns Directive, this would require the existence of a *significant* risk of absconding.[82] But the notion of absconding also has a bearing, for example, on the extension of the time limit within which Dublin transfers must take place. Normally, if such a transfer does not take place within six months, the member state where the third-country national is staying at that point becomes responsible for his or her case. However, if the transfer cannot be effected because the person concern absconds, this time limit can be extended by another 18 months.[83] The CJEU's judgment in *Jawo* deals specifically with the meaning of absconding in this regard.[84] This provision was in question in relation to the situation of Mr Jawo, whose transfer had been cancelled because he had left his allocated accommodation without informing the authorities. This led to the consideration by the CJEU of the precise meaning of absconding within the context of the Regulation, especially whether this implied a deliberate intent to evade transfer, or whether his disappearance from the allocated accommodation was sufficient to count as absconding. The CJEU noted that the Dublin III Regulation did not define 'absconding'

81 CJEU C-146/14 PPU *Mahdi* [2014], paragraph 70.
82 Regulation 604/2013, Article 28(2).
83 *Ibid.*, Article 29(2).
84 CJEU C-163/17 *Jawo* [2019].

and that none of its provisions expressly specified this meaning. However, the concept should be given autonomous and uniform meaning throughout the EU. It noted that the ordinary meaning of the term implied "the intent of the person to escape from someone or evade something, namely, in the present context, the reach of the competent authorities and, accordingly, his transfer."[85] While, in principle, this would imply deliberately evading the reach of the authorities,[86] the CJEU also found that member states would be justified in assuming this is the case where the transfer could not be carried out because the person had left the allocated accommodation without informing the competent authorities, provided he had been informed of his obligations in this regard.[87] The context of the specific provision of the Dublin III Regulation is clearly different from the situation in relation to the denial of a voluntary departure period in the Returns Directive. However, the approach of a person evading the reach of the authorities, which in the case of the Dublin III Regulation prevents their transfer and in the case of the Directive may prevent their removal, seems similarly relevant.

Finally, the risk of absconding is also used in Directive 2013/33 (the recast Reception Conditions Directive), as an element of the possibility of detention.[88] The latter Directive does not provide a specific definition, although the 2016 Commission proposal for a revised Directive, which is still under negotiation, incorporates the same definition as the Returns Directive.[89] That proposal for a revision also provides an explicit definition of 'absconding' as "the action by which an applicant, in order to avoid asylum procedures, either leaves the territory where he or she is obliged to be present [in accordance with Dublin rules] or does not remain available to the competent authorities or to the court or tribunal."[90] While not (yet) in force, it further strengthens the general reading of the specific meaning of absconding as disappearing from view of the authorities, so that they cannot take the actions provided for in an EU instrument.

In view of the discussion above, it should be assumed that a risk of absconding within the meaning of Article 7(4) of the Directive must imply that there are reasons to believe that third-country nationals involved would disappear from view of the authorities, making the enforcement of the return decision issued to them impossible. This also means that the objective indicators used should be related specifically to identifying a risk that such disappearing from view might happen. As a result, criteria that do not specifically relate to this cannot be considered as meeting the

85 *Ibid.*, paragraphs 54-56.
86 *Ibid.*, paragraph 56.
87 *Ibid.*, paragraph 70.
88 Directive 2013/33, Article 8(3)(b).
89 COM(2016) 465 final, 13 July 2016, Article 2(11).
90 *Ibid.*, Article 2(10).

requirements of the Directive. Despite this, several criteria commonly used by member states, and proposed by the Commission, raise serious doubt whether they actually perform this function, as discussed below.

*10.4.3.2 The conflation of absconding with non-cooperation or non-return*

Despite the meaning of absconding elaborated above, there is a tendency to conflate absconding with other concepts. For example, criteria that relate to a third-country national's non-cooperation with return procedures are commonly part of national frameworks.[91] Similarly, the possibility that the third-country national does not return within the voluntary departure period has been used as a criterion to surmise a risk of absconding. The Return Handbook's overview of frequently used criteria mentions, for example, includes "refusing to cooperate in the identification process" and the "explicit expression of intent of non-compliance with return-related measures."[92] The Commission's recast proposal also includes elements of both. For example, it suggests "not fulfilling the obligation to cooperate with the competent authorities of the Member State at all stages of the return procedures" as an indicator of absconding.[93] So is an "explicit expression of intent of non-compliance with return-related measures."[94] From the perspective of the member state, this makes sense. After all, why should a voluntary departure period be granted to someone who is unwilling to cooperate and to comply with his or her obligation to return? However, making a direct link between non-cooperation and/or non-return on the one hand, and absconding on the other, in my view is deeply problematic.

The possibilities for member states to withhold a voluntary departure period are exhaustively set out in the Directive and only cover the three sets of grounds discussed in this chapter. Non-cooperation or non-return are not formulated as such grounds. Indeed, looking at the scheme set out by the Directive, ensuring that the third-country national will return is the subject of other provisions, namely those dealing with the enforcement of the return decision. It is noteworthy that the Directive deals explicitly with the third-country national's efforts to make return possible only in the context of detention. In Article 15(1)(b), the Directive authorises detention if the third-country national "avoids or hampers the preparation of return or the removal process." Similarly, Article 15(6) sets out that such detention may not be extended beyond six months unless for specific reasons, one of them being that there is "a lack of cooperation by the third-country national concerned." Interfering with the return process or not giving cooperation to it can thus lead to consequences for the third-country national during

91 Moraru 2017.
92 C(2017) 6505 final, 16 November 2017, Annex, paragraph 1.6. The former criterion is suggested as creating a rebuttable presumption of the existence of a risk of absconding.
93 COM(2018) 634 final, 12 September 2018, Article 6(1)(j).
94 *Ibid.*, Article 6(1)(f).

the *enforcement stage*. However, such grounds are not part of the exhaustive list of reasons to deny or shorten a period for voluntary departure.[95]

This again strengthens the notion that absconding is connected to availability for removal in the future, and should be distinguished, when it comes to questions of granting a voluntary departure period, from the concepts of non-cooperation or unwillingness of the third-country national to return voluntarily. Whilst absconding invariably also has the effect that the third-country national makes the enforcement of his or her return impossible, the reverse is not necessarily true. It would be perfectly possible for a third-country national to avoid taking any action to return, or refuse to cooperate with the authorities in relation to return, without disappearing from view. For example, if third-country nationals refuse to file an application with the consular authorities of their country of origin to replace missing travel documents, this could be seen as non-cooperation with the return procedure. However, such third-country nationals may still be staying in an asylum centre or other government-run facility and thus be on the authorities' radar, or otherwise continue to comply with reporting or other obligations. In such a situation the fact that third-country nationals have failed to take steps towards their return does not seem to indicate, in any objective manner, that they will not be available for eventual removal.

