

Judicial Review
of Immigration Detention
in the UK, US and EU
From Principles to Practice

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Balancing Factors

I. INTRODUCTION

THIS BOOK HAS explored the development of the law relating to immigration detention and the way the right to liberty is guaranteed in the UK, USA and EU. Its principle aim thus far has been to explain why detention is used in these jurisdictions and when detention is permissible. It has also described the ways detainees can bring their detention outside the administrative context and into the judicial context so that the legality of their detention can be considered by independent decision makers. This and the following chapters move beyond principle to practice by examining how all of those factors impact judicial review. As explained in chapter one, the specific focus is on the lower judiciary, with the exception of the CJEU, which interprets the EU Return Directive for referring national courts at all levels.

Before getting into the substantive analysis of the 191 judgments, this introduction sets out some of the main features of the cases in each jurisdiction, including detainee characteristics and the circumstances surrounding the cases. This is to demonstrate the types of cases included in this book, and to assist the reader in understanding the typical circumstances encountered by the judges in their review of ongoing detention.

Legomsky has written about the impact that a criminal sentence has on whether an individual will be detained,¹ and notes the fact that, in many cases, non-citizen criminal defendants will be advised to plead guilty without being warned of the immigration consequences of a guilty plea in light of the mandatory deportation and detention provisions.² Most of the detainees in the 173 cases from the UK and USA have been convicted of either an immigration or a criminal offence, which has contributed in some way to the state's decision to detain them. These offences range from entry without permission to drug offences of all levels, and to more violent crimes, such as assault or manslaughter.³ This is significant when

¹SH Legomsky, 'The Alien Criminal Defendant' (1977) 15 *San Diego Law Review* 105.

²SH Legomsky, 'Transporting *Padilla* to Deportation Proceedings: A Due Process Right to Effective Assistance of Counsel' (2011) 31 *St Louis U Public Law Review* 43.

³See, eg *R (I) v SSHD* [2002] EWCA Civ 888, indecent assault on a minor; *R (Lumba) v SSHD* [2008] EWHC 2090 (Admin), grievous bodily harm; *R (Raki) v SSHD* [2011] EWHC 2421 (Admin), theft; *Charran v Philips* 2014 WL 296429 (WDNY), driving while intoxicated, petty larceny (among others); *Copes v McElroy* 2001 WL 830673 (SDNY), criminal possession of marijuana, cocaine.

one considers that, in the context of the EU Return Directive, Member States are permitted to exclude from the scope of the Directive third-country nationals who are subject to return because they have committed a qualifying crime under domestic law.⁴ If the numbers in the UK and US cases are representative, it may be that many third-country nationals in the EU subject to return under domestic law could be without the protection of the Directive if the Member State chooses to implement this exception.

Deportation may also be the result of unsuccessful immigration applications, for example, for leave to remain or asylum, or because immigration laws have been breached. For example, in ten cases, the detainees had only committed immigration offences, such as entry by deception or applying for asylum using false information.⁵ In six of the 173 cases, there was no mention of criminal history, but I am unable to state with confidence whether that is because the detainee had not been convicted of a crime or because the judgment simply left out that data.⁶ However, it is important to stress that this high incidence of criminal history is not surprising, but nor is it representative of all migrants.⁷ That is because the cases I have chosen to examine concern the legitimacy of ongoing detention, with the subjects still in detention at the point at which they seek judicial review. Criminal history is a key factor in the state's determination of whether detention is appropriate, often resulting in the conclusion during judicial review that continued detention is permissible. Therefore, people with past criminal convictions are more likely to be in detention than those without convictions. If an individual does not have a criminal history, they are less likely to be detained, and therefore would not be seeking judicial review of their detention and would consequently not be in my pool of cases.

In many cases, a determination that the individual poses a danger to the community or a risk of absconding, coupled with a difficulty in achieving removal, means that the detention of many of these detainees is prolonged. One judge in the Administrative Court remarked in a case that I observed that in 1971, when the Immigration Act entered into force, it was likely that no one imagined that it could be so difficult to remove people, especially those whose

⁴Directive 2008/115/EC of the European Parliament and of the Council on 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Art 2(2)(b).

⁵See, eg *R (Qaderi) v SSHD* [2008] EWHC 1033 (Admin), applying for asylum using false documents; *R (Davies) v SSHD* [2010] EWHC 2656 (Admin), possession of false passport; *Azad v Interim District Director, NY ICE and Riley* 2009 WL 2569132 (SDNY), failure to depart after issuance of final removal order; *Islam v Philips* 2015 WL 1915106 (WDNY), attempted unlawful entry.

⁶See, eg *Greenland v INS/Ice Dep't of Homeland Sec* (2009 WDNY) 599 F Supp 2d 365; *Powell v Ashcroft* (2002 EDNY) 194 F Supp 2d 209; *Hwez v SSHD* [2002] EWHC 1597 (Admin); *R (Badjoko) v SSHD* [2003] EWHC 3034 (Admin).

⁷However, Bosworth and Kaufman have written about the over-representation of foreign national offenders in US prisons, including immigration detention centres. See M Bosworth and E Kaufman, 'Foreigners in a Carceral Age: Immigration and Imprisonment in the United States' (2011) 22 *Stanford Law and Policy Review* 429.

presence was considered not conducive to the public good.⁸ Indeed, it is a real problem felt in both the UK and the USA, whether because the target state is not co-operating or because it is taking a long time to identify a person's true nationality.

In addition, because of the similarities in the tests for lawfulness in the UK and USA, arguments posed by the parties are often the same. For example, detainees will often argue that the state has not acted diligently in securing removal, or that, because the target state (ie the state to which the detainee would be removed) has been unresponsive to requests by the removing state to receive the detainee, removal in the foreseeable future is unlikely. Conversely, the state typically focuses on arguments that the detainee has been unco-operative, for example, in providing identification documents, or that it has been diligent in seeking removal and that removals to the target country in question have a history of success and will likely be successful in the individual case.

Success rates are easier to quantify with regard to the UK and US cases. 'Successful' in this book includes cases where the court orders release or a bond/bail hearing, issues a declaration of unlawfulness or gives the state a deadline to effect removal.⁹ Of the 173 UK and US cases, 46 (26.58 per cent) resulted in a successful outcome. The following sections provide a breakdown by jurisdiction. However, the USA was the poorer performer on two counts, with lower rates of success and also with longer instances of detention. In terms of the length of detention, detainees in the USA were held for an average time of 2.4 years, versus 2.1 years in the UK. This is quite a long time to be detained without having committed any offence (and in most cases having already completed a prison term) in what Dow refers to as a 'gulag', at least in the context of American detention centres.¹⁰ However, as noted in chapter one, the judgments considered here involve special cases of prolonged detention in which the detainees have not managed to secure release through administrative processes. Therefore, the statistics discussed above should be read within that context and should not be considered as representative of overall detention lengths in any of the jurisdictions evaluated.

The cases from the CJEU are different from the UK and US cases for two reasons. First, as will be explained below, not all of the CJEU cases strictly involve immigration detention, though most involve detention in some form. Secondly, although there is discussion regarding the circumstances of each case, particulars regarding criminal history are rarely included in the CJEU judgments. This is perhaps owing to the fact that the role of the CJEU is not to determine the facts of the case, but rather to interpret the Return Directive.

⁸ *G v SSHD* [2016] EWHC 3232 (Admin). Hearing dates 15–16 November 2016.

⁹ For example, in one US case, the government was given 60 days to remove the petitioner, otherwise habeas would issue and release would follow. See *Gumbs v Heron* 2009 WL 2958002 (WDNY).

¹⁰ M Dow, *American Gulag: Inside US Immigration Prisons* (University of California Press, 2004).

This means that evidence relating to the detainee's personal characteristics would be confined to proceedings at the national level. However, the CJEU is a worthy comparator because the Return Directive employs essentially the same test as those used in the UK and the USA, and the way in which it interprets the test components may serve as a model for those jurisdictions. With regard to the arguments made by the parties, although the standard in the Directive mimics that which is seen in the UK and the USA, again, because the focus is on the interpretation of the Directive rather than the legitimacy of the facts at hand, parties' arguments focus on the way in which the CJEU should construe the relevant provisions of the Directive.

II. CASE BASICS

This book includes 63 cases from the Administrative Court of England and Wales. Most of the detainees were detained under either Schedule 2 or Schedule 3 of the 1971 Act. A small minority of people (seven) were detained under the mandatory provisions of the UK Borders Act 2007. When that is the case, the *Hardial Singh* principles may be applied slightly differently, depending on the issue in dispute (discussed below). The average length of detention in the UK cases was 2.1 years.¹¹ Out of the 63 cases, 31 judicial review applications (49.2 per cent) were successful.

The book also considers 110 federal district court cases from the Second Circuit in the USA. The majority (76) come from the Western District of New York (WDNY), followed by 28 from the Southern District of New York (SDNY) and six from the Eastern District (EDNY).¹² These cases roughly fall into two main categories: (1) '*Zadvydas*' cases (82 cases); and (2) mandatory detention cases under section 236(c) of the Immigration and Nationality Act 1952 (INA) (28 cases).¹³ The successful cases under category (2) were successful not because they led to a finding that detention is unlawful (though many detainees argue legality), but because the courts concluded that the detainees were entitled to a bond hearing because their detention had become prolonged.

Of the 110 US cases examined in this book, 15 resulted in successful petitions – that is, 13.6 per cent of the cases. The average length of detention in the US cases

¹¹ Only one case did not include the requisite data to determine detention length. One case (*R (A) v SSHD* [2008] EWHC 142 (Admin)) involved four detainees, so the average duration was calculated using the number 65 to account for the 63 cases, minus the case with no data but plus an additional three detention periods in *R (A) v SSHD*.

¹² Three petitioners have two petitions each in this batch of cases, making 102 individual detainees.

¹³ Category (1) includes cases both before and after the USSC decision in *Zadvydas*, which consider whether the individual has been detained for an unlawful period and should be released, and which also engage in analysis of whether the individual would be a flight risk or a danger to society, should he or she be released.

was 2.4 years.¹⁴ This can be broken down further into cases involving prolonged detention under section 236(c) of the INA (ie mandatory detention cases), where the average duration of detention was 1.9 years, and detention under section 241(a) (ie *Zadvydas* cases), with an average length of 2.8 years.

Finally, this book considers 17 cases under the Return Directive that were sent to the CJEU for a preliminary reference, including those where immigration detention is not the focus of the case, or even the main issue. This is because, in comparison to the UK and USA, there are far fewer decisions under the Return Directive on immigration detention – in fact, just six. By expanding the scope of the EU comparison to include non-detention cases, this book can more accurately draw conclusions regarding the comparative themes examined here and in chapters six and seven because many of the substantive themes found in the tests employed in the three jurisdictions are present in judgments interpreting the Return Directive outside the context of Article 15. Therefore, in light of the small number of detention cases, this broadened look at the Return Directive provides a more complete picture of judicial practice at the CJEU level and allows for a fuller comparison to the UK and USA.

For purposes of analysis, I have divided the CJEU cases into three categories. In Category A are six cases specifically focused on immigration detention and the interpretation of Chapter IV of the Directive.¹⁵ Category B comprises eight cases concerning the criminalisation of migration by the Member States, and focuses primarily on the question of whether imposing criminal sanctions for violations of immigration law at the national level is permitted under the Return Directive.¹⁶ In several of these cases, the Directive's detention provisions take centre stage because the CJEU is asked to consider whether the Directive permits criminal detention prior to initiating return. Finally, in Category C are three cases that concern issues purely to do with return, rather than detention of any kind.¹⁷ This includes two cases on the right to be heard prior to being issued with a return decision and one on the meaning of risk in relation to granting a period of voluntary departure. The discussion in this and the next chapter will focus primarily on the first two categories. However, cases in Category C are illustrative of the CJEU's style of legal reasoning and demonstrate how the CJEU makes its decisions. They will therefore be referenced as appropriate during the comparative analysis.

¹⁴ Seven cases lacked the requisite data to determine detention length.

¹⁵ Case C-357/09 PPU *Kadzoev* [2009] ECR I-11189; Case C-534/11 *Arslan* [ECR TBC]; Case C-383/13 PPU *G and R* [ECR TBC]; Joined Cases C-473/13 and C-514/13 *Bero and Bouzalmate* [ECR TBC]; Case C-474/13 *Pham* [ECR TBC]; Case C-146/14 PPU *Mahdi* [ECR TBC].

¹⁶ Case C-61/11 PPU *El Dridi* [2011] ECR I-3015; Case C-329/11 *Achughbabian* [2009] ECR I-12695; Case C-430/11 *Md Sagor* [ECR TBC]; Case C-522/11 *Mbaye* [ECR TBC]; Case C-297/12 *Filev and Osmani* [ECR TBC]; *Zaizoune*; Case C-290/14 *Celaj* [ECR TBC]; Case C-47/15 *Affum* [ECR TBC].

