

relevant factors, none of which is a 'trump card'.¹¹⁶ Two detainees, A and B, may pose exactly the same risks of absconding and offending and may have been equally uncooperative in their removal. Nonetheless, it may be permissible to detain A for significantly longer than B because at all times there was a better reason for hoping that A could be deported. Furthermore, no matter how long detention has been, a court will not order release if deportation is likely to take place within an extremely short period of time.¹¹⁷

The only situation where comparison with the length of detention in other cases may be helpful is where all of the relevant factors are comparable. So, for instance, where the obstacles to removal are the same in two cases, and the risks of offending and absconding are comparable, it may be helpful to have regard to where earlier judgments have drawn the line. A common example is where the obstacle to removal is one that is generic to a particular country. In such cases, the court will carefully examine earlier judgments concerning the same country to see how other courts have assessed the prospects of removal. If the other relevant facts are comparable, judgments in earlier cases may assist in identifying whether detention was lawful and, if not, when it ceased to be.¹¹⁸ 8.48

E. The Third Principle

As originally formulated by Woolf J, the third *Hardial Singh* principle was that detention should not continue if it was 'apparent' that removal would not be possible within a reasonable period of time. Lord Dyson has described this as a requirement that there be a 'realistic' prospect of removal within a reasonable period of time.¹¹⁹ This is not to be conflated with the test in *Khadir*¹²⁰ for whether there is a power to detain—i.e. whether there is 'some prospect' of removal.¹²¹ The *Khadir* test does not take into account *when* removal might take place. By contrast, the third *Hardial Singh* principle requires there to be a prospect of removal *within a reasonable period of time*. This distinction is very important because it is very difficult to establish that there is no prospect of removal at any point in the future. 8.49

¹¹⁶ *Shafiq-ur-Rehman* at [27].

¹¹⁷ See paragraph 8.10.

¹¹⁸ See *R (Murad) v Secretary of State for the Home Department* [2012] EWHC 1112 (Admin) at [101]; *R (LK (Somalia)) v Secretary of State for the Home Department* [2012] EWHC 1299 (Admin) at [58]; *R (Mahmoud) v Secretary of State for the Home Department* [2012] EWHC 1834 (Admin) at [45]; *R (Alsaadon) v Secretary of State for the Home Department* [2013] EWHC 2184 (Admin) at [40].

¹¹⁹ See *R (Lumba & Mighty) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 at [103].

¹²⁰ *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39; [2006] 1 AC 207 at [32]. See paragraph 1.09.

¹²¹ In *BXS v Secretary of State for the Home Department* [2014] EWHC 737 (Admin) at [68], the Deputy High Court Judge rightly rejected the Secretary of State's submission that the third *Hardial Singh* principle was to be tested by asking whether there was 'some prospect of removal'.