Similarly, it is far from evident that a simple statement by third-country nationals that they do not *want* to return is sufficient to assume they will abscond. For example, third-country nationals may in certain circumstances prefer being removed over voluntarily returning, such as in relation to avoiding 'voluntary *refoulement*,' discussed in 7.3. But such a preference may also be inspired by a felt need to show resistance to return up until the last moment, for example, as a way of showing communities back home (which may have invested heavily in the individual's migration) that they did not give up without a fight. This may be important to deal with the stigma of an unsuccessful migration attempt to Europe, and removal could therefore, perhaps paradoxically, be seen by individuals as a more dignified option than voluntary return.[96] Again, such persons may nevertheless be willing to stay in view of the authorities, including when they are dependent on the authorities for shelter, health care or other essential services. There may

95 The new cooperation duties in the recast proposal are part of a separate provision.

96 The issue of stigma and return has been addressed in migration research (see, for example, Schuster & Majidi 2015), although in relation to voluntary return this has often focused on whether this can help reduce stigma, especially through assistance (for example, Van Wijk 2008, p. 35). However, Brekke 2015, p. 79, notes that recourse to such assistance may also be a stigmatising factor for: "Being motivated to give up the dream of asylum because of a cash incentive may appear stigmatizing to some." The point here is not to draw any general conclusion on such a complex phenomenon of return and stigma, and how it is experienced by individuals. Rather, this is just to illustrate that there may be logical reasons, from the perspective of the individual, to prefer removal over return, and that it can thus not always be assumed that the former will be chosen over the latter.

be many variations on this, and in each individual case the member state will have to see whether there is a specific risk of the third-country national disappearing from view if a voluntary departure period were to be granted, even in the face of clear evidence that the third-country national does not want to return or is demonstrably not taking action to make return happen. A criterion, such as under point (f) in 10.4.2 above ("explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive") fails to consider this nuance, and therefore cannot act as an appropriate, self-standing indicator for a risk of absconding.

This may seem unsatisfactory for member states, which may then have to accord a voluntary departure period despite knowing in advance that this cannot bring any of the advantages (fewer administrative efforts, cheaper) associated with this. This dilemma could be addressed from a pragmatic perspective, as well as from a principled one. From a pragmatic perspective, it might be wondered whether the fact that the third-country national will clearly not take advantage of this protective function does not negate the need to provide a voluntary departure period. However, it may be difficult to establish at the outset that a third-country national, even one who is explicitly defiant of returning, will not eventually return voluntarily. The threat of removal appears to be one of the key underlying presumptions for the effectiveness of voluntary return.[97] Therefore, it cannot be ruled out that a defiant third-country national, the closer the deadline for potential removal comes into view, will still opt to return voluntarily. The Return Handbook also notes the possibility of member states to change their assessment of the risk of absconding at any time, for example because "a previously non-cooperating returnee may change his/her attitude and accept an offer for assisted voluntary return." This, it suggests, may even lead to the granting of a voluntary departure period later on, after such a period was initially denied due to the existence of a risk of absconding.[98] As such, it must be acknowledged that a third-country national's attitude to voluntary return is not static.

From a principled perspective, it must be recalled, as discussed earlier, that the CJEU has taken a clear rights-based approach to voluntary departure, with specific limitations on the derogation from this right. A rights-based approach may suggest that the fact that third-country nationals opt not to take advantage is not a matter for the state, at least not during the voluntary departure period.[99] Of course, this would mean that effective return is delayed somewhat, because the member state cannot enforce the decision until the end of the voluntary departure period. This would

97 Van Wijk 2008, p. 28, notes that "[f]ear to be detained or living in detention sometimes constitutes a serious push-factor" for irregular migrants faced with the prospect of return.

98 C(2017) 6505 final, 16 November 2017,,paragraph 6.3.

99 See, by analogy, the discussion on the forced exercise of the right to return in 5.3 as well as the 'right to be removed' in 7.3.4.

appear to clash with the other core objective of the Directive, ensuring effective return. Indeed, in several judgments, the CJEU has stated that member states should not allow measures that would undermine the effectiveness of the Directive, including by delaying or impede return measures.[100] However, it made these findings in relation to measures taken under domestic law that are not specifically provided for in the Directive, in particular criminal law measures, such as imprisonment or home detention for the offence of irregular entry or stay. By contrast, the procedure set out in this Directive clearly takes into account that some delays in the return of third-country nationals may be inevitable for the sake of balancing effectiveness with protection. It does so by setting the priority for voluntary return. But the procedure is also clearly based on the presumption that not everyone who is given a chance to return voluntarily will actually do so, and that the member state may eventually have to intervene. As such, granting a period for voluntary departure always entails a risk of delay for member states. However, this risk may be inevitable to ensure that the protective function of voluntary return is fully realised. From that perspective as well, the expectation that third-country nationals might not use the opportunity afforded to them through the voluntary departure period cannot be equated to a risk of absconding, since the latter is only concerned with the possibility of enforcement if it indeed turns out that this opportunity has been left unused.

In light of the above, I also do not consider the fact that third-country nationals might not return or refuse cooperation, in and of itself, as an objective indicator to adduce a risk of absconding, even if they themselves are very clear about their intentions. At most, when using, for example, expressions of intent by third-country nationals, member states should clearly distinguish between statements that indicate that they may want to disappear from view (such as saying they will leave for another EU member state), and those that simply express a lack of willingness to return more generally. Although it may not always be easy to make this distinction, the onus is on the member state to show that it is justified to derogate from the rule that a voluntary departure period should be granted. And the member state must thus be able to explain why a third-country national's statements or conduct related to non-cooperation and non-return can reasonably be understood as indicating that they will evade enforcement of the return decision.