¹⁷ Case C-166/13 *Mukarubega* [ECR TBC]; Case C-249/13 *Boudjilda* [ECR TBC]; Case C-554/13 *Zh and O* [ECR TBC].

Having set out some basic features of the cases considered in this book, the following sections will delve into the cases beyond statistics to look at how the machinery of judicial review operates in practice. In the main, they consider common components of the tests employed to determine the legality of detention and the way in which they are applied by judges. In doing so, they will take a detail-oriented approach to consider the mechanics of the judgments themselves, examining issues relating to the application of tests of legality, such as risk assessment and the impact of detainee non-co-operation in return or removal.

III. THE LEGALITY TESTS

The origin of the three jurisdictions' tests was explained in chapter four. That discussion demonstrated that the UK and US tests were developed by the courts partly in response to the indeterminate state of the statutory law on detention. In contrast, the test in the EU is statutory and very detailed after intense negotiations among the Member States during the legislative process. Any remaining gaps in coverage or questions about interpretation are for the CJEU to determine, much in the same way that the USSC addressed indefinite detention in *Zadvydas* and the Administrative Court developed the *Hardial Singh* principles. Despite being developed years apart and on different continents, these tests share characteristics, and are built upon the basic tenet that detention must be reasonable in all the circumstances. Thus, in the UK, the *Hardial Singh* principles require removal to take place within a reasonable period;¹⁸ in the USA, *Zadvydas* requires that removal must be likely in the reasonably foreseeable future;¹⁹ and under the EU Return Directive, there must be a reasonable prospect of removal.²⁰

In such a fact-dependent inquiry, the application of the tests largely becomes a proportionality analysis where the judges have to weigh facts in evidence and balance competing interests. As described in chapter one, proportionality acts as a key safeguard on fundamental rights, limiting the state's right to exercise sovereign control over its borders. Each jurisdiction evaluated here considers a number of factors in its determinations of whether detention is proportionate and therefore lawful, some of which overlap. In the UK and USA, this includes an evaluation of whether the detainee poses a risk of flight or danger to the community, or whether the detainee has co-operated with the state. The UK goes beyond this to include consideration of the effect of detention on the

¹⁸ *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB).

¹⁹ *Zadvydas v Davis* (2001) 533 US 678.

²⁰ EU Return Directive 2008/115/EC, Art 15(4).

detainee and his or her family, and the conditions of detention.²¹ The EU Return Directive refers to some of these elements when it specifies that detention is only permissible where there is a risk of absconding, or where an individual is avoiding or interfering with the return process. In some cases, particularly in the USA, a detainee's pursuit of remedies against removal or deportation will be factored into the court's review of whether detention is justifiable.

The evaluation is not one-sided. The state must work actively to secure removal. In the UK and EU, this is expressed as 'diligence', whereas in the USA, diligence is implied in evaluations of state efforts to remove. Detention may be considered unreasonable if the state is making no effort to remove the individual in question, for example, by failing to regularly communicate with the relevant foreign embassy or consulate to obtain identity documents. Detention under the Return Directive can only be maintained for as long as removal arrangements are in progress and are executed diligently.

Assessing reasonableness may also include an evaluation of the length of detention to date. The UK has no maximum, nor is any indicative period of reasonableness contemplated by the Administrative Court. The USA is essentially the same, except the Supreme Court has set a presumptively reasonable period for post-removal order detention of six months. However, the NY district courts do not often factor into their analysis the duration of detention at the time of the hearing. Finally, the Return Directive explicitly limits detention to six months, extendable by 12 months only where the detainee is not co-operating or where there are delays in obtaining the requisite documents from the target country – either of which must be causally linked to a delay in effecting return. The Directive also stresses that detention must be as short as possible and necessary.

Application of the legality tests in the context of mandatory detention under the UK Borders Act 2007 differs slightly. One judgment in particular identified a need to alter the *Hardial Singh* principles to take into account cases where individuals have been detained under the mandatory detention provisions of section 36 of the UK Borders Act 2007. In *Hussein*, Nicol J modified principles (i) and (iv) as follows:

- (i) The Secretary of State must intend to deport the person unless one of the exceptions in s.33 applies and can only use this power to detain for the purpose of examining whether they do.
- (iv) The Secretary of State should act with reasonable diligence and expedition to determine whether any of the exceptions in s.33 is applicable.²²

²¹ See, eg *R (Asekun) v SSHD* [2009] EWHC 1707 (Admin); *R (Mjemer) v SSHD* [2011] EWHC 1514 (Admin); *R (Rashid) v SSHD* [2011] EWHC 3352 (Admin); *R (JM) v SSHD* [2014] EWHC 151 (Admin), where the individual had been 'detained in a strict prison regime, locked alone in a cell for over 20 hours a day with limited use of a pay phone', but release was not ordered because of a significant risk of reoffending (91).

²² *Hussein v SSHD* [2009] EWHC 2492 (Admin) 43.

The Court further specified that principle (iii) ('if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, she should not seek to exercise the power of detention') would be violated in the context of mandatory detention when it becomes clear that *either* deportation would not be possible within a reasonable time *or* if the question whether any exceptions under section 33 to automatic deportation are applicable cannot be resolved within a reasonable period.²³ Because detention under section 36 is rare among the pool of cases examined in this book, there has not been much occasion to consider how this works in practice. However, it is interesting to note that the diligence requirement has been incorporated into the test in such a way as to try to ensure that time spent detained under mandatory provisions is kept to a minimum.

More broadly, this illustrates an important willingness to consider that mandatory detention requires different standards, arguably because of the potential for injustice inherent in the tests as they have been traditionally applied. The Administrative Court decision in *Hussein* represents a concern that the requirement of diligence should apply to the Secretary of State not only in seeking removal, but also in determining whether the mandatory provisions apply, because if they do not, people may be detained unlawfully for lengthy periods of time. However, the impact of the *Hussein* judgment on other judgments in the book pool seems thus far to be limited to that case, as subsequent cases of mandatory detention do not refer back to Nicol's formulation.²⁴ Though one case specified that the Secretary of State should be afforded a 'reasonable time' to determine whether the mandatory detention provisions apply,²⁵ no other case on mandatory detention in the case pool considered that the *Hardial Singh* principles might apply differently. This is most likely because most cases reached the Administrative Court after the Secretary of State made the decision that section 36 detention is appropriate. Upon such a determination, the *Hardial Singh* principles would presumably apply as normal – this appears to be the case, according to the judgments in this pool. However, Nicol's formulation has been cited and applied by the Court of Appeal and by Administrative Court cases excluded from the pool.²⁶

Thus, though there are differences between the three jurisdictions, they each broadly review the legality of detention using the same criteria. However, the weight given to and evaluation of each factor differs, producing varied case outcomes. What follows is an examination of these test components in practice in

²³ *ibid* 44.

²⁴ See, eg *Mohammed v SSHD* [2010] EWHC 3323 (Admin); *R (AK) v SSHD* [2010] EWHC 3083 (Admin); *R (Ismail) v SSHD* [2013] EWHC 3921 (Admin).

²⁵ *Ismail (ibid)* 17.

²⁶ *R (Saleh (Sudan)) v SSHD* [2013] EWCA Civ 1378, 15; *Saleh v SSHD* [2013] EWHC 61 (Admin) 26–29; *R (Rahman) v SSHD* [2014] EWHC 1640 (Admin) 48; *R (Botan) v SSHD* [2017] EWHC 550 (Admin) 28.

the judgments collected for this book. Despite these similarities, the difference in case outcomes across jurisdictions (especially the UK and USA, where release can actually be ordered by the courts) demonstrates the subjective nature of this exercise.

IV. LIKELIHOOD OF REMOVAL AND DUE DILIGENCE

Each of the three jurisdictions considers the likelihood that removal will occur within a reasonable time. Coupled with this assessment is an evaluation of whether the state has acted conscientiously in seeking removal. Key to the assessment, especially in the UK and USA, is the placement of the burden of proof. This undoubtedly sets the tone for judicial review and impacts whether detainees will succeed in their applications. For example, where the state must make a case to continue detention, as is the situation in the UK, the Court is perhaps more sympathetic to detainee arguments. This is reflected in more rights-protecting outcomes in the UK. Conversely, though the US Supreme Court had the opportunity to rule on the constitutionality of placing the burden of proof on the detainee in *Zadvydas*, it opted not to do so. Thus, detainees in the USA begin judicial review at a procedural disadvantage. Indeed, US case outcomes are the poorest of the three jurisdictions evaluated. Though the CJEU has not had much occasion to consider this issue, it is clear that there must be a real prospect that removal is likely to occur and that the diligence of the state, on its own, will not justify continued detention.

A. United Kingdom

In UK judicial review proceedings, the burden of proof rests with the state, which has to demonstrate that detention is lawful and that removal is likely.²⁷ ‘That principle is so well established in ... law that citation of authority is hardly necessary for it.’²⁸ The Administrative Court has remarked that ‘shifting the burden of proof to the detained person ... is tantamount to overturning the rule of Article 5’ ECHR.²⁹ The Secretary of State must prove on the balance of probabilities that removal within a reasonable period is likely.³⁰ In addition, some Administrative Court decisions demonstrate that, where gaps in evidence create doubt or uncertainty regarding specific facts, the court is permitted to draw adverse inferences in favour of the claimant.³¹

²⁷ See, eg *R (C) v SSHD* [2010] EWHC 1089 (Admin) 36; *R (Boukhalfa) v SSHD* [2003] EWHC 991 (Admin) 18.

²⁸ *R (Kumar) v SSHD* [2003] EWHC 846 (Admin) 15.

²⁹ *JM* (n 21) 20.

³⁰ *R (HY) v SSHD* [2010] EWHC 1678 (Admin) 10.

³¹ *MA & TT v SSHD* [2010] EWHC 2350 (Admin) 31; *R (Azaroad) v SSHD* [2013] EWHC 1248 (Admin) 42.

Recall that the UK case rate of success is just under 50 per cent. The reason for this in most cases is because of the court's assessment that removal will not take place within a reasonable period. Whether removal will take place within a reasonable period is assessed in view of the state's efforts to seek removal, the behaviour of the relevant foreign consulate/embassy and, in certain target countries, the political climate. This means that there must be 'some prospect' beyond a 'mere hope' that the state will be able to carry out deportation within a reasonable time.³² Moreover, even if a reasonable period of time in detention has not yet passed, if it becomes clear that the person cannot be deported within a reasonable period, detention will become unlawful.³³ For example, in a number of cases where the detainees were to be removed to Somalia, the court had to take into consideration the fact that there were difficulties removing anyone to Somalia, and that the ECtHR was due to render judgment on whether such removals were permissible.³⁴ In view of those problems, in one case, the court remarked that it was likely to be at least 18 months before a position could be reached regarding the possibility of effecting removal to Somalia.³⁵ In another, the court highlighted the state's inability to specify with any precision when it would be able to deport the detainee, and upon what evidence that expectation was based.³⁶ In the judge's view, the state had 'an uncertain expectation as opposed to a reasonable expectation' that deportation would be possible, and he ordered release.³⁷ In another case, detention was held to be

³² *R (M) v SSHD* [2009] EWHC 629 (Admin) 21; See also *R (Babbage) v SSHD* [2016] EWHC 148 (Admin) 90: 'the acid test is always whether there is a realistic prospect of effecting a return'; *R (Belfken) v SSHD* [2013] EWHC 4658 (Admin) 21; *R (SM) v SSHD* [2011] EWHC 338 (Admin) 89, citing Richards LJ in *R (MH) v SSHD* [2010] EWCA Civ 1112, [65]: 'there can be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all', and that, while the extent of certainty or uncertainty will affect the balancing exercise, what is necessary is that 'there must be a sufficient prospect of removal to warrant continual detention when account is taken of all other relevant factors'. However, he also stated ([68(v)]) that as the situation drags on, so certainty becomes a factor of considerable and increasing importance and a greater degree of certainty and proximity of removal will be required to justify continued detention.

³³ *R (Hussein) v SSHD* [2010] EWHC 2651 (Admin) (ordering release where the detainee had been detained for about six months).

³⁴ See, eg *R (Daq) v SSHD* [2009] EWHC 1655 (Admin); *R (MM (Somalia)) v SSHD* [2009] EWHC 2353 (Admin).

³⁵ *MM (Somalia)* (ibid) 34. See also *R (Abdi) v SSHD* [2009] EWHC 1324 (Admin); *Daq* (ibid); *R (Egal) v SSHD* [2009] EWHC 2939 (Admin); *R (A) v SSHD* [2006] EWHC 3331 (Admin); *R (Aziz) v SSHD* [2011] EWHC 554 (Admin). Similar issues arose regarding returns to Iraq in *R (A (Iraq)) v SSHD* [2010] EWHC 625 (Admin).

