

Hardial Singh update

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The principles

- (i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
- (ii) the deportee may only be detained for a period that is reasonable in all the circumstances;
- (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect a deportation within a reasonable period, [she] should not seek to exercise the power of detention;
- (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal

R (Lumba) v SSHD [2011] UKSC 12 [2012] 1 AC 245 at §26

Some general points

- Court decides for itself: A v SSHD [2007] EWCA Civ 804
- Court of Appeal reluctant to interfere with first instance assessment: JM
- Based on facts known to SSHD at time of decision: Fardous v SSHD [2015] EWCA Civ 931
- Including facts known to the SSHD but not referred to in detention reviews: AXD [2016] EWHC 1133 (QB)
- Overlap with public law error, especially relevant/irrelevant considerations: YH (China) v SSHD [2018] EWHC 92 (Admin)

The first principle: proper purpose

- Miyanji v SSHD [2017] EWHC 1939 (QB): detention required “in order to progress section 35 prosecution”
- Kedienhon v SSHD [2017] EWHC 3373 (Admin): grace period to arrange suitable accommodation before effecting release
- Belfken v SSHD [2017] EWHC 1834 (Admin): agreement to this doesn’t render otherwise unlawful detention lawful

Second principle: what is a reasonable period?

- Can be very long:
- DZ (Eritrea) v SSHD [2017] EWCA Civ 14 – 43 months
- Botan v SSHD [2017] EWHC 550 (Admin) – 33 months and continuing
- Unlikely to produce different result to assessment under Article 27(2) of Citizens Directive: Lauzikas v SSHD [2018] EWHC 1045 (Admin)

Risk of absconding/reoffending



YH (China) [2018] EWHC 92 (Admin)

- May attach weight to SSHD's assessment, but not if clearly flawed/based on very little
- Prima facie entitlement to s95 support negates assumption will reoffend in order to support self
- Use of deception in criminal offending doesn't displace history of compliance when assessing risk of absconding

Conduct of claimant

- Need for clear findings where evasion or deception alleged to contribute to length of detention: Antonio v SSHD [2017] EWCA Civ 48
- Attach very little weight to period of detention caused by claimant pursuing a hopeless appeal or JR: Anugha v SSHD [2017] EWHC 139

Third principle: prospect of removal

- No need for SSHD to be able to say with certainty when removal will be possible

BUT

- *“In any given case it should be possible to estimate the likely duration of detention required to effect removal.”*

Adults at Risk Policy

Judicial review as bar to removal

- Where recognised that will need to be expedited in order for removal to take place within reasonable time, missing chance to ask for expedition can be breach of third principle: Lauzikas v SSHD [2018] EWHC 1045 (Admin)
- If decide that removal is reasonable in light of expected timetable, must reassess if that changes (due to non-expedited JR or other reasons): BS v SSHD [2018] EWHC 454 (Admin)
- Where expedition sought, fact JR is bar to removal doesn't mean there will necessarily be a breach of third principle: RM v SSHD [2017] EWHC 1262 (Admin)

Need for a subjective belief?

- Kajuga v SSHD [2017] EWCA Civ 240:

“Although it is not necessary to do so in order to determine this appeal, which, as I have indicated, on this point turns on the reading of the 15 February review as a whole, for the reasons put forward by Miss Anderson, I am unpersuaded by Mr Metzger’s submission that the 3rd Hardial Singh principle requires the Secretary of State to maintain a subjective state of mind on the issue of her inability to effect deportation within a reasonable period, which is separate and distinct from a court’s later objective evaluation of whether such an inability is apparent.”

- Belfken v SSHD [2017] EWHC 1834 (Admin):

“...there is no evidence that when making the decision to detain, or in continuing to detain the Claimant up to 7 September 2016, the Secretary of State considered there was any reason to believe the Moroccan authorities were now taking, or would now take, a more positive approach to ETD applications such as that in respect of the Claimant.”

Fourth principle: diligence and expedition

- Not breached by “mere administrative failings”: Abid v SSHD [2017] EWHC 1962 (Admin)
- Failure to exercise due diligence in investigating likely timeframe or making plan to enable removal treated as breach of third rather than fourth principle:
 - BS v SSHD [2018] EWHC 454 (Admin)
 - Qarani v SSHD [2017] EWHC 507 (Admin)