### 10.4.4 Absconding and the 'mere fact' of illegal stay

The meaning of absconding provides an implicit limitation on the scope of the criteria that member states can use to identify that a third-country national is at risk of absconding, and thus to justify a denial of a voluntary

100 CJEU C-61/11 PPU *El Dridi* [2011], paragraph 55; CJEU C-329/11 *Achughbabian* [GC] [2011], paragraph 39; C-430/11 *Sagor* [2012], paragraphs 32 and 35.

departure period. But the Directive also includes an explicit limitation. As noted, Recital 6 of the Directive's preamble tells us that any decisions in relation to the return procedure should be taken "on a case-by-case basis and based on objective criteria, implying that *consideration should go beyond the mere fact of an illegal stay*."[101] This has also been emphasised by the CJEU.[102]

The requirement to go beyond the 'mere fact' of illegal stay flows logically from the scheme of the Directive. After all, the illegal stay of third-country nationals in a member state is a necessary precondition to bring them within the scope of the Directive. If there would be no illegal stay, there would be no question of a third-country national being subject to its return procedure and thus to any issues concerning the denial of a voluntary departure period due to the risk of absconding. Considering illegal stay as indicating a risk of absconding would mean that this would theoretically be met *in all cases* coming withing the scope of the Directive. If member states could make decisions on the granting or denial of a voluntary departure period on this basis, they could do so for every third-country national to which a return decision is issued. On this point, the Return Handbook emphasises that:

> *"[i]t is not possible to exclude in general all illegal entrants from the possibility of obtaining a period of voluntary departure. Such generalising would be contrary to the definition of risk of absconding, the principle of proportionality and the obligation to carry out a case by case assessment and it would undermine the 'effet utile' of Article 7."*[103]

Despite this clearly not being allowed under the Directive (nor the proposed recast), many of the criteria currently used in member states, and some proposed by the Commission, skirt uncomfortably close to the 'mere fact of illegal stay.'[104] This is most obviously the case when the fact that a third-country national has irregularly entered the member state is considered as an indication of a risk of absconding. Irregular entry, after all, is one of the immediate causes of illegal stay within the meaning of the Directive and thus the reason why the third-country national is faced with an obligation to return.[105] In my view, this cannot be taken as a reason, in and of itself, that the third-country national may abscond, as it conflicts with the 'mere fact' requirement. Of course, the counterargument would be that third-country nationals who have irregularly entered a member state have shown that they are willing to circumvent the rules, and could therefore also be

101 My emphasis.
102 CJEU C-430/11 *Sagor* [2012], paragraph 41. CJEU C-146/14 PPU *Mahdi* [2014], paragraph 40; CJEU C-554/13 *Zh. And O.* [2015], paragraph 49.
103 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.3.
104 Moraru 2017, p. 33; COM(2018) 634 final, 12 September 2018, Article 6(2)(d).
105 See CJEU C-47/15 *Affum* [2016], paragraph 60: "in the context of Directive 2008/115 the concepts of 'illegal stay' and 'illegal entry' are closely linked, as such entry is one of the factual circumstances that may result in the third-country national's stay on the territory of the Member State concerned being illegal."

expected to do so in relation to absconding. However, again, the return decision is already the response to the circumvention of immigration rules. Furthermore, it is not immediately obvious why such a situation would have to be distinguished, for example, from that of someone who has been found to be irregularly staying after failing to renew a visa or other authorisation of stay. This would also be a circumvention of immigration rules. At best, there may be specific circumstances in the way that the third-country national gained unlawful entry into the member state.[106] Again, it would be for the member state to specify this, and simply referring to the fact that entry was irregular is insufficient. It would, at the very least, require a much more sophisticated application of the criterion than relying on the mere fact that the third-country national entered irregularly. The same would obviously go for criteria based solely on irregular stay, rather than entry. While such criteria are not proposed by the Commission, they are applied in several member states.[107]

Other criteria may similarly need to be applied in such a way that they do not just replicate the reason for finding that a third-country national is staying illegally in a member state. I suggest this is the case, for example, for a lack of identity documents. Third-country nationals who cannot produce identity documents, including any indication that they are authorised to stay in the member state, will be considered staying illegally. Furthermore, obtaining the necessary documents is an inherent part of the obligation to return under the current Directive. The proposed recast only makes this obligation more explicit.[108] It is in this context that the lack of documents should be addressed, rather than taking it as a prima facie indicator of a risk of absconding. It would be for the member state to show that the particular circumstances which led to the lack of documents would indicate a risk of absconding.[109] This is particularly relevant since a large number of third-country nationals engaged in return procedures may be undocumented. As such, a broad application of this criterion would undermine the exceptional nature of the derogation from the general rule that a voluntary departure period should be granted. This is not to say that criteria as discussed above could never be applied. However, they cannot be used as a blunt instrument. Rather, there must be a clear justification that they are used in

106 For example, the Grand Chamber of the ECtHR took specific circumstances of irregular entry, such as a mass attempt at scaling a fence and the alleged use of force, into account in deciding whether the prohibition of collective expulsion under the ECHR was violated. See ECtHR *N.D. and N.T* [GC][2020], paragraph 231; ECtHR *M.K. and Others v. Poland* [2020], paragraph 200.

107 Moraru 2017, p. 33

108 COM(2018) 634 final, Article 7(1)(d).

109 In this context, it should be noted that the Commission's proposal already includes a separate criterion dealing with the destruction of documents, see COM(2018) 634 final, 12 September 2018, Article 6(2)(m). This is also identified as a frequently used criterion in the Return Handbook, section 1.6.

a manner that distinguishes them clearly from just replicating the finding that the third-country national is irregularly present in the member state.

### 10.4.5 Criminal law issues and the risk of absconding

Other criteria may also raise questions as to their suitability to indicate a risk of absconding. This includes the existence of criminal proceedings or convictions. The interplay between irregular entry or stay, return procedures under the Directive, and national criminal law provisions has frequently been addressed by the CJEU. This issue has been dealt with in detail elsewhere.[110] However, for the specific purpose of clarifying the scope of the possibility to deny a voluntary departure period due to a risk of absconding, the following should be observed in my view. If member states use the existence of criminal proceedings or convictions as a prima facie indicator of a risk of absconding, this could act as a backdoor option for member states when they cannot fulfil the (arguably more stringent) conditions of a risk to public policy, public security or national security to deny a voluntary departure period. As discussed in detail above, the CJEU has made clear that the suspicion or conviction for a criminal offense, in and of itself, is not sufficient to deny a voluntary departure period on the grounds of public policy.[111] It would be inconsistent if the same act would allow for a derogation of the priority of voluntary departure, simply by reclassifying it as an indicator of a risk of absconding. The member state would have to show that the fact that criminal investigations or proceedings are ongoing translate to a genuine risk of absconding. It could be imagined, for example, that such investigations or proceedings uncover a flight risk in relation to a third-country national, which could then also be a possible indication of a risk of absconding within the meaning of the Directive. In this light, a particular issue that needs to be mentioned here is the criminalisation of irregular entry or stay. If using irregular entry or stay as an indicator for absconding contradicts the 'mere fact' principle, the same goes for using a criminal proceeding exclusively on the basis of irregular entry or stay as a reason to assume the third-country national will abscond. Otherwise, the use of such a criterion would simply be a barely concealed proxy for an indicator that is clearly in in contradiction with the 'mere fact' principle.[112]