³⁶ *R (IO) v SSHD* [2008] EWHC 2596 (Admin).

³⁷ *ibid* 48. See also *C* (n 27) 36–37: 'The Secretary of State has not pointed to any further information which might be forthcoming from the claimant or any other source which might create any realistic prospect of persuading X to accept the removal of the claimant there ... Moreover ... there was no evidence of any assessment of what further information might persuade the authorities of X to take a different view of the claimant and no attempt to explain how such information might be expected to be forthcoming.'

unlawful because it was not possible to issue removal directions and therefore removal within a reasonable period was not possible.³⁸

Sometimes, though the court acknowledges that certain factors may counsel in favour of a finding that detention has become unreasonable, it will conclude otherwise. This can be, for example, because of assurances from the state that travel documentation will be forthcoming in the near future. Though in the case of *Badjoko*, the court specifically noted that, absent strong assurances regarding the timing of deportation, the court ‘would not have been prepared to countenance an open-ended prospect of ill-defined certainty’.³⁹ In one case in particular, when evaluating the state’s activity in effecting removal, the court recognised that ‘the pressure under which officials work’ must be balanced against ‘individuals whose rights must be recognised and given effect to’.⁴⁰ The balance in that case fell in favour of the detainee, who was granted a declaration of illegality.

In some cases, the court permits continued detention, but acknowledges that the situation may need to be re-evaluated in the future under certain circumstances. For example, in *Chen*, there was evidence from China that it would take one to two months to acquire the evidence it needed to be able to accept the return of the detainee.⁴¹ In view of that, and of concerns regarding risk of absconding, the court felt that it was not yet time to say that removal within a reasonable time is unlikely.⁴² However, it also held that the state of relations with the Chinese Embassy must be kept under ‘constant review’.⁴³ A similar conclusion was reached in *Lubana*, where the court stated that

there is at least a real possibility that the time will come when the Secretary of State will have to face up to the difficulties raised by the Indian authorities and give serious consideration as to whether he is going to be able to remove the applicant within a reasonable time.⁴⁴

In that case, rather than come to a judgment, the court adjourned the case and retained supervision over it.⁴⁵

³⁸ *Hwez* (n 6).

³⁹ *Badjoko* (n 6) 22.

⁴⁰ *R (Abdullah) v SSHD* [2010] EWHC 259 (Admin) 64.

⁴¹ *Chen v SSHD* [2002] EWHC 2797 (Admin).

⁴² *ibid* 32.

⁴³ *ibid* 34.

⁴⁴ *R (Lubana) v SSHD* [2003] EWHC 410 (Admin) 13. See also *R (Giwa) v SSHD* [2013] EWHC 3189 (Admin) 82; *R (Mohamed) v SSHD* [2010] EWHC 1244 (Admin) 41: ‘Having considered all of those factors and balanced them together, the Secretary of State has satisfied me that despite the length of time of the claimant’s detention he, the Secretary of State, has a reasonable prospect of deporting the claimant within a reasonable time. Of course, I can only make that decision on the basis of matters as they stand today, and on the evidence that I have seen. The claimant has been in detention for a long time, and, if the Secretary of State does not keep up his endeavours and/or if the Somali authorities show a disinclination to accept his return and reasonably promptly, the balance may change. It will then be open to the claimant to make a further application on the basis of the new circumstances, no doubt by way of application to the tribunal for bail in the first instance.’

⁴⁵ See also *Kumar* (n 28) 30–31.

With the UK cases, the most important thing to stress in relation to the discussion of whether removal is likely is that a conclusion whether it is or not is not the only dispositive factor. As will become evident in subsequent sections, the Administrative Court will generally balance a finding that removal in the reasonable future is not likely against detainee criminal history and risk of absconding. The extent to which there is certainty regarding when removal will occur will obviously impact the balancing exercise.⁴⁶ This, of course, occurs in the US cases as well, but with two main differences. First, the balance almost always comes out in favour of a finding that removal is likely, which trumps all other considerations; and secondly, the balancing exercise itself is not scaled or weighted the way it is in the Administrative Court. For example, the Administrative Court in *Qaderi* considered that there was evidence of a lack of due diligence in seeking removal, but, viewed in consideration of other ‘significant factors which point[ed] the opposite way’, including ‘stubborn’ non-co-operation in effecting removal and a criminal conviction for using false documents in an asylum application, the court concluded that, on balance, the state’s poor diligence should be given less weight.⁴⁷ Similar reasoning was used in *Chahboub*, where, though it was uncertain when the necessary documents would be issued, a view that the detainee would almost ‘inevitabl[y]’ abscond led the court to conclude that it was legitimate to keep the individual in detention.⁴⁸ More detail regarding risk assessment follows. However, at this point, I would stress that the Administrative Court explicitly engages in a balancing of factors to determine whether, in an individual case, detention is proportionate. It engages with the parties’ evidence of likelihood and diligence, and assigns weight. I would argue that in most cases, this is done fairly because of the Court’s overall awareness that multiple factors are at play.

However, it is interesting to juxtapose the findings in these cases with statistics published jointly by the All Party Parliamentary Groups on Refugees and Migration. The report notes specifically that at least one-third of detainees are released due to an inability to remove them.⁴⁹ This suggests that, at the administrative level, periodic reviews of detention may not be conducted as robustly as they are at the Administrative Court.

B. United States

Administrative Court practice contrasts sharply with US practice, where the balance seems to fall in favour of the state, especially regarding an assessment

⁴⁶ *R (Momoh) v SSHD* [2012] EWHC 3740 (Admin) 105.

⁴⁷ *Qaderi* (n 5) 35, 37–40.

⁴⁸ *R (Chahboub) v SSHD* [2009] EWHC 1989 (Admin) 33. See also *R (Said) v SSHD* [2010] EWHC 365 (Admin); *Mohamed* (n 44).

⁴⁹ Joint Inquiry by the All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, ‘The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom’, (March 2015) 17.

of whether it has acted diligently. To succeed on a *Zadvydas* claim, the *detainee* must demonstrate that removal in the reasonably foreseeable future is unlikely.⁵⁰ In doing so, the Supreme Court has held that non-citizens bear the burden of providing ‘good reason to believe’ that removal in the reasonably foreseeable future is unlikely, and that, if they sustain that burden, the government must provide ‘sufficient evidence’ to rebut it.⁵¹ The immigration regulations require the detainee to submit evidence demonstrating ‘that there is no *significant* likelihood of removal in the reasonably foreseeable future’.⁵² This is a stricter standard than permitted by the Supreme Court. If the detainee manages to succeed in sustaining the burden of proof, it then passes to the government to rebut. Writing two years after the judgment in *Zadvydas*, Peitzke evaluated the reactions to the judgment in the Ninth and Fifth Circuits, and found that courts were applying the reasoning of the Supreme Court and ‘closely analyzing the intent of Congress’.⁵³ The cases in this book do not suggest that this approach is still (if it ever was) taken by the NY district courts. In fact, these courts take a less nuanced approach to identifying what is reasonable. As a result, the discussion seems more black and white.

For example, the fact that the burden of proof is on the detainee can significantly impact results. In considering whether the petitioners have satisfied the burden of proof, the emphasis is on whether there are any ‘institutional barriers to removal’.⁵⁴ This is established by demonstrating that the government has been communicating regularly with the consulate or embassy,⁵⁵ that there have been prior successful repatriations to the state at issue⁵⁶ or that travel documents had been previously issued to the petitioner.⁵⁷ Placing the burden of proof on the detainee is incongruous when compared to federal pre-trial detention and federal habeas corpus in the context of the war on terror, where the government bears the burden of proving that detention is justified by ‘clear and convincing evidence’⁵⁸ and a ‘preponderance of the evidence’,⁵⁹ respectively. Kimball points out that, in fact, ‘All other forms of civil commitment have a variety of more

⁵⁰ *Zadvydas* (n 19) 701.

⁵¹ *ibid.*

⁵² 8 CFR 241.13(d) (emphasis added).

⁵³ M Peitzke, ‘The Fate of “Unremovable” Aliens before and after September 11, 2001: The Supreme Court’s Presumptive Six-Month Limit to Post-Removal-Period Detention’ (2002) 30 *Pepperdine Law Review* 769, 797.

⁵⁴ *Rahel v Tryon* 2013 WL 1878914 (WDNY) 6.

⁵⁵ See, eg *Dookhan v Holder* 2013 WL 1945950 (WDNY); *Mohamed v Holder* 2013 WL 2468738 (WDNY); *Juma v Mukasey* 2009 WL 2191247 (SDNY).

⁵⁶ See, eg *Alzubi v Tryon* 2015 WL 860792 (WDNY); *Campbell v Tryon* 2014 WL 3809747 (WDNY); *Ahmed v Holder* 2013 WL 2468732 (WDNY); *Tejeda-Estrella v Holder* 2013 WL 1570141 (WDNY).

⁵⁷ See, eg *Andreenko v Holder* 2012 WL 4210286 (WDNY); *Ricketts v Mule* 2009 WL 102953 (WDNY).

⁵⁸ Bail Reform Act 1984, Pub L No 98-473, 98 Stat 1976-87; see also, eg *US v Arena* (NDNY 1995) 894 F Supp 580.

⁵⁹ See MC Waxman, ‘Guantánamo, Habeas Corpus, and Standards of Proof: Viewing the Law through Multiple Lenses’ (2009) 42 *Case Western Journal of International Law* 245, 247. The burden

robust procedures not available to indefinitely detained non-citizens, including the right to have the government carry the burden of proof.⁶⁰ Holper discusses burden of proof in the immigration bond hearing context, and the placement by the USSC in *Zadvydas* of the burden of proof on the detainee.⁶¹ She argues that, though it appears that the burden is on the detainee to demonstrate that removal is unlikely, in fact, the government bears the ultimate burden of persuasion.⁶² This would be significant if detainees had a genuine chance of sustaining their burden of proof, but the cases examined in this book demonstrate that this is highly unlikely and that therefore any burden of persuasion that the government might carry is meaningless in practice.⁶³ Indeed, it appears that US detainees are being held to the stricter standard of proof set out in the immigration regulations, which require a showing of significant evidence that removal will not occur soon. This has an impact on success rates.

The judgments demonstrate a clear link between legal representation and successful habeas petitions in the context of ‘likelihood’ arguments.⁶⁴ Though some thoughtful arguments were put forth by pro se applicants,⁶⁵ in most cases their arguments were rudimentary. For example, detainees often argued that removal was not likely in the reasonably foreseeable future without supplying any evidence as to why this was the case, or failing to demonstrate that he or she did not pose a flight risk or a danger to the community.⁶⁶ Some would go a step further by arguing that removal was not likely because travel documents had not been issued by the relevant consulate or embassy, and there was no certainty as to when they might be issued in the future – but in these cases the government was typically able to rebut the argument simply by showing that they were

also rests with the state in the context of civil mental health detention. See *Foucha v Louisiana* (1992) 540 US 71.

⁶⁰ KJ Kimball, ‘A Right to be Heard: Non-citizens’ Due Process Right to In-Person Hearings to Justify their Detentions prior to Removal’ (2009) 5 *Stanford Journal of Civil Rights and Civil Liberties* 159, 186, fn 167.

⁶¹ M Holper, ‘The Beast of Burden in Immigration Bond Hearings’ (2016) 67 *Case Western Reserve Law Review* 75.

⁶² *ibid* 105.

⁶³ Moreover, McGinty Borg writes about the injustice of the fact that even in administrative immigration proceedings, the detainee ‘incorrectly’ bears the burden of proving that he or she is not dangerous. See M McGinty Borg, ‘Freedom from the Deprivation of Liberty: The Supreme Court Imposes Limitations on Indefinite Detention of Criminal Aliens – *Zadvydas v Davis*’ (2003) *William Mitchell Law Review* 951, 964, fn 96.

⁶⁴ See, eg *Minto v Decker* (2015 SDNY) 108 F Supp 3d 189; *Bugianishvili v McConnell* 2015 WL 3903460 (SDNY); *Monestime v Reilly* (2010 SDNY) 704 F Supp 2d 453; *Farez-Espinoza v Chertoff* (2009 SDNY) 600 F Supp 2d 488.

⁶⁵ See, eg *Worrell v Ashcroft* (2002 WDNY) 207 F Supp 2d 61; *Pan v Ashcroft* 2005 WL 1398601 (WDNY).