110 See, for example, Vavoula 2016.

111 See 10.3.

112 The confluence of irregular entry or stay and criminal procedures is evident, for example, from the frequency in which this plays a role in the CJEU's judgments, such as in *El Dridi*, *Achughbabian* and *Mahdi* discussed above. Also see Vavoula 2016.

### 10.4.6 Measures to prevent absconding and the right to a voluntary departure period

In addition to setting the risk of absconding as a ground for the denial of a voluntary departure period, Article 7 of the Directive also deals with steps that member states can take to prevent such absconding from happening. Specifically, Article 7(3) says that:

> *"Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure."*

This provision sits between the first two paragraphs of Article 7 on the granting and extending of a voluntary departure period, and its fourth paragraph, outlining the exceptions to the general rule that a voluntary departure period should be granted. Although not made specific in the Directive, this implies that Article 7(3) does not simply authorise member states to impose certain measures, but must be read in relation to the other elements of Article 7. The obvious connection here is with the ground for denial or shortening of a voluntary departure period in Article 7(4), and it is this connection that is explored here.

Although Article 7(3) states that certain obligations "may be imposed" on third-country nationals to prevent absconding, I would suggest this is not a matter that is entirely left to member states' discretion. On the one hand, it could be argued that, if there is a risk of absconding, this may trigger obligations on the member state to prevent this. This would follow from the general obligation to ensure the effective implementation of the Directive, which cannot happen if the third-country national absconds.[113] Furthermore, if such absconding might lead to the third-country national irregularly moving to another member state, there might arguably be an additional reason, rooted in the principles of sincere cooperation and mutual trust, that the member state should impose measures to prevent this.

In terms of giving *effet utile* to the provisions of the Directive, this does not only extend to the possibility of enforcement, but also to the priority of voluntary return. While exceptions to this can be made, including on the basis of the existence of a risk of absconding, these must be applied only when necessary, as discussed above. A member state that has indications of a risk of absconding, but which can eliminate or significantly reduce this risk by imposing measures such as outlined in Article 7(3), can therefore be expected to do this, in an effort to safeguard the priority of voluntary return. This reading is supported by the opinion of the Advocate General in the *Zh. and O.* case, who notes that "Article 7(3) provides that where measures

113 CJEU C-61/11 PPU *El Dridi* [2011], paragraph 55; CJEU C-329/11 *Achughbabian* [GC] [2011], paragraph 39; C-430/11 *Sagor* [2012], paragraphs 32 and 35

such as reporting restrictions, can be applied to avoid the *risk* of absconding, the preference should still be for a period for voluntary departure."[114] Although in the judgment itself, the CJEU does not engage with this, the strong reasons to protect the entitlement to a voluntary departure period, both as a right in the Directive and as a means to ensure the third-country national's fundamental rights are protected, suggest that this approach by the Advocate General is correct. This does not mean that member states cannot apply the measures in Article 7(3) in other situations, but it means that they *must* do so if they would otherwise seek to deny a voluntary departure period on the ground that there is a risk of absconding, and these measures adequately address this risk. In this respect, the member state, in my opinion, is entitled to make an assessment of the likelihood that the third-country national will indeed comply with these measures, although much that has been discussed above about ensuring that such an assessment truly focuses on the risk of absconding, rather than other issues, is relevant in this situation as well.[115]

## 10.5 Denying a voluntary departure period in case of manifestly unfounded or fraudulent applications

The final ground for shortening or denying a voluntary departure period is when "an application for a legal stay has been dismissed as manifestly unfounded or fraudulent." The question of manifestly unfounded or fraudulent applications is addressed in several EU instruments. For asylum seekers, Directive 2013/32 (the recast Asylum Procedures Directive) provides for a number of reasons in which a member state can declare an application manifestly unfounded, provided it has defined these as such in its national legislation.[116] The recast Asylum Procedures Directive also makes provision for declaring applications just unfounded (rather than manifestly unfounded) or inadmissible, but both would fall outside the scope of the ground for derogation in Article 7(4) of the Returns Directive.

114 CJEU, Opinion AG, C-554/13 *Zh. And O.* [2015], point 39 (emphasis in original).

115 It should be noted that the imposition of such measures has further consequences as well. See, for example, its potential impact on the third-country national's ability to approach consular representations in 8.4.1.

116 Directive 2013/32, Article 32(2). These circumstances are set out in Article 31(8) and comprise: (a) he has only put forward irrelevant to the question of international protection; (b) he is from a safe country of origin; (c) he has misled the authorities by presenting false information or documents or by withholding it with respect to his identity or nationality; (d) he has, in bad faith, destroyed or disposed of an identity or travel document; (e) he has made clearly inconsistent and contradictory, false or obviously improbable representations; (f) he has made an inadmissible subsequent application; (g) he is making an application merely in order to delay or frustrate the enforcement of his removal; or (h) he entered the member state unlawfully or prolonged his stay unlawfully and, without good reason, has not presented himself to the authorities or has not made an application for international protection as soon as possible.

It should be noted that, while declaring an application to be manifestly unfounded is currently optional, a Commission proposal for a new Asylum Procedures Regulation would introduce a number of situations in which declaring an application to be manifestly unfounded becomes mandatory.[117]

Several other EU instruments deal with the rejection of applications in case of fraud. Directive 2003/86 on the right to family reunification (the Family Reunification Directive),[118] for example, allows member states to reject an application for entry and residence for the purpose of family reunification when it is shown that false or misleading information was provided, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used.[119] Similarly, Directive 2014/36 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (the Seasonal Workers Directive)[120] foresees the possibility of rejecting an application for either a short or long-term authorisation for seasonal work when documents presented as proof for eligibility were fraudulently acquired, falsified or tampered with.[121] And similar provisions for refusal or non-renewal can be found in Directive 2009/50 on conditions of entry and residence of third-country nationals for the purposes of highly qualified employments (the Blue Card Directive).[122] None of these instruments establish a separate category of 'fraudulent applications'; they simply provide for the rejection of applications in case of fraud as one of several grounds for rejection. However, to the extent that the rejection makes clear that fraud was the reason for rejection, this should satisfy the requirement of Article 7(4).

In some cases, a question may also be how strictly 'application,' as used in Article 7(4) of the Directive, should be read. Regulation 810/2009 establishing a Community Code on Visas (the Visa Code),[123] for example, foresees in the annulment or revocation of a visa if the conditions for issuing it are no longer met, in particular if there are serious grounds for believing that the visa was fraudulently obtained.[124] Strictly speaking, this does not concern the denial of an application itself, but rather its later revocation. However, it might be argued that this is in effect a retrospective correction of a previously wrongly accepted application. The formulation in Article 7(4) does not specify whether any particular type of application is meant, and it would appear that it is meant to be as broad as possible, encompassing any claim to entry or stay in the member state's territory.

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117 COM(2016) 467 final, 13 July 2016, Article 37(3). This is not further affected by the amendments to the proposal put forward by the Commission in 2020, see COM(2020) 611 final, 23 September 2020.

118 OJ L 251, 3 October 2003, pp. 12-18.

119 Directive 2003/86, Article 16(2) and under (a).

120 OJ L 94, 28 March 2014, pp. 375-390.

121 Directive 2014/36, Article 8(1) and under (b).

122 OJ L 155, 18 June 2009, pp. 17-29, Articles 8(1) and 9(1) and under (a).

123 OJ L 243, 15 September 2009, pp. 1-58.

124 Regulation 810/2009, Article 34(1).

The Directive also does not expressly limit the applicability of this limb of Article 7(4) to cases in which applications were rejected as manifestly unfounded or fraudulent on the basis of EU legal instruments. As such, national law provisions that would result in rejected applications being characterised as manifestly unfounded or fraudulent would, in principle, also be sufficient to consider this condition for denying a voluntary departure period met.

A key question in dealing with these various situations of manifestly unfounded or fraudulent claims discussed above is whether this presents a sufficient condition to deny a voluntary departure period. In other words, can a voluntary departure period be denied on the sole basis that a third-country national's application has been dismissed in this way? In the previous sections, I have repeatedly discussed the principles that should be applied to decisions to deny a voluntary departure period. However, it may also be said that this particular ground for denying a voluntary departure period is qualitatively different from both the risk of absconding and the risk to public policy, public security, and national security grounds. Both of those, in different ways, deal with an assessment of an issue that is somewhat unknown. Whether a third-country national represents a genuine and present threat to key interests of society requires an assessment which member states must make. Similarly, whether there is a risk of absconding requires the member state to assess what is likely to happen in the future. By contrast, the dismissal of an application for stay as manifestly unfounded or fraudulent is an established fact, over which, in principle, no dispute is possible.[125] As such, there seems to be no place, for example, for a forward-looking approach. It also calls into question whether the seriousness of the facts of the case can play much of a role in the assessment by the member state (although member states would possibly consider making a fraudulent application as a stronger transgression than making a manifestly unfounded one).

However, this cannot mean that member states can disregard the principle of proportionality, which has been affirmed by the CJEU as applicable throughout the return procedure, on this basis. In this respect, a particularly prominent role must be accorded to weighing up of the interests of the member state in denying a voluntary departure period, on the one hand, and the impact of the denial of such a period on the individual, including in the light of the obligation to take into account the best interests of the child,[126]

125 The third-country national might challenge whether it was legitimate for the application to be dismissed in this way, but this is something outside the scope of the Directive. The 'input,' as it were, for the Directive is simply that fact that such a dismissal took place.

126 The obligation to take into account the best interests of the child may also come into play when the third-country national him or herself is an adult, but the return will impact on children not specifically addressed by the return decision. See CJEU *M.A.* [2021], paragraph 43.

family life and the health of the third-country national under Article 5 of the Directive.

But this only serves to emphasise how awkwardly the inclusion of the manifestly unfounded and fraudulent applications ground sits with the other grounds outlined in Article 7(4). The burden would remain on the member state to justify why the fact that the third-country national's earlier application was dismissed as manifestly unfounded or fraudulent necessitates the withholding of a voluntary departure period, taking into account all relevant aspects of the situation. But it is not easy, in my view, to imagine such justifications which are only rooted in the fact that an application was dismissed as manifestly unfounded or fraudulent. It could be argued that the fact that such dismissal may lead to the denial of a voluntary departure period would help deter third-country nationals from making manifestly unfounded or fraudulent applications. But prevention of such applications as a general objective is not the function of Article 7(4), which only relates to ensuring the effectiveness of the return procedure in each individual case.

Other justifications that might be imagined quickly veer into the areas covered by the other two grounds for denial. For example, the reason why committing fraud in an application necessitates the withholding of a voluntary departure period might be found in the fact that, through this action, the third-country national has committed a criminal offence. While not sufficient in and of itself, this constitutes a potential element in finding that the third-country national constitutes a risk to public policy or public security. Similarly, by showing willingness to 'abuse' the system for authorisation of legal stay (by submitting a manifestly unfounded or fraudulent application), it may be assumed that third-country nationals may try to avoid their other obligations, including by evading return.[127] In this regard, Majcher distinguishes between different grounds for declaring an application unfounded under the recast Asylum Procedures Directive, noting that dismissal on some procedural grounds "can hardly justify the refusal of voluntary return," while others relate more clearly to "dishonest conduct" showing "clear bad faith."[128] But if these are indications of an intention by the individual to evade return, this would amount to a risk of

127 In this respect, the Return Handbook, paragraph 6.3, seems to introduce an additional category of "third-country nationals who submitted abusive applications," which "involve a higher degree of reprehensible behaviour than manifestly unfounded applications," and should also be covered by Article 7(4). Also see Majcher 2020, p. 563, referring to the 2015 edition of the Handbook. The questionable characterisation of third-country nationals' conduct as "reprehensible" aside, the Directive's provisions do not include such a category of abusive applications, and they therefore cannot be a self-standing ground for denial of a voluntary departure period, unless they are specifically subsumed within the categories of manifestly unfounded or fraudulent applications.