⁶⁶ *Dogra v Immigration Customs Enforcement* 2009 WL 2878459 (WDNY); *Adams v Holder* 2012 WL 1999488 (WDNY); *Toure v Holder* 2013 WL 1352288 (WDNY); *Adegbite v Holder* 2013 WL 1945734 (WDNY); *Haidara v Mule* 2008 WL 2483281 (WDNY); *Singh v Holmes* 2004 WL 2280366 (WDNY); *Powell* (n 6).

actively attempting to obtain the documents.⁶⁷ In one case, a detainee argued that removal was unlikely because, at the time, the DHS had temporarily halted removals to Haiti (the destination state for the petitioner) for some time, and had only recently resumed the removal of certain non-citizens (of which the petitioner was not one).⁶⁸ Despite the government arguing only that it anticipated removal in the foreseeable future following this resumption, the court held that the petitioner had not shown ‘good reason to believe’ that removal was not imminent.⁶⁹

In rare cases, the court finds that the government has not acted diligently. For example, in *Scarlett*, the WDNY court remarked that removal of the detained individual had been delayed due to the state’s attempts to ‘forum shop’ the underlying immigration proceedings in which the detainee was challenging his removal.⁷⁰ In most cases, regular communications with foreign consulates or embassies, coupled with previous successful removals, resulted in a finding that the state acted diligently and that removal in the foreseeable future is likely.⁷¹ These cases indicate that the quality of response time by foreign consulates is not as important as state efforts to communicate with them in securing travel documents. However, in one case, the court remarked that ‘the Government cannot exploit another nation’s timetables to justify an indefinite detention’.⁷²

In some cases, the courts indicated that as the period of detention under section 241(a) INA increases, what is considered as the reasonably foreseeable future will decrease in time. Judges making this statement relied on the part of *Zadvydas*, which stated that:

After [the reasonable period of six months], once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to shrink.⁷³

This was the case in *Ramos*,⁷⁴ where the detainee had been detained for nearly two years at the time of the hearing, and in *Dogra*,⁷⁵ where detention had lasted

⁶⁷ See, eg *Tejeda-Estrella* (n 56); *Gonther v Napolitano* 2013 WL 1569311 (WDNY).

⁶⁸ *Gabriel v Cleary* 2009 WL 2413674 (WDNY) 2.

⁶⁹ *ibid* 4. This case was actually premature in terms of a *Zadvydas* claim, but the court considered it anyway.

⁷⁰ *Scarlett v US Department of Homeland Security Bureau of ICE* (2009 WDNY) 632 F Supp 2d 214, 223.

⁷¹ See, eg *Toure* (n 66) 5; *Williams v Holder* 2013 WL 1352306 (WDNY) 5; *Jones v Holder* 2013 WL 2898069 (WDNY) 4; *McKoy v Holder* 2013 WL 5211500 (WDNY) 5; *Juma* (n 55) 4.

⁷² *Muhury v Tryon* 2011 WL 6016606 (WDNY) 3.

⁷³ *Zadvydas* (n 19) 701.

⁷⁴ *Ramos v Chertoff* 2009 WL 1563894 (WDNY) 6.

⁷⁵ *Dogra* (n 66) 4. See also *Jama v Napolitano* 2013 WL 5503965 (WDNY) 4.

1.3 years. However, the detainees were not released in either of those cases, largely due to the court concluding that their behaviour warranted their continued detention, despite its length to date.

With regard to travel documents, the case law is rife with negative statements by the court to the effect that, at the time of the hearing, the embassy or consulate had not yet indicated that travel documents were not forthcoming.⁷⁶ For example, in one case, the court held that the detainee had failed to sustain his burden of proof because ‘Antigua has not refused to issue petitioner travel documents, or has ambiguously answered when it would produce such documents, or failed to respond to ICE [US Immigration and Customs Enforcement] inquiries’.⁷⁷ This effectively requires the petitioner to prove a negative in order to sustain the burden of proof. The inappropriateness of this is not completely lost on the courts. In *Gumbs*⁷⁸ and *Azad*,⁷⁹ both petitioners were granted some form of relief due in part to the courts’ recognition that

the negative statement that the Consulate has not given ICE any reason to believe that a travel document *will not* issue is not equivalent to a statement that the Consulate has given ICE reason to believe that a travel document *will issue*.⁸⁰

In Mr Gumbs’s case, the court gave the government 60 days to try to remove him, after which release under supervision must follow. Mr Azad was ordered to be released within 14 days. In one case, the court hailed the fact that travel documents would be forthcoming after the detainee’s challenge to removal was resolved as being ‘critical to the analysis of reasonably foreseeable removal’.⁸¹ That, coupled with the fact that the court deemed it likely that the detainee’s removal challenge would fail and that his detention was not at risk of becoming indefinite, apparently justified a conclusion that his detention was lawful, despite his having been detained for a year and a half by the time of the habeas hearing.

C. European Union

In contrast to the UK and USA, where the likelihood of removal forms a substantial part of the case law, this aspect of the Return Directive has only been considered in one case before the CJEU. Article 15(1) and (5) of the Return Directive permit detention only ‘as long as removal arrangements are in progress and executed with due diligence’. Article 15(4) also requires release where it

⁷⁶ See, eg *Duarte-Ceri v Napolitano* 2009 WL 1806694 (WDNY); *Ramos* (n 74).

⁷⁷ *Roberts v Bureau of Immigration and Customs Enforcement* 2007 WL 781925 (WDNY) 2. See also *Haidara* (n 66) 3.

⁷⁸ *Gumbs* (n 9).

⁷⁹ *Azad* (n 5).

⁸⁰ *ibid* 3 (emphasis in original); *Gumbs* (n 9), citing *Azad* (n 5) 3.

⁸¹ *Dover v Holder* 2011 WL 4054952 (WDNY) 4. See also *Adams* (n 66) 4.

appears that there is no reasonable prospect of removal. As discussed in chapter four, in *Kadzoev*, the Bulgarian authorities had been trying for two years to return Mr Kadzoev to Russia. Faced with the circumstances of the case, the CJEU clarified that it must be apparent to the detaining authorities that a ‘real prospect exists that the removal can be carried out successfully’ in light of the duration of detention to date.⁸² It went on further to hold that such a prospect does not exist where it is apparent that it is unlikely that the detainee will be successfully admitted to a third country.⁸³

Thus, for the CJEU, the diligence of the state in seeking removal did not impact its decision about the unreasonable prospect of removal. This means that diligent state action will not, in itself, justify detention if the target third country is not going to admit the individual, even where the maximum period has not yet expired. In addition, the CJEU specified that: ‘where the maximum duration of detention ... has been reached, the question whether there is no longer a “reasonable prospect of removal” ... does not arise. In such a case the person concerned must in any event be released immediately.’⁸⁴

V. ASSESSING RISK

Part of a state’s decision whether to detain inevitably involves a qualitative or quantitative assessment of risk. This risk comes in two forms: risk to the public through, for example, the commission of crime; and a risk of flight – that is, the concern that the state will be unable to remove non-nationals considered as undesirable from the territory because they cannot be located. The assessment may be confined to determining whether the individual has sufficient ties to the community to reduce the risk of flight, or it may consist of an evaluation of whether their criminal history would make them a danger to the community if they were to be granted bail or bond. In the UK and USA, we see both considerations in the cases, while the Return Directive, remarkably, does not include criminal history as a factor justifying detention.

Risk of flight and risk of dangerousness are often considered together by scholars and sometimes even within the relevant statutory provisions setting out what factors are suitable for consideration in determinations of either risk.⁸⁵ Though there may be some overlap in indicators, evaluation of flight risk should be separated from evaluation of whether an individual would pose a danger to the community if he or she is released.⁸⁶ The literature seems to be more

⁸² *Kadzoev* (n 15) para 65.

⁸³ *ibid* para 66.

⁸⁴ *ibid* para 60.

⁸⁵ LP Gouldin, ‘Disentangling Flight Risk from Dangerousness’ (2016) *Brigham Young University Law Review* 837, 865.

⁸⁶ *ibid* 837.

preoccupied with dangerousness, and the case law from both the USA and the UK demonstrates that judicial review is focused more on dangerousness as well. Thus, the ensuing discussion will focus on dangerousness. However, it is important to note, on the subject of risk of flight, that scholars have argued that modern technological advances, such as electronic tagging, have rendered detention based on flight risk alone largely unnecessary.⁸⁷ Moreover, Noferi argues that risk of flight, at least in the USA, has never been as high as it has been made out to be and that the issue is rather that the public has a low tolerance for crimes committed following flight from authorities.⁸⁸

Much scholarship laments the pitfalls of attempting to accurately predict risk of criminal behaviour.⁸⁹ For example, there is general debate surrounding the question whether the methods used to determine if a person is dangerous are reliable. There are three main categories of indicators of future dangerousness: past conduct of the individual (including past criminal behaviour); past conduct of other individuals in similar circumstances; and an evaluation based on experts.⁹⁰ Some additionally consider that certain immutable characteristics, such as age, gender and race, should be used as indicators.⁹¹ Slobogin argues that race is an illegitimate basis for prediction.⁹² This should perhaps be expanded to apply to nationality – another fairly immutable characteristic that is relevant to determinations of dangerousness in immigration detention. One scholar argues, in view of the risk of bias associated with immutable characteristics, that the only reliable indicator of future dangerousness is past criminal behaviour.⁹³ Indeed, this seems to play a large role in the UK, and even more so in the US courts under review here. However, this is not a view held by all, especially when the past criminal behaviour resulted in a minor conviction.⁹⁴ More broadly, it has been suggested that immigration detention is ‘all about prediction’ and that, because no one can actually predict the future, decision makers either fall back

⁸⁷ M Noferi, ‘Mandatory Immigration Detention for US Crimes: The Noncitizen Presumption of Dangerousness’ in MJ Guia et al, *Immigration Detention, Risk and Human Rights* (Springer, 2016) 227 et seq; LP Gouldin, ‘Defining Flight Risk’ (2018) 85 *University of Chicago Law Review* 677, 727.

⁸⁸ Noferi (ibid) 228.

⁸⁹ See, eg LI Appleman, ‘Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment’ (2012) 69 *Washington and Lee Law Review* 1297, 1336–49; K Auerhahn, ‘Selective Incapacitation and the Problem of Prediction’ (1999) 27 *Criminology* 703; DJ Baker, ‘Punishment without a Crime: Is Preventive Detention Reconcilable with Justice?’ (2009) 34 *Australian Journal of Legal Philosophy* 120; A Das, ‘Immigration Detention: Information Gaps and Barriers to Reform’ (2013) 80 *University of Chicago Law Review* 137; LS Pershan, ‘Selective Incapacitation and the Justifications for Imprisonment’ (1984) 12 *New York University Review of Law and Social Change* 385.

⁹⁰ S Dimock, ‘Criminalizing Dangerousness: How to Preventively Detain Dangerous Offenders’ (2015) 9 *Criminal Law and Philosophy* 537, 556.

⁹¹ J Freeman and C Slobogin, *Proving the Unprovable: The Role of Law, Science, and Speculation in Adjudicating Culpability and Dangerousness* (Oxford University Press, 2006) 112.

⁹² *ibid.*

⁹³ J Monahan, ‘A Jurisprudence of Risk Assessment: Forecasting Harm among Prisoners, Predators and Patients’ (2006) 92 *Virginia Law Review* 391, 428.

⁹⁴ Noferi (n 87) 233.

on stereotypes or they err on the side of caution to avoid public condemnation in the event that the released individual commits a crime.⁹⁵

Exacerbating the disagreement over which indicators are reliable and how dangerousness is best measured is the confusion surrounding what is meant by 'dangerous'. Parry argues that, over time, the definition of 'dangerousness' has become increasingly inclusive so that there are no straightforward boundaries.⁹⁶ As a result, 'dangerousness' includes such a long list of antisocial or criminal acts that its meaning has become arbitrary.⁹⁷ In this vein, it has been suggested that this has resulted in a situation where the state has too much power.⁹⁸ In addition, the meaning of dangerousness changes depending on the context. For example, in relation to capital punishment in the USA, dangerousness indicates 'propensity to commit serious bodily injury to another', while in civil detention, such as mental health detention, it can refer to whether the person is 'likely to do substantial physical or emotional injury on another'.⁹⁹

Another problematic point is a lack of clarity regarding whether the decision maker is assessing an individual's *present* danger or whether *future* danger is being evaluated. Dimock argues that preventive detention (which includes immigration detention) can only be ordered where an individual poses a present risk of danger.¹⁰⁰ She suggests that this is necessary because it is only possible to accurately predict future dangerousness based on an assessment of their present circumstances.¹⁰¹ This has profound implications for the case law evaluated in this chapter, especially for cases in the NY federal courts, where it appears that judges are using past criminal behaviour as evidence of future risk, regardless of severity or when the conduct occurred.

A final complicating factor is disagreement over what standard of proof is required to demonstrate dangerousness. Within the legal context generally, different standards of proof may be applicable depending on the type of liberty deprivation at issue.¹⁰² Slobogin suggests that the unreliability of predicting future dangerousness means that no one's liberty should be deprived 'unless there is a high degree of certainty that the person will offend in the near future'¹⁰³ and that the standard of proof should be heightened as the length of the liberty deprivation increases.¹⁰⁴ He also argues that any civil commitment

⁹⁵ *ibid* 233, citing D Cole, 'Out of the Shadows: Preventive Detention, Suspected Terrorists and War' (2009) *California Law Review* 693, 696.