128 Majcher 2020, pp. 562-564. Regarding the latter, she mentions, among others, misleading the asylum authorities by presenting false information or documents, withholding information with respect to identity and nationality, or having destroyed documents.

absconding.[129] As discussed extensively, decisions on these grounds should be subject to specific restrictions and safeguards. If justifications are in fact rooted in those other grounds, then the requirements associated with them, discussed in sections 10.3 and 10.4, must also be met. Otherwise, the manifestly unfounded or fraudulent applications limb of Article 7(4) would simply serve to circumvent those requirements.[130]

Overall, therefore, it may be difficult to provide self-standing justifications for a denial of a voluntary departure period on the ground that an application was dismissed as manifestly unfounded or fraudulent. In an ideal world, then, the possibility of denying a voluntary departure period because the third-country national's prior application for stay had been dismissed as manifestly unfounded or fraudulent would not have been part of Article 7(4) at all. And as will be discussed in 10.7, it may be wondered whether the possibility of denying a voluntary departure period only on the basis that an individual's application for stay being rejected as manifestly unfounded or fraudulent can still be considered compatible with primary EU law. Arguably, there may still be a role for this provision in the decision to provide a voluntary departure period shorter than seven days, since, at least, this would not negate the individual's right to such a period altogether. This issue, in relation to all three grounds, is discussed below.

## 10.6 Considering a voluntary departure period shorter than seven days: a necessary step to ensure proportionality?

Although Article 7(4) has been discussed in relation to the possibility of denying a voluntary departure period altogether, it also provides for the possibility of granting a period shorter than the minimum of seven days normally required by Article 7(1). In principle, the safeguards to be observed in deciding to provide a shorter period are the same as deciding to deny such a period, since these pertain to the same provision. However, the two options clearly do not have the same impact, which raises further questions about their interrelation. In its preliminary questions in the *Zh. and O.* case, the referring court actually asked about this. In particular, it asked whether, in relation to the risk to public policy, the same factors should be taken into account when providing a period shorter than seven days as when deciding not to provide such a period at all. Additionally, in the proceedings, the Netherlands had submitted that it was basically free to choose between shortening and denying a voluntary departure period, and that it was in line with Article 7(4) that, when a risk to public policy existed, it would always deny such a period altogether, rather than consid-

129 Which, it must be re-emphasised, needs to be distinguished from issues of non-cooperation and non-return, see 10.4.3 above.

130 See, by analogy, the discussion of the use of criminal proceedings as a criterion for the risk of absconding in 10.4.5 above.

ering granting a period of between one and six days. This, it argued, avoids uncertainty and ensures that there are no unreasonable administrative burdens on the state to consider both the denial and a shorter period. Other member states making observations in the case also argued that the choice between denial or the granting of a period of one to six days is a matter of discretion for the relevant national authorities. This gave the CJEU an opportunity to provide clarity on the matter of shorter voluntary departure periods than Article 7(1) normally foresees. However, in rephrasing the question in the way discussed in 10.3.2.3 above, the Court fails to address this point.[131] In her Opinion, Advocate General Sharpston does devote significant attention to this issue, and it is worth looking at her reasoning on this matter.

The Advocate General first acknowledges that the aim of Article 7(4) is to ensure speedy return where member states' interests (in this case public policy) so require. In this way, the factors relevant to determining a threat to public policy are also relevant when deciding to grant a period of less than seven days.[132] However, she disagreed with the Dutch government that Article 7(4) would allow, in the case of such a threat, the automatic denial of a voluntary departure period. Rather, she noted, a case-by-case assessment should also be made in this instance as to whether such denial is appropriate or a period from one to six days should be granted instead.[133] This more nuanced approach is supported by the wording of the Directive, including the preference for voluntary return over forced return. The Advocate General also notes that the denial of a voluntary departure period entails the issuing of an entry ban, which has important consequences for the individual, and that crucial safeguards, such as family unity and health care, may be jeopardised.[134] She notes that member states have an obligation to exercise their discretion in compliance with the general principles of EU law, including the principle of proportionality.[135] Within the context of the Directive, this means that restricting the right to voluntary departure must be done through the least restrictive measure, according to the circumstances of the case.[136] In contrast to the referring court, which considered denial of a voluntary departure period the least restrictive measure, the Advocate General suggests that a member state that automatically resorts to denial, rather than shortening, in fact fails to apply the least restrictive measure, since all cases are then subject to the same rule and there is no process of individual assessment.[137] She adds that she does not accept the argument that automatically resorting to denial of a voluntary departure

131 See, for example, Cornelisse 2014, who considers the CJEU avoiding this question "disappointing."
132 CJEU, AG Opinion C-554/13 *Zh. And O.* [2015], point 86.
133 *Ibid.*, points 87-88.
134 *Ibid.*, points 89-91.
135 Referring specifically to CJEU C-402/13 *Cypra* [2014], paragraph 26.
136 CJEU, Opinion AG, C-554/13 *Zh. And O.* [2015], point 91.
137 *Ibid.*, point 92.

period avoids burdens on executive and judicial bodies. In this context, she states that "[s]eeking to minimise administrative inconvenience is not a valid reason for avoiding assessing cases in accordance with the more nuanced system required under the directive."[138] As a result, she concludes that automatically denying a voluntary departure period in each case where a risk to public policy exists, even if a period of between one and six days might be appropriate in the circumstances of the individual case, is not compatible with the Directive.[139]

As said, the CJEU does not really engage with this issue, although its judgment provides the slightest of hints that it could have accepted the Advocate General's argumentation. In finding that member states do not have to carry out a fresh examination of the circumstances leading to the finding of a risk to public policy when deciding on the application of Article 7(4),[140] the CJEU also adds the following:

> *"That said, it is open to the Member State concerned to take account of those matters, which may in particular be relevant when that Member State evaluates whether it is appropriate to grant a period for voluntary departure shorter than seven days."*[141]

While it remains non-committal on this point, the CJEU acknowledges that the assessment of the appropriateness of providing a shorter period, rather than denying a voluntary departure period altogether, may be a relevant element of Article 7(4). This rather unsatisfactory engagement by the CJEU notwithstanding, it is hard to find fault in the Advocate General's conclusions, which should extend not only to public policy but to the other grounds in Article 7(4) as well. While, at face value, Article 7(4) leaves the member state the option of choosing between full denial of a voluntary departure period and providing a period of one to six days, the latter option must be considered to be included in the Directive for a reason. And since, as discussed, the voluntary departure period acts as a proportionality mechanism to ensure that the fundamental rights of the individual are protected during the return procedure, this mechanism should be used to the maximum extent possible in the individual case, as long as it still ensures effective return. It is obvious that providing a six-day period, from this perspective, is a less restrictive measure than denying an opportunity to return voluntarily altogether and proceeding immedi-

138 *Ibid.*, point 93. Also see footnote 93 of the Opinion, where the Advocate General recalls the CJEU's settled case law that a member state may not plead practical or administrative difficulties to justify failure to implement a directive, referring, by analogy, to CJEU C-277/13 *Commission* v. *Portugal* [2014], paragraph 59 and the case-law cited.

139 CJEU, Opinion AG, C-554/13 *Zh. And O.* [2015], point 93, also referring by analogy to CJEU C-277/13 *Commission v. Portugal* [2014], paragraph 59 and the case law cited there, confirming that a member state may not plead practical or administrative difficulties in order to justify a failure to comply with its obligations to implement a Directive.

140 See 10.3.2.3 above.

141 CJEU C-554/13 *Zh. And O.* [2015], paragraph 74.

ately with enforcement. While such very short periods may raise further questions,[142] the CJEU has made it clear that member states must, when implementing the return procedure, use a gradation of measures, where each time the least intrusive but effective, measure should be applied.[143] In this respect, Majcher notes that the CJEU says, on the basis of Article 7(4), that member states may propose a period shorter than seven days or "even" refuse it, suggesting that the latter is a last resort, and the former should be considered first.[144] As such, the proportionality requirements inherent in the Directive must also extend to considering whether in spite of the grounds in Article 7(4) being applicable, the right to a voluntary departure period can be safeguarded at least to some degree by granting a period shorter than seven days. And when this is the case, which period between one to six days is appropriate. Only if the interests of the state cannot be sufficiently safeguarded even with such a short voluntary departure period can such a period be denied altogether. It should be noted that such an interpretation may be far removed from member states' current practices. Indeed, concerns that their obligation to consider the option of shortening a voluntary departure period may at some point be formally confirmed by the CJEU, may have led to the elimination of the lower limit of seven days in the Commission's recast proposal.[145]

## 10.7 The limits of provisions denying voluntary departure as compatible with fundamental rights

In sections 10.3 to 10.6, I have discussed the extent to which the provisions of the Directive on the denial of a voluntary departure period can and should be read compatibly with the priority of voluntary return, and the related principle of proportionality, to ensure that voluntary return can play its assigned role in protecting the fundamental rights of the third-country national. While such possibilities exist in most cases, there are certain provisions that raise particular concerns. As discussed in 10.5, this appears to be the case for the possibility of denying a voluntary departure period because a third-country national has previously submitted a manifestly unfounded or fraudulent application for stay. It was noted that it is difficult to see how this can act as a self-standing justification for denial, given that the mere fact that such an application has been dismissed as manifestly unfounded or fraudulent appears to provide an insufficient guarantee of proportionality, and thus for securing voluntary return as a mechanism to protect fundamental rights. From this perspective, the inclusion of this ground in the

142 See the discussion of very short voluntary departure periods and the effectiveness of the right to voluntary return in 11.2.4.
143 CJEU C-61/11 PPU *El Dridi* [2011], paragraphs 37-41.
144 *Ibid*., and comments thereon by Majcher 2020, p. 558.
145 See 1.2.3.

Directive could be regarded as teetering on the edge of being prima facie incompatible with fundamental rights and therefore invalid as a matter of EU primary law. Perhaps the saving grace of this provision, if it could be called that, is the fact that denial of a voluntary departure period on this ground is optional, and could (and, as discussed, should) prompt member states to avoid using this option generally, or to use it only as a ground to shorten a voluntary departure period to fewer than seven days – and then only exceptionally.

Looking forward, the spectre of prima facie incompatibility with primary EU law, due to the inherent lack of proportionality, is especially raised by the European Commission's recast proposal which seeks to change the optional use of the grounds for denial of a voluntary departure period to a mandatory one ("Member States *shall not* grant a period for voluntary departure …").[146] In combination with the other proposed changes (an expansive list of indicators of a risk of absconding and the lack of a minimum period for voluntary departure) this could significantly increase the number of cases in which voluntary departure periods are denied.[147] While this analysis focuses on the current Directive, this potential move towards mandatory denial of a voluntary departure period, considering the discussion above, deserves some further attention.

From the perspective of secondary EU law, the change from an optional to a mandatory denial of a voluntary departure period will simply be a change of procedure to be followed by member states. This could be seen as further clarification of when it is not in the interest of the purpose of a return procedure to grant a voluntary departure period, and as a way to ensure uniformity in application. Furthermore, in relation to the public policy, public security and national security and the absconding grounds, member states would still need to establish such risks on an individualised, contextualised, and forward-looking basis. However, once such a risk is established, other than in the current Directive, the proposal would require member states to deny a voluntary departure period. This thus removes the consideration of whether the risk identified, balanced against the overall circumstances of the case and the individual's interest in a voluntary departure period as a way to protect his or her rights, is proportionate. Arguably, it would furthermore remove any kind of individualised consideration in cases in which an individual's application for stay has been dismissed as manifestly unfounded or fraudulent.

It is difficult to see how such provisions could be reconciled with the CJEU's recognition that voluntary return is not only a right granted by the Directive as secondary EU law, but that it is a mechanism that protects fundamental rights. No matter what formulation is used in secondary legislation, this cannot circumvent safeguards to protect fundamental rights, especially the application of the principle of proportionality to any potential

146 COM(2018) 634 final, 12 September 2018, Article 9(4) (my emphasis).
147 Peers 2018.

interference with such rights. This is especially the case given the long history of EU institutions asserting that giving priority to voluntary return is indeed necessary to adequately protected fundamental rights. Since the CJEU has already asserted that this precludes any automatic applications of derogations to the general rule that a period for voluntary departure should be provided, this would also be the case in the new formulation, if eventually adopted. This would either require reading into the provision an obligation, regardless of its formulation, that member states would still need to justify that denial of a voluntary departure period is proportionate in the individual case, notwithstanding the fact that one of the grounds set out in the new Directive applies. However, this would clearly also create tension with the explicit formulation ("shall not grant") in the Commission's proposal. The other prospect, therefore, would be for the CJEU, when being called upon to examine this provision, to declare it invalid, in the light of its incompatibility with primary law. As such, it can be said that, now that the genie of the priority of voluntary is out of the bottle, it is not easy to put it back, especially not by simply reformulating the provisions on the exceptions to granting a voluntary departure period.