⁹⁶ JW Parry, *Mental Disability, Violence, and Future Dangerousness: Myths Behind the Presumption of Guilt* (Rowman & Littlefield, 2013) 98.

⁹⁷ *ibid* 98.

⁹⁸ C Slobogin, 'A Jurisprudence of Dangerousness' (2003) 98 *Northwestern University Law Review* 1, 18.

⁹⁹ Freeman and Slobogin (n 91) 100 and fn 6–7.

¹⁰⁰ Dimock (n 90) 544.

¹⁰¹ *ibid* 544.

¹⁰² Slobogin (n 98) 50.

¹⁰³ *ibid* 6, suggesting further that it is impossible to achieve this standard.

¹⁰⁴ *ibid*.

must involve a proportionality evaluation that includes three components. The first is that the length of detention must be reasonably related to the harm it is aimed at preventing. The second is that the type of detention employed must be reasonably related to the harm feared. Finally, there must be a periodic review of detention if it is ordered.¹⁰⁵

Excluding the EU, which does not include future dangerousness as a justification for detention under the Return Directive, we see that the standards and proportionality analysis suggested above are rarely a part of detention review in the NY courts, though they feature in some form in the Administrative Court. Judgments from the latter suggest that, though the language may not be exactly the same as above, for the most part, the judges are considering the nature and timing of the detainees' past criminal behaviour in their assessment of whether detention is appropriate.

Regardless of whether you agree that risk of future behaviour, criminal or otherwise, is a proper justification for detention, it is clear that the courts in each of the three jurisdictions under examination consider risk in one form or another. Broadly, the determination of whether a detainee poses a risk of absconding or a danger to the community (eg through reoffending) centres on issues such as criminal history, family ties and identity documentation. The UK and US courts engage in a balancing test, though, on the whole, the Administrative Court considers the circumstances surrounding previous convictions or attempts to flee, rather than making a judgment based on the presence or absence of a criminal history or past flight, which is usually the case in the USA. The CJEU's exposure to these issues relates more to defining what risk means and how it can be legitimately evaluated by the Member States. Risk is specifically connected to whether or not detention can be extended beyond the initial six-month period under Article 15(6) of the Return Directive.

A. United Kingdom

Chapter three illustrated the way in which a computer algorithm is used in the USA to predict risk of future criminality at the point of the initial decision to detain. Interestingly, the UK analyses risk using a similar method, the Offender Assessment System (OASys), but in contrast to the USA, OASys is only used in connection with criminal offenders and is not meant to function as the main risk assessment tool for immigration authorities. The role of OASys reports in assessing risk in the context of immigration detention was addressed by the Administrative Court in *JM*, where the Court stated that:

[the Secretary of State] has to have careful regard to the OASys assessments, in accordance with her policy. Nonetheless she was required to bring her own judgment

¹⁰⁵ *ibid* 13–15.

to bear upon the facts in any particular case. The OASys is an assessment tool, designed for use by the decision maker, along with other information. It is necessarily mechanistic. It is *not a substitute for an exercise of judgment by the decision maker*, whether that is a sentencing judge or an immigration official.¹⁰⁶

A High Court judge confirmed this perspective when I asked him about the role that such reports play in assessing risk. He noted that they are one factor among many others, including whether and to what extent completing a criminal sentence may have positively affected the individual in question, and that individual's feelings about his or her experience in prison.¹⁰⁷ He also indicated that the weight of an OASys report will decrease the older it is.¹⁰⁸

Chapter 55 of the EIG, discussed in chapter three above, states that 'public protection is a key consideration underpinning ... detention policy'.¹⁰⁹ It requires initial detention decision makers (ie immigration officials) to consider whether the presumption in favour of bail outweighs the risk of harm to the public and instructs them to look at all relevant factors. It also stipulates that convictions for serious offences are 'strongly indicative of the greatest risk of harm to the public and a risk of absconding', and that therefore the 'high risk of public harm carries particularly substantial weight when assessing if continuing detention is reasonably necessary and proportionate'.¹¹⁰

While this may be going on at the administrative level, there is no explicit evidence that the Administrative Court is undertaking the same review. However, there is evidence that the Court considers any risk of reoffending or dangerousness in light of 'the breach of the principle of liberty', and in doing so considers a range of relevant factors.¹¹¹ Indeed, I observed arguments at the Administrative Court where the judge lamented the failure of the Immigration Act to properly account for the potential of an individual's risk level to change over time, and admonished the Secretary of State for basing its risk assessment on a nine-year-old determination by another decision maker that the individual presented a danger.¹¹² Beyond that, the case law provides several examples of the judges balancing the severity of the offence with when it occurred. In doing so, they remind the parties that no single factor operates as a 'trump card'.¹¹³ In the case of *H*, the Court discussed the likelihood of absconding. It felt that, if the state managed to prove the existence of such a

¹⁰⁶ *JM* (n 21) 101 (emphasis added).

¹⁰⁷ Anonymous Interview, August 2017.

¹⁰⁸ *ibid.*

¹⁰⁹ UK Visas and Immigration, 'Enforcement Instructions and Guidance', ch 55, s 55.3.A.

¹¹⁰ *ibid.*

¹¹¹ *R (Polanco) v SSHD* [2009] EWHC 826 (Admin) 20.

¹¹² *G* (n 8). Note that the person was not detained, but was instead placed under house arrest (despite being wheelchair bound).

¹¹³ *R (Egal) v SSHD* [2009] EWHC 2939 (Admin) 43.

risk, it ‘should not be overstated’ because ‘it could become a trump card that could

carr[y] the day for the Secretary of State in every case where such a risk was made out regardless of all other considerations, not least the length of the period of detention. That would be a wholly unacceptable outcome where human liberty is at stake.¹¹⁴

Therefore, a delicate balance must be struck between whether removal is likely and whether a risk is present. This balance must be based on objective facts, rather than speculation.¹¹⁵ Many of the judgments cite the Court of Appeal in the case of *A* in support of this balancing exercise, where Toulson LJ held that:

Be that as it may, a pertinent question in this case is whether, and to what extent, a risk of the individual absconding and a risk of him reoffending may be taken into account in considering what may be a reasonable time for attempting to bring about his removal or departure. The way I would put it is that there must be a sufficient prospect of the Home Secretary being able to achieve that purpose to warrant the detention or the continued detention of the individual, having regard to all the circumstances including the risk of absconding and the risk of danger to the public if he were at liberty.¹¹⁶

Indeed, in *HY*, the Court considered Toulson’s judgment and concluded that:

as regards the risk of offending if released, it is noteworthy that the court is enjoined always to consider the strength of its relevance by reference to [the] nature of the offences the claimant is likely to commit and the likelihood of the risk materialising. The more serious the type of offence the greater will be its relevance.¹¹⁷

In *Chabboub*, the court acknowledged that the claimant’s risk of reoffending was so high as to be almost ‘inevitable’.¹¹⁸ However, the court went on to say that:

It is true that the scale of offending ... does not involve serious offences of violence to the person, nor does it involve, for example, sexual offences against women or children. Although the type of offending is not serious, there is a large amount of offending, and it is both the extent and the seriousness of offending which needs [*sic*] to be considered.¹¹⁹

However, the court tipped the balance in favour of continued detention, after determining that both risks were too high at the time of the hearing.¹²⁰

The determination of whether a risk of absconding is present in a given case is undertaken in a similar manner. For example, in *Boukhalfa*, though the individual was an illegal entrant and had previously evaded the authorities, the

¹¹⁴ *R (H) v SSHD* [2005] EWHC 1702 (Admin) 21, citing Dyson LJ in *I* (n 3) 53.

¹¹⁵ *Kumar* (n 28) 20.

¹¹⁶ *R (A) v SSHD* [2007] EWCA Civ 804, 45, cited by, eg *R (YG) v SSHD* [2008] EWHC 1735 (Admin) 14; *Asekun* (n 21) 14; *Abdi* (n 35) 41.

¹¹⁷ *HY* (n 30) 24.

¹¹⁸ *Chabboub* (n 48) 33.

¹¹⁹ *ibid.*

¹²⁰ *ibid.* See also *MM (Somalia)* (n 34) 46.

court said the risk that he would abscond in the near future was diluted because he had been granted bail after he was arrested and did not abscond, and because he very much wanted to return to Algeria.¹²¹ In the case of *A*, the court ordered release because removal was not likely within a reasonable time, but it noted that, had there been evidence that removal was likely, the individual's serious criminal offence and risk of absconding would have tipped the balance in favour of continued detention.¹²² In *Qaderi*, the court first acknowledged evidence of a lack of due diligence by the state, but then considered that the detainee's conviction for using false documents in an application for asylum indicated that he would present a risk of absconding. Ultimately, the claimant was unsuccessful.¹²³ In contrast, in the case of *N*, the Court determined that the claimant presented a risk to public property because of prior convictions for theft and burglary, among other offences against property, but felt that the risk could be minimised with appropriate bail conditions.¹²⁴ This decision is interesting in light of the fact that the claimant had previously been released on criminal bail and had returned to crime immediately.¹²⁵

The Administrative Court has determined that a refusal to return voluntarily presents a risk of absconding sufficient to justify continued detention, such as in *MMH*.¹²⁶ Similarly, bail conditions were deemed inadequate in the case of *A*, where the Court stated that

The claimant evinced then and evinces now a single objective, namely to stay in this country by hook or by crook. If granted bail I am confident that he will make every effort to remain here, including, if he believes it necessary to achieve that objective, absconding, and removing or disabling any electronic device designed to assist in locating him.¹²⁷

Finally, it is important to note that, in examining risk, the Administrative Court considers evidence anew, rather than limiting itself to determining whether the state acted reasonably in continuing to detain individuals. This is consistent with what the cases reveal about the role of the Administrative Court in judicial review, which will be discussed in chapter seven.

B. United States

In the Supreme Court's discussion of flight risk and danger in *Zadvydas*, Justice Breyer incorporated, by reference to judgments in the pre-trial detention

¹²¹ *Boukhalfa* (n 27) 24.

¹²² *R (A) v SSHD* [2008] EWHC 142 (Admin) 17.

¹²³ *Qaderi* (n 5) 37.

¹²⁴ *R (N) v SSHD* [2014] EWHC 1593 (Admin) 46.

¹²⁵ *ibid* 17.

¹²⁶ *R (MMH) v SSHD* [2007] EWHC 2134 (Admin) 40.

¹²⁷ *A* (n 35) 41.

context, a number of standards in the Court's habeas corpus review of the Fifth Circuit's decision to authorise Mr Zadvydas's continued detention. The cases referred to required a showing by the detaining authority of a 'sufficiently strong special justification' to permit indefinite civil detention.¹²⁸ The Court considered the government's stated purpose of immigration detention – to ensure the appearance of individuals at immigration proceedings and to prevent danger to the community – and concluded that, where removal is a 'remote possibility at best', flight risk as a justification is 'weak or non-existent'.¹²⁹ Preventive detention justified by dangerousness, on the other hand, is only traditionally permitted in circumstances where the individual is 'specially dangerous' and where strong procedural protections apply.¹³⁰ The Court cited three criminal law cases concerning preventive detention which reinforced this notion, including one which required 'proof of dangerousness by clear and convincing evidence', and another requiring a special circumstance, such as mental illness, in addition to the dangerousness claim.¹³¹ The immigration regulations adopted in order to implement the decision in *Zadvydas* state that once a non-citizen demonstrates that there is no significant likelihood of removal in the reasonably foreseeable future, and there are no special circumstances justifying continued detention, release must follow.¹³² The term 'special circumstances' is not defined, and it is unclear whether this represents an assessment of danger or flight risk.

Some clarity on the types of risk of concern to the state can be found within the immigration regulations pertaining to initial decisions to detain. They state that the immigration officer can order release if he is satisfied that 'such release would not pose a danger to property or persons and that the alien is likely to appear for any future proceeding'.¹³³ Confusingly, however, the equivalent standard in relation to bond hearings before an immigration judge requires that detainees 'demonstrate, by clear and convincing evidence, that release would not pose a danger to the safety of other persons or of property'.¹³⁴ Absconding does not appear to be a concern.

Looking at what has happened to these standards in practice in the district courts, one sees quite quickly that the more strict USSC approach to risk has not been respected. In fact, the issue of risk is seldom addressed because, especially in the WDNY, petitioners usually fail to sustain their burden of proving that removal in the foreseeable future is unlikely.¹³⁵ Moreover, whether the petitioner

¹²⁸ *Zadvydas* (n 19) 690.

¹²⁹ *ibid.*

¹³⁰ *ibid* 691.