It may also be wondered whether such far-reaching restrictions on the granting of a voluntary departure period – especially in combination with the extensive list of criteria for a risk of absconding – can be reconciled with the Directive's overall objective of ensuring effective return. In this respect, Majcher has noted that this would "result in voluntary departure being systematically refused," and that this "risks reversing the order between the rule and exceptions thereto."[148] While the proposed changes are clearly inspired by the fact that quicker enforcement would ensure greater effectiveness of return, the likely effect is also that far fewer third-country nationals are able to enjoy the opportunity to return voluntarily. As noted, voluntary returns currently make up an important proportion of overall effective returns.[149] It is not at all evident that replacing voluntary return opportunities with immediate enforcement will indeed lead to more effective returns, given that voluntary return may play a specific role in fostering more constructive cooperation by third-country nationals and countries of return alike, which may be undermined when member states rely more heavily on enforcement, as discussed in Chapter 2.[150]

From these perspectives, the Commission's proposal is worrying. Although it is far from clear that the mandatory denial of voluntary return will make it into the recast Directive's final text,[151] the fact that it has

148 Majcher 2020, pp. 565-566.

149 See 2.2.2.

150 In this respect, it is useful to highlight again that quite a number of countries of origin already cooperate poorly, or not at all, in the return and readmission of nationals who are removed, as various examples in this dissertation have shown.

151 See 1.2.3, noting that the proposal is not supported by the LIBE rapporteur and that even the Council seems to leave the door open to optional denial in some cases.

been put forward seems to further enhance the idea (already perceptible in member states) that voluntary return is an inconvenience, interfering with effective return, rather than an essential component of an effective and fundamental rights-compliant procedure. Furthermore, so far member states' judiciaries have not been very forthcoming in referring prejudicial questions on voluntary return matters to the CJEU. This may change if the final text of the recast indeed includes far-reaching restrictions on the right to voluntary return, but it also shows that the voluntary departure stage remains a matter of somewhat limited scrutiny, which means it could be some time before an emergency brake on such problematic provisions might be pulled by the CJEU.

## 10.8 Conclusions

Third-country nationals have a clear right to be accorded a voluntary departure period, which is doubly protected: as a right under secondary EU law and as a mechanism to ensure their fundamental rights are not disproportionately affected during the return procedure. This right is not unlimited, but any interference must be based on objective criteria, which furthermore should meet certain requirements mentioned below, that one of the grounds in Article 7(4) is applicable. This is subject to a consideration of the proportionality of a denial of an opportunity for voluntary return in the light of the specific circumstances of the individual case, including the best interests of the child, family life or the health of persons involved, but any other relevant factors should also be taken into account. Furthermore, an integral part of the proportionality assessment is the consideration whether a period shorter than seven days, rather than complete denial of the voluntary departure period, would be appropriate. Automatic denials, simply on the basis that one of the grounds in Article 7(4) has been found to apply, do not meet these requirements.

When a denial of a voluntary departure period because of a risk to public policy, public security, or national security is concerned, this cannot only be based on the past conduct of third-country nationals, such as the fact that they were suspected or convicted of a criminal offence. Rather, this should be done on the basis of an individualised, contextualised and forward-looking approach to establish there is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Any factual or legal matter that can shed light on the existence of such a threat, including the seriousness of past conduct, the elapse of time since it, and intentions of leaving the country, must be taken into account. General presumptions, in law or practice, that specific past acts are sufficient to indicate a threat that is sufficient to justify a denial of a voluntary departure period must not be applied by member states.

As regards the risk of absconding, denial of a voluntary departure period cannot take place when objective criteria are not set out in law.

Any criteria set out in law must furthermore truly be able to indicate a risk of absconding. This should be understood as a risk that third-country nationals disappear from view of the authorities, which would make enforcement of the return decision impossible. Within this meaning, non-cooperation or unwillingness to return, as such, do not indicate a risk of absconding, since they do not deprive the member state of the possibility to enforce the return decision after the voluntary departure period has ended. Such criteria should also not simply mirror the mere fact of illegal stay. In this respect, I have noted that this generally makes criteria such as irregular entry, overstaying of visas or residence permits, or the lack of documents as unsuitable indicators of a risk of absconding. This may only be different if member states can show specific circumstances in the individual case, for example in the way that a person irregularly entered, that would give rise to a risk of absconding. I have also suggested that criteria should not replicate other grounds of Article 7(4), such as those related to criminal proceedings or convictions, especially in such instances when irregular stay or entry are criminalised in the member state. This would lead to circumvention of the arguably higher bar for denial of a voluntary departure period on the ground of public policy. When a risk of absconding is found to exist, denial or shortening of a voluntary departure period should only be decided by a member state if it has considered the possibility of imposing measures, as provided for in Article 7(3), to prevent such a risk. Only if these are not adequate can denial or shortening on this ground take place.

In relation to denial of a voluntary departure period because of the dismissal of an application for legal stay as manifestly unfounded or fraudulent, automaticity must also be avoided, and proportionality safeguards must fully be observed, even though the ground for denial is an objective fact. However, I have suggested that justifications for denial must be related specifically to this ground, and not to the others, which will be difficult to do. When member states justify denial more in relation to, for example, public policy or a risk of absconding, all the requirements set out above should be observed. The denial of a voluntary departure period purely on the basis of the dismissal of an application as manifestly unfounded or fraudulent may therefore be difficult to reconcile with the principle of proportionality, except perhaps when only used to provide for a shorter period than seven days. At any rate, that same principle requires member states to consider the possibility of providing such a shorter period in all cases, and grant such a period if this avoids an outright denial of the enjoyment of a voluntary departure period, because this would be a less coercive measure.

Both the current possibility to deny a voluntary departure period on the ground that an application has been dismissed as manifestly unfounded or fraudulent, and – particularly – the Commission's proposal to make denial of a voluntary departure period mandatory on all three grounds in the recast Directive, raise acute questions of their compatibility with primary EU law. As suggested, it is difficult to see how the latter specifically can

be reconciled with the CJEU's case law. Regressing on this point just by changing secondary legislation does not appear to be a viable option, since a change in the Directive does not affect the core principle of proportionality and voluntary return's role in safeguarding fundamental rights.