¹³¹ *ibid.*, citing *Hendricks*, *Salerno* and *Foucha*.

¹³² 8 CFR 241.13.

¹³³ *ibid* 1236.1(c)(8).

¹³⁴ *ibid* 1236.1(c)(3).

¹³⁵ An example of where this burden was satisfied is *Rajigah v Conway* (EDNY 2003) 268 F Supp 2d 159, 166.

is a flight risk is often not considered because they have already been deemed a danger.

Recall that ICE uses an automated risk assessment tool to initially determine whether detention is permissible.¹³⁶ Problems identified by scholars indicate that the algorithm disproportionately results in the detention of individuals.¹³⁷ This is important because in habeas corpus proceedings the courts seemingly rely on determinations of risk by the immigration authorities, especially where the detainee is unrepresented and fails to present opposing evidence. Perhaps it is because of their reliance on this method of risk calculation that the courts generally do not look at the evidence in a nuanced manner.¹³⁸ Though they may occasionally indicate that a crime was ‘violent’ or ‘aggravated’, or that there has been a prior flight, there is generally no consideration of whether circumstances may have changed with time or, indeed, of the circumstances surrounding the crime at the time. One scholar has argued that, to avoid a due process violation, the right to liberty can only be limited through an individualised assessment of need.¹³⁹ Though it is arguable that the district courts are technically doing this in assessing risk with reference to detainees’ criminal records, the failure to engage fully with the relevant facts, such as the severity of the crime and its temporality, would suggest that their analysis falls short of satisfying due process.¹⁴⁰ Moreover, though the district courts weigh risk against likelihood of removal, in most cases where risk is assessed, the court agrees with the state’s determination that there is a risk that the person would flee or pose a danger to the community if released. The very fact of a criminal history plays a large role, though there is often not a lot of discussion. Usually, a finding of risk is based on whether the detainee committed an aggravated felony or has fled previously in the criminal or immigration context.¹⁴¹

For example, in *Pan*, after determining that the detainee failed to sustain his burden of proof, the WDNY court went on to hold that the state was nevertheless correct in detaining him because of the ‘nature and seriousness of

¹³⁶ See ch 3, s V.B above.

¹³⁷ R Koulisch, ‘Immigration Detention in the Risk Classification Assessment Era’ (2016) 16 *Connecticut Public Interest Law Journal* 1, 19: ‘a second factor that likely contributed to high detention rates in the Baltimore sample is that the RCA assessed the vast majority of these discretionary cases as being medium or high for at least one risk factor – while RCA did not recommend release if either risk factor was medium or high’.

¹³⁸ An important caveat here is that, given how few cases considered risk in the USA, my conclusions cannot be said to be representative of overall practice.

¹³⁹ Anonymous, ‘Making Outcasts Out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention’ (2004) 17 *Harvard Law Review* 2731, 2739.

¹⁴⁰ Senate Bill 36, the ‘Keep Our Communities Safe Act of 2017’, 115th Congress (2017–2018), was introduced by Republican Senator James Inhofe in January 2017. Among other relevant provisions, it seeks in s 4(2) to ensure that non-citizens who qualified for automatic detention under INA, s 236(c) are detained beyond the 90-day removal period under s 241 without possibility for release, even where detention is prolonged. It is unclear whether this Bill will pass, but, in any case, this seems to be occurring in practice simply as a result of a prior criminal record.

¹⁴¹ *Dover* (n 81) 4.

[his] federal criminal convictions for racketeering and extortion'.¹⁴² However, there was no real discussion of the circumstances of these crimes or the risk, and the detainee appeared not to offer any evidence to the contrary. This is a common occurrence. The state need only demonstrate that it acted reasonably in detaining based on risk.¹⁴³ In *Dover*, the court listed several factors justifying continued detention, including the fact that the individual had fled before and is an aggravated felon.¹⁴⁴

In *Fofana*, the court did not believe that the detainee presented a risk of absconding, but concluded that the state was reasonable to determine that he posed a danger to the community because of a previous sex offence.¹⁴⁵ Again, no exploration of the severity of the offence or consideration of whether it occurred sufficiently long ago to indicate that risk might be low was undertaken by the court. In *Miller*, a lack of family ties was enough to consider the detainee a flight risk,¹⁴⁶ and in *Adler*, the very fact that the detainee was liable to deportation seemed to be enough to convince the court that he presented a risk of absconding.¹⁴⁷

On the more positive side of the scale, in *Azad*, the court ordered release after finding that the detainee posed no risk of danger because he did not have a criminal record, nor was he deemed a risk of absconding because he had never attempted to conceal his identity or address upon being released from prison.¹⁴⁸ The *D'Alessandro* case indicates that, though it does not seem to occur very often, the federal district courts are willing to review the government's determination that continued detention is justified because of a risk of flight or dangerousness.¹⁴⁹ In that case, the WDNY judge concluded that such a finding was 'patently unreasonably in light of the evidence in the record'¹⁵⁰ and that the Supreme Court has traditionally required 'the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger'.¹⁵¹ This is the only case that based a finding of non-dangerousness on this rationale.

Some legal theory suggests that when judges are trying to choose between two possible rulings, they consider what consequences each would have and how acceptable those consequences are in light of considerations such as common sense, public policy, convenience and expediency.¹⁵² In the immigration context,

¹⁴² *Pan* (n 65) 6.

¹⁴³ See, eg *St Louis v Heron* 2011 WL 2746787 (WDNY) 3; *Fofana v Holder* (2013 WDNY) 947 F Supp 2d 329, 334.

¹⁴⁴ *Dover* (n 81) 3.

¹⁴⁵ *Fofana* (n 143) 334. See also *Iturralde-Manosalva v Reno* 2001 WL 1398689 (SDNY) 4.

¹⁴⁶ *Miller v Shanahan* 2010 WL 481002 (SDNY) 4.

¹⁴⁷ *Adler v US Department of Homeland Security* 2009 WL 3029328 (SDNY) 2.

¹⁴⁸ *Azad* (n 5) 3.

¹⁴⁹ *D'Alessandro v Mukasey* (WDNY 2009) 628 F Supp 2d 368.

¹⁵⁰ *ibid* 377.

¹⁵¹ *ibid* 380, citing *Zadvydys* (n 19) 690–91.

¹⁵² N MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press, 1994) 101–19 and ch 6.

one former judge expressly remarked that ‘a judge must have the common sense and humility ... to consider the rights of the next victim of a violent thug pleading his human rights’.¹⁵³ This approach may explain the way in which the Administrative Court considers risk in degrees, by reference to the nature and timing of the incident or crime. That is, the more severe a prior conviction, the more drastic the potential consequences. Consequences framed in terms of convenience and expediency may, in contrast, over-inform the conclusions of the US district courts, which seem to assess risk quickly and overwhelmingly in favour of state determinations with a view towards ensuring that removal occurs.

C. European Union

With regard to the CJEU, the judgment in *Mahdi* addresses the relationship between a lack of identification documents and the risk of absconding. The referring court in Bulgaria asked the CJEU whether the Directive precludes national law permitting an extension of detention beyond the initial six months solely based on the fact that the detainee lacks identification documents, and is therefore considered to present a risk of absconding.

Though an initial decision to detain can be based on a risk of absconding according to Article 15(1) of the Return Directive, the CJEU emphasised that, when it comes to extending detention beyond the initial six-month period, Article 15(6) contemplates only two circumstances: (i) where the detainee is not co-operating; and (ii) where there are delays in obtaining requisite documents from the third country to where the detainee will be removed.¹⁵⁴ Article 15(6) does not permit a lack of identification documents on its own to serve as a basis for extending detention, nor does it repeat the language in Article 15(1) regarding absconding as a justification for detention. However, the Court held that Article 15(6) must be read alongside Article 15(4), which requires the cessation of detention when there is no longer a reasonable prospect of removal or where the conditions in Article 15(1) no longer exist.¹⁵⁵ This means that any decision to extend detention beyond six months must include a re-examination of the initial reasons for detention, including whether the person poses a risk of absconding.

The Directive defines ‘risk of absconding’ in Article 3(7), which makes it clear that the determination of risk must be based on an individual, objective assessment of the facts.¹⁵⁶ While it is permissible to consider a lack of identity documents as one factor in the determination of whether there is a risk of

¹⁵³ J Hanratty RD, *The Making of an Immigration Judge* (Quartet, 2016) 159.

¹⁵⁴ *Mahdi* (n 15) para 68.

¹⁵⁵ *ibid* para 59.

¹⁵⁶ *ibid* para 70.

absconding, a lack of documents on its own cannot serve as a basis for extending detention.¹⁵⁷ However, in *Md Sagor*, the Court held that a risk of absconding can justify a Member State's decision not to grant a period of voluntary departure under Article 7(4) of the Directive.¹⁵⁸

This is an interesting outcome because Article 15(6) does not, on its face, require Member States to re-evaluate the circumstances of detention under Article 15(1) when deciding whether to extend detention beyond the initial six-month period. It refers only to two specific grounds: lack of co-operation and delays in obtaining documentation. This means, as Mitsilegas explains, that Member States cannot extend detention automatically because of a presumption of risk¹⁵⁹ or a prior determination of risk. It seems that the CJEU has gone beyond the requirements of the Directive to require a fuller examination of whether an extension is appropriate. This is consequently a more rights-protecting approach by the Court.

In *Kadzoev*, the CJEU considered whether the maximum detention period could be exceeded in cases where the detainee is aggressive or where he or she does not have identification documents and may therefore flee. This is discussed more fully in chapter six below, in relation to the impact of a maximum detention period. For the purposes of this section, it is important to stress that, rather than attempt to define these terms, the CJEU reiterated that the maximum period of detention is absolute and cannot be exceeded even where the detainee may pose a risk of fleeing. In so doing, the CJEU has limited the circumstances under which a Member State can detain third-country nationals based on risk of absconding.¹⁶⁰

The Court addresses the impact of criminal activity only in relation to a Category C case on voluntary return and the concept of risk to public policy. *Zh and O* considers whether the fact that a third-country national is suspected of committing, rather than has been convicted of, a criminal offence can be considered a risk to public policy in the context of determining whether to grant a period of voluntary return (and for how long) under Article 7(4) of the Directive.¹⁶¹ The Court emphasised that voluntary return should only be withheld in limited circumstances because the aim of Article 7 is to ensure that the fundamental rights of third-country nationals subject to return are protected. Any derogations from rights-protecting provisions must be interpreted strictly.¹⁶² The Member State must be able to prove, in an individual case, that the third-country national actually poses a risk.¹⁶³ This means that the

¹⁵⁷ *ibid* paras 72–73.

¹⁵⁸ *Md Sagor* (n 16) para 41.

¹⁵⁹ V Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer, 2015) 102.

¹⁶⁰ *ibid* 99.

¹⁶¹ *Zh and O* (n 17).

¹⁶² *ibid* paras 42, 47.

¹⁶³ *ibid* para 46.

relevant authorities must ‘properly [take] into account the national’s personal conduct and the risk that that conduct poses to public policy’, having regard to the principle of proportionality.¹⁶⁴ Therefore, the fact that a third-country national is suspected, *or has been convicted*, of a criminal offence, on its own, is not enough to justify withholding return.¹⁶⁵ However, suspicion of a criminal offence may serve as a basis for a determination that the individual poses a risk to public policy alongside other relevant factors.¹⁶⁶ This is because, ultimately, it is for the states to determine the meaning of ‘public policy’ for the purpose of Article 7. Despite this statement, the CJEU goes on to discuss the meaning of ‘risk’ in the context of Article 7, which it says is to be distinguished from the concept of ‘risk of absconding’ and must be interpreted as requiring a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’.¹⁶⁷ This makes sense in light of the Court’s holding that findings of risk must be based on individual determinations. However, the Court appears to consider ‘risk’ in relation to public policy to require a heightened evidence base. Though this may seem strange within the context of the Return Directive, this standard is employed in the context of the EU Citizenship Directive, which addresses the validity of Member State decisions to restrict the free movement of EU nationals or expel them.¹⁶⁸

The CJEU recently decided a detention case in the context of asylum seekers in the Dublin III Regulation,¹⁶⁹ which might impact the Court’s future case law dealing with the risk of absconding.¹⁷⁰ The Dublin III Regulation defines ‘risk of absconding’ in the same way as the Return Directive.¹⁷¹ In *Al Chodor*,¹⁷² the Court held that Member States’ domestic laws must include objective criteria to assist in determinations of whether there is a risk of absconding, and that such law must be a provision of general application in order to ensure that detention is not arbitrary.¹⁷³ Thus, Poli argues that the same should be true within the

¹⁶⁴ *ibid* para 50.

¹⁶⁵ *ibid*.

¹⁶⁶ *ibid* para 52.

¹⁶⁷ *ibid* paras 56, 60.

¹⁶⁸ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2005] OJ L158/77, Art 27(2) and related case law.

¹⁶⁹ Regulation 604/2013/EU of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31.

¹⁷⁰ T Poli, ‘Immigration Detention and the Rule of Law: The ECJ’s First Ruling on Detaining Asylum-Seekers in the Dublin System’, *EU Law Analysis* (5 May 2017) <http://eulawanalysis.blogspot.co.uk/2017/05/immigration-detention-and-rule-of-law.html>.

¹⁷¹ EU Dublin III Regulation 604/2013 (n 169) Art 2(n).

¹⁷² Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salab Al Chodor and Others* [ECR TBC].

¹⁷³ *ibid* paras 39–46.

context of the Return Directive, which also requires the Member States to base their determinations on objective criteria.¹⁷⁴

Perhaps the most important thing to take away from the CJEU judgments on risk is the absence of risk of dangerousness from the assessment of whether detention is permitted. The Return Directive does not, in any provision, draw upon criminal history or risk of dangerousness as a justification for detention either at the initial part of the return process, or in relation to decisions to extend detention beyond the initial six-month period. This is remarkable especially considering how prominent a role criminal risk and dangerousness play in the US cases.

VI. DETAINEE NON-CO-OPERATION

An individual's behaviour during the removal process will impact the length of his or her detention. Behaviour becomes relevant in particular where detainees do not engage in voluntary return procedures, or where they do not communicate with relevant consulates or embassies in an attempt to obtain identity or travel documents. This evaluation is often part of, or in direct proximity to, the discussion of risk. Again, three outlooks can be observed. In the UK, the Administrative Court's assessment of the impact of non-co-operation on the detainee's judicial review application is part of an overall balance of factors much in the same way that it considers risk. Non-co-operation alone cannot act as a trump card which guarantees the legality of continued detention. In the USA, non-co-operation is a statutory basis for extending the 90-day removal period in section 241 INA. Thus, many cases reject detainees' habeas applications based on non-co-operation. Finally, in the EU, the CJEU has interpreted the Return Directive as requiring a causal relationship between the detainee's non-co-operation and any delays in effecting return.

A. United Kingdom

As with a risk of absconding, detainees' non-co-operation in the UK is considered one factor among many to be balanced in assessing whether detention is reasonable, though extensive non-co-operation will counsel against release.¹⁷⁵ As the court stated in *Mahfoud*: 'Any relevant factor may affect the length of time of detention that might be regarded as reasonable. Whilst in a specific case one or more factors may have especial weight, no factor is necessarily determinative. There is no "trump card"',¹⁷⁶ not even a refusal to take part in

¹⁷⁴ EU Return Directive 2008/115/EC, Art 3(7).

¹⁷⁵ *R (Yegorov) v SSHD* [2011] EWHC 3358 (Admin) 31; *R (Nouredine) v SSHD* [2012] EWHC 1707 (Admin) 85.

¹⁷⁶ *R (Mahfoud) v SSHD* [2010] EWHC 2057 (Admin) 14.

voluntary return.¹⁷⁷ A number of standards used by the Administrative Court were derived from the Court of Appeal and the Supreme Court.¹⁷⁸ The Supreme Court in *Lumba* provided three of the four standards relevant to this discussion. First, detainees who do not comply with the documentary process associated with removal, or who behave badly in detention and can be considered to be 'doing everything [they] can to hinder the deportation process, may reasonably be regarded as likely to abscond'.¹⁷⁹ Secondly, a refusal to participate in voluntary return cannot result in an automatic inference that the person poses a risk of absconding.¹⁸⁰ Thirdly, there must be a causal link between non-co-operation in return and the fact that removal is not possible.¹⁸¹ In addition, in the case of *I*, Lord Dyson held in the Court of Appeal that non-co-operation alone cannot make a period of unreasonable detention reasonable.¹⁸²

It is interesting to see how these principles have been applied and interpreted by the Administrative Court. In particular, the need for a causal link between non-co-operation and failure to effect removal runs through many of the cases. For example, in *Davies*, the Administrative Court looked to the Court of Appeal decision in *WL Congo*¹⁸³ for its conclusion that 'Non-co-operation has the greatest relevance to the legality of detention when it has a material bearing on removability'.¹⁸⁴ Though non-co-operation may not have a direct relationship to non-removability, it should still be considered a factor that can impact whether the person presents an abscond risk. However, the Court noted that under Article 5 ECHR, detention to compel co-operation is impermissible.¹⁸⁵ Therefore, the degree to which non-co-operation operates as a factor in determining the legality of detention will vary depending on the individual circumstances of the case. Still, 'the legal policy is clear: a person cannot complain about the legality of immigration detention if ... it is a product of his own making'.¹⁸⁶ To give no weight to co-operation would permit situations where detainees could avoid removal simply by refusing to take any part in the removal process. This, said the court, 'would frustrate the Parliamentary intention behind the removal provisions'.¹⁸⁷ However, in this particular case, the detainee was considered to be 'uncooperative in every sense' and no relief was awarded. Likewise, in *Smith*, the detainee's non-co-operation was given

¹⁷⁷ *Mjemer* (n 21) 23.

¹⁷⁸ See *Momoh* (n 46) for a list of these standards, beginning para 105.

¹⁷⁹ *Lumba* (WL) v SSHD [2011] UKSC 12, 123; this was also noted in *MH* (n 32) 68(iii).

¹⁸⁰ *Lumba* (ibid) 123.

¹⁸¹ *ibid* 127.

¹⁸² *I* (n 3) 51, as cited by *Chen* (n 41) 18.

¹⁸³ Prior to reaching the Supreme Court, as cited as *Lumba* (n 179), the Court of Appeal case was cited as *WL (Congo) v SSHD* [2010] EWCA Civ 111.

¹⁸⁴ *Davies* (n 5) 17.

¹⁸⁵ *ibid* 18.

¹⁸⁶ *ibid* 19.

¹⁸⁷ *ibid*.

‘considerable weight’ because it was, in the court’s view, aimed at manipulating the immigration system to frustrate removal.¹⁸⁸

In *Said*, the Administrative Court refused relief on the basis that the detainee’s lengthy detention was substantially his own making and that, had he co-operated, it is likely that removal would have been effected.¹⁸⁹ In one of the more egregious examples of non-co-operation, the Court in *Noureddine* refused relief because the case was not simply one in which

The claimant had told lies about his history or even claimed one or two false identities; rather, he provided detailed information about, for example, the identity of his employers in Algiers and their telephone numbers and addresses, and had provided a false birth certificate, all the time knowing that the information that he provided was untrue. He knew perfectly well that the UK Border Agency officials would act upon this false information and try unavailingly and over a long period to persuade the authorities of Algeria to accept it. Even now, the claimant continues to refuse to provide necessary true information about himself.¹⁹⁰

The Court went on to hold that ‘A detained person who has conducted himself as this Claimant has, must accept most, if not all, of the blame for the delay in removing him which results from the false information provided by him’.¹⁹¹ This non-co-operation, coupled with a risk of absconding, persuaded the court that further detention was reasonable.¹⁹²

In *Lamrani*, the detainee’s refusal to co-operate in obtaining travel documents was not counted against him by the Court because removal would not have been possible regardless, owing to the fact that he was in the process of appealing his removal at all times and could not, therefore, be removed legally.¹⁹³

On the other end of the scale, the detainee in *Abdullah* was granted relief because the court did not consider that the evidence demonstrated that he was ‘heavily obstructive’.¹⁹⁴ Rather, the court felt that, at most, he could be considered ‘grumpy and reluctant about engagement with the Sudanese Embassy’.¹⁹⁵

B. United States

The INA mandates an extension of the 90-day removal period if the detainee fails to co-operate in effecting removal:

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make

¹⁸⁸ *R (Smith) v SSHD* [2010] EWHC 2774 (Admin) 22.

¹⁸⁹ *Said* (n 48) 43.

¹⁹⁰ *Noureddine* (n 175) 85.

¹⁹¹ *ibid* 89.

¹⁹² *ibid* 90–91.

¹⁹³ *R (Lamrani) v SSHD* [2011] EWHC 3059 (Admin) 54.

¹⁹⁴ *Abdullah* (n 40) 29.

¹⁹⁵ *ibid*.

timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.¹⁹⁶

Thus, in most cases where the court makes a determination that the petitioner has failed to co-operate, continued detention will be justified as a matter of law. This can be seen, for example, in *Alzubi*, where the court cited 'a consistent pattern of deliberate conduct on the part of petitioner aimed at frustrating the removal process, triggering suspension of the removal period' when it refused relief.¹⁹⁷ Similarly, in *Powell*, the court noted that the petitioner had 'repeatedly provided the INS with inconsistent information regarding his identity, and these inconsistencies have demonstrably hampered the INS in carrying out his removal' when it rejected the habeas application.¹⁹⁸ In *Diallo*, the court dismissed the habeas petition, stating that the 'petitioner would not be in confinement had he co-operated with Respondent's attempt to effectuate his removal [on two occasions]' and that 'the only reason he continues to remain in detention is because he refuses to leave the country'.¹⁹⁹ In *Ramos*, a finding that the immigration authorities failed to conduct a custody review prior to the expiry of the 90-day removal period did not excuse the detainee's withholding of identity information and provision of false information.²⁰⁰

In the rare positive cases, such as *Farez-Espinoza*, the courts have noted that a failure to appear for removal proceedings on its own does not trigger extension of the 90-day removal period.²⁰¹ The judgment in *Leslie* relied on *Farez-Espinoza* to arrive at the same conclusion.²⁰² In *Farez-Espinoza*, the petitioner was granted release, while in *Leslie* the court withheld its decision for lack of adequate information regarding the diligence of the state. However, the overwhelming majority of cases evaluated as non-co-operation resulted in an extension of detention. This is likely due in part to the fact that the INA includes non-co-operation as an express ground for extending detention beyond the 90-day removal period. Because the language is obligatory, the courts may feel that they have no choice but to allow continued detention.

¹⁹⁶ INA, s 241(a)(1)(C).

¹⁹⁷ *Alzubi* (n 56) 6. See also *Dogra* (n 66) 2 ('petitioner has consistently thwarted the attempts of DHS to effectuate his removal').

¹⁹⁸ *Powell* (n 6) 210. See also *Ricketts* (n 57) 6, where the petitioner 'repeatedly failed to cooperate with Respondent's requests to assist in obtaining travel documents and continues to reference fraudulent documents in support of his claim to United States citizenship'; *Ncube v INS* 1998 WL 842349 (SDNY) 16; *Jiang v Holder* 2015 WL 3649739 (WDNY) 3–4.

¹⁹⁹ *Diallo v Immigration and Customs Enforcement* 2010 WL 3769506 (WDNY) 5.

²⁰⁰ *Ramos* (n 74) 6. Indeed, the immigration regulations explicitly state this. See 8 CFR 241.4(g)(5)(iv).

²⁰¹ *Farez-Espinoza* (n 64) 501.

²⁰² *Leslie v Heron* 2010 WL 4226561 (WDNY) 4.

C. European Union

In great contrast to the USA, the CJEU has held that non-co-operation must bear a causal relationship to the delay in effecting removal. In *Mahdi*, the CJEU was asked whether a lack of identity documents can be considered a ‘lack of cooperation’ for purposes of Article 15(6)(a), and thus a permissible reason to extend detention beyond the initial six months. In *Mahdi*’s case, the Embassy of the Republic of Sudan had refused to provide him with an identity document, thus making removal impossible. The question for the CJEU was whether it was possible to attribute that refusal to *Mahdi*, who refused to return voluntarily to Sudan.²⁰³ The CJEU considered that a determination that there was a lack of co-operation under Article 15(6) requires the national court to examine the detainee’s conduct during his or her initial period of detention to ascertain whether he or she has failed to co-operate in removal.²⁰⁴ However, the national court must also consider the likelihood that removal has been or will be delayed owing to the person’s conduct.²⁰⁵ If not, ‘no causal link may be established ... and therefore no lack of cooperation on his part can be established’.²⁰⁶ In addition, before determining whether there is a failure to co-operate, the decision-making authority must be able to show that removal is lasting longer than anticipated, ‘despite all reasonable efforts’, including continuing efforts by the state to obtain the requisite documents.²⁰⁷ This means that the detainee’s non-co-operation must be directly linked to any delay in removal, and that the state must continue to act with due diligence in effecting removal, before detention can be extended under Article 15(6)(a).

Moreover, given the Court’s decision discussed above regarding extending detention beyond the initial six-month period under Article 15(6) and its conclusion that, prior to any decision to extend, the decision maker must re-examine the initial reasons for detention, it is arguable that non-co-operation itself cannot justify an extension beyond the six months without a re-evaluation of all the evidence in favour of detention initially.

VII. PURSUIT OF LEGAL REMEDIES AGAINST REMOVAL OR DEPORTATION

Courts in each of the three jurisdictions address the impact that a detainee’s pursuit of legal remedies against deportation or removal has on the lawfulness of his or her detention. The approaches take two main forms. The UK

²⁰³ *Mahdi* (n 15) para 77.

²⁰⁴ *ibid* para 82.

²⁰⁵ *ibid*.

²⁰⁶ *ibid*.

²⁰⁷ *ibid* para 83.

and the EU each consider that legitimate attempts to seek relief should not be held against detainees. In the UK, this means that such judicial review is one of many factors to consider in determining whether detention is reasonable; in the EU, it means that the time spent pursuing legitimate review of return cannot be excluded from the calculation of the maximum detention period because to do so would lead to varied detention lengths across the Member States and the maximum period would effectively be rendered optional. The USA presents a completely opposing picture, where pursuit of legal remedies, in general, is counted against detainees. For the most part, any delay due to review of removal is attributed to the detainee and not viewed as unreasonable. Though some judgments reflect on the idea that merit should play a role in this determination, for the most part it does not.

A. United Kingdom

In the UK, the pursuit of legal remedies against removal generally functions as ‘simply a factor to be taken into account rather than a factor which is to be discounted in assessing the period, for the purpose of *Hardial Singh* principles for which it is reasonable for him to be detained’.²⁰⁸ Similarly, it was stressed by the Court in *Aziz* that ‘Generally, a deportee’s legal challenges cannot, without regard to other factors, be a trump card in the hands of the Secretary of State’.²⁰⁹ Somewhat allaying the concerns expressed by members of the House of Lords that a maximum period of detention would be exploited through disingenuous applications for judicial review of removal/deportation,²¹⁰ the Administrative Court has held that more weight will be given to appeals that have merit. For example, in *Saleh*, though the Administrative Court felt that the claimant was dishonest and presented a risk of reoffending, the court stated:

He cannot be criticised for using legal procedures to challenge the decisions which are adverse to him but the overall picture which emerges is that the Claimant has used and will use all available avenues in order to delay matters.²¹¹

Some judgments have held that the claimant cannot ‘complain’ of prolonged detention when it is due to his or her pursuit of legal remedies.²¹² Others state that, for purposes of determining the length of detention, the clock will not

²⁰⁸ *AK* (n 24) 28. See also *Abdi* (n 35) 29; *Giwa* (n 44) 73.

²⁰⁹ *Aziz* (n 35) 25.

²¹⁰ See ch 3, s II.A above.

²¹¹ *R (Saleh) v SSHD* [2009] EWHC 2395 (Admin) 54.

²¹² *A (Iraq)* (EWHC 2010) 20; *R (Bashir) v SSHD* [2007] EWHC 3017 (Admin) 12, citing *A* (n 116) 55 (per Toulson LJ).

begin to run until after all appeal rights are exhausted.²¹³ This is just a small minority of cases, however.²¹⁴

B. United States

The most surprising treatment of this issue comes from the US federal district courts, which apply what I refer to as the ‘attribution principle’. In 41 cases, the court denied relief in part (sometimes in the main) based on the fact that the detention was prolonged due to the individual’s pursuit of judicial remedies.²¹⁵ The delay is therefore attributed to the detainee making use of available judicial processes, and detention is permitted to continue. The language used by the courts is couched in blame. For example, in *Miller*, the WDNY court stated that the ‘petitioner’s own actions’, including applying for citizenship, resulted in delays justifying his lengthy detention.²¹⁶

Some courts reasoned that, where the detainee was pursuing judicial or administrative remedies against removal, and there were no other obstacles to removal, there was consequently no Fifth Amendment Due Process violation because the end of litigation marked the end of detention – hence it was not indefinite.²¹⁷ The attribution principle was most remarkably found in the *Reyes-Cardenas* case, where the petitioner had been detained for over seven years at the time of the hearing, and was kept in detention because of his pending proceedings.²¹⁸

The court refused to apply the attribution principle in only three cases. In *Rajigah*, where the petitioner was granted immediate release, the court said that the petitioner had not ‘in any way acted in bad faith’ but was ‘simply avail[ing] himself of judicial process’.²¹⁹ Similarly, in *Bugianishvili*, the court held that

²¹³ *AK* (n 24) 25; *Asekun* (n 21) 24.

²¹⁴ Moreover, one case indicates that the Nationality, Immigration and Asylum Act 2002 prohibits removal while appeals against certain immigration decisions are pending. See *AK* (n 24) 31. A second case notes that the claimant could not have been removed during a specific period while his asylum and deportation appeals were pending, but does not indicate the legal basis for such suspension. See *A* (n 35) 45. These are the only two cases that mention such practice. Because this issue is beyond the scope of this book, I have not examined whether there are other statutory bases for suspending removal. Certainly, none of the other cases indicated that it is a common occurrence. However, it is clear from s 94 of the same Act that claims for asylum or human rights that are ‘clearly unfounded’ do not have a suspensive effect.

²¹⁵ See, eg *Dover* (n 81); *Guang v INS* 2005 WL 465436 (EDNY).

²¹⁶ *Miller v Tryon* 2013 WL 5592484 (WDNY) 6. See also *Morales v Holder* 2014 WL 1117827 (WDNY) 6; *Campbell v Tryon* 2014 WL 3809747 (WDNY) 6.

²¹⁷ See, eg *Newell v Holder* (2013 WDNY) 983 F Supp 2d 241, 247: ‘Accordingly, because the detention challenged by the habeas petition in this action has been prolonged by petitioner’s own pursuit of judicial review of the final order of removal, the duration of his detention cannot be found to constitute a violation of his rights under the due process clause of the Fifth Amendment’; *Neil v Holder* 2015 WL 3937280 (WDNY) 5; *Johnson v Phillips* 2010 WL 6512350 (WDNY) 7; *Reyes-Cardenas v Gonzales* 2007 WL 1290141 (SDNY) 7; *Abassi v Secretary, Department of Homeland Security* 2010 WL 199700 (SDNY) 4.

²¹⁸ *Reyes-Cardenas* (ibid). See also, eg *Abassi* (ibid); *Andreenko* (n 57).

²¹⁹ *Rajigah* (n 135) 166.

‘the mere fact that a non-citizen opposes his removal, without distinguishing between bona fide and frivolous arguments in opposition, is insufficient to defeat a finding of unreasonably prolonged detention’.²²⁰ However, in that case, the court also made it clear that detainees ‘may not rely on the extra time resulting [from pursuit of legal remedies] to claim that [their] prolonged detention violates substantive due process’.²²¹ It went on to order that a bond hearing be held within seven days.

The attribution principle is a product of the case law, rather than any statute. MacCormick suggests that pressure due to society and the nature of the judicial role means that it is highly likely that the course chosen in a judgment will be reasonable or correct.²²² However, the decision by most district judges to penalise detainees for pursuing relief against removal seems unreasonable, given that the lesson from these cases seems to be that prolonged detention, even beyond the presumptively reasonable six months pronounced in *Zadvydas*, is permissible as long as the delay cannot be imputed to the government, even where the delay results simply from the detainee making use of available judicial processes. It may be possible to suggest that if the district court judges felt any societal pressure, it would be to ensure that people liable to removal remain in detention; so, in that sense, perhaps this behaviour could be viewed as correct. It cannot, in my view, be seen as reasonable, however. Apart from the discussion in *Rajigah*, the issue of the detainees’ good or bad faith was not addressed by the district courts in their determination that detention is lawful owing to pursuit of a legal remedy. To conclude, then, that the petitioner effectively deserves to be detained on this basis seems arbitrary. In some cases, however, additional factors, such as detainee non-co-operation or risk, contribute to a finding of legality.

In addition to the attribution principle, the Second Circuit has an informal agreement with the DHS that the DHS will not remove people who have sought a stay of removal in addition to a petition for review of the removal order.²²³ This ‘forbearance’ policy operates as the ‘equivalent of a court-ordered stay of removal’,²²⁴ effectively justifying prolonged detention in several cases, many of which are ‘cookie-cutter’ judgments emanating from the WDNY.²²⁵ Forbearance policy, coupled with the attribution principle, means that virtually all applicants’ detention will be considered lawful while review is pending. Holding an individual’s pursuit of available legal remedies against him or her in a determination of whether detention should continue seems like an arbitrary exercise of the power to detain, which effectively functions as a punishment unwarranted by the INA.

²²⁰ *Bugianishvili* (n 64). See also *D’Alessandro* (n 149) 386.

²²¹ *Bugianishvili* (n 64) 7.

²²² MacCormick (n 152) 34.

²²³ *Khaleque v Department of Homeland Security* 2009 WL 81318 (WDNY) 3.

²²⁴ *Luna-Aponte v Holder* (2010 WDNY) 743 F Supp 2d 189, 197. See also *Khan v Herron* 2011 WL 4899994 (WDNY) 1–2; *Mathews v Philips* 2013 WL 5288166 (WDNY) 3.

²²⁵ See, eg *Tejeda-Estrella* (n 56) 5; *Rahel v Tryon* 2013 WL 1878914 (WDNY) 5; *Haley v Holder* 2013 WL 1945704 (WDNY) 6.

C. European Union

In the EU, this discussion has taken place in two contexts: judicial review of a removal order and applications for asylum. The former was addressed in *Kadzoev*, where one of the questions was whether a detainee's time spent disputing return in judicial review proceedings should count towards the maximum detention period in the Return Directive. The CJEU considered that the maximum period of detention in Article 15(6) of the Directive is aimed at limiting deprivations of liberty and ensuring that detention periods are consistent across the EU; to hold otherwise would risk varied detention lengths, depending upon the length of judicial review.²²⁶ In addition, the Directive also requires Member States to afford third-country nationals subject to return procedures an effective remedy to appeal or seek review of a removal decision.²²⁷ These conclusions, together with the fact that Article 15 does not explicitly permit the Member States to use pursuit of legal remedies against return (therefore suspending the return process) as a ground for extending detention, led the Court to conclude that the Directive requires that Member States take into account time detained whilst appealing removal, even if removal is not possible owing to such an appeal.²²⁸

The latter instance in which the impact of pursuing remedies against removal has arisen in the EU context is with regard to the interaction between the framework of the Return Directive and that of the EU CEAS,²²⁹ but for now it is important to note that the CJEU concluded that where an application for asylum is made during the course of the removal process, the CEAS framework is triggered. This means that detention under the Return Directive is paused and the detention framework in the CEAS governs. Ultimately, this means that the total length of detention could potentially exceed the 18-month maximum in the Return Directive.

VIII. CONCLUSION

This chapter was intended to illustrate that, though the three jurisdictions use roughly the same tests for legality, the way they are applied during judicial review leads to different interpretations of the test components and different case outcomes. Indeed, one can see patterns emerging, particularly when comparing the UK to the USA. The dominant theme in the UK cases is that the circumstances of the case must be balanced against each other. The balance is not

²²⁶ *Kadzoev* (n 15) paras 54, 56.

²²⁷ *ibid* para 50.

²²⁸ *ibid* paras 52, 57.

²²⁹ See ch 6, s IV.C below, discussing the *Arslan* judgment in the context of detention time limits.

inferred, but, rather, explicitly undertaken in the judgments, especially in those discussing the notion of a ‘trump card’. The UK decisions generally exhibit a more grounded approach, where, for example, the likelihood of removal must be more than just a mere hope, or where a person’s past criminal activity must be viewed in light of its severity and when it occurred. This should be distinguished from the USA, where risk and non-co-operation play key roles in the decision-making processes of the NY district courts – effectively amounting to the very trump card that the Administrative Court admonishes. The CJEU case law most closely resembles that of the Administrative Court, but because of the nature of the questions asked by the referring national courts, it is difficult to directly compare the CJEU judgments to those of the other jurisdictions. Like the Administrative Court, the CJEU has emphasised that removal must be a realistic prospect and that the diligence of the state on its own is not enough to warrant continued detention under the Directive. Though it is not possible to conclude whether the Court balances risk factors like the Administrative Court, it is interesting to note that the Return Directive does not include past criminal behaviour as a basis for detention. Thus, this discussion is not present in any of the judgments – a glaring absence in view of the prominence this discussion has in the NY judgments.

In summary, what is evident thus far from the judgments is that they roughly fall into three categories. The first is the USA, with its quicker and less-nuanced balancing of whether detention is reasonable in all circumstances, often settling on the side of the state. The second is the EU, with a more high-level discussion of concepts aimed at fulfilling the aim of the Return Directive to limit detention. The third is the UK, which seems to be a bit of both in the sense that it engages in a balancing of reasonableness in a more detail-oriented way, where even the items it balances are themselves scaled and weighted. This is seen most prominently with regard to consideration of risk. At the same time, it is working to give meaning to core concepts by reference to judgments of the Court of Appeal and Supreme Court. The next chapter will explore the impact of additional interpretive principles on the application of the legality tests and, consequently, judicial review outcomes.