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Case No: CO/2668/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2015

Before :

MR JUSTICE EDIS

- -

Between :

The Queen on the Application of Abdiwell Gedi	**Claimant**
- and -	
Secretary of State for the Home Department	**SSHD**

- -
- -

Tom Hickman (instructed by **Irvine Thanvi Natas Solicitors**) for the **Claimant**
Carine Patry (instructed by **The Government Legal Department**) for the **SSHD**

Hearing dates: 17th September 2015

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Judgment

Mr. Justice Edis:

1. This application for Judicial Review is brought by leave of Mr. Justice Kerr granted after reconsideration of the papers on 3rd August 2015. By the same order, he extended time pursuant to CPR 3.1(2)(a). In it, the claimant challenges the lawfulness of bail conditions (a curfew monitored by electronic tagging) imposed by the defendant during deportation proceedings under section 32(5) of the UK Borders Act 2007, "the 2007 Act". I shall refer to the defendant as the Secretary of State for the Home Department ("SSHD"). By doing so I do not mean that she has taken any part in any of these events personally. The deportation proceedings began with a notice of intention to deport in February 2013. At this time the claimant was serving a prison sentence. The custodial part of that sentence ended and he was detained thereafter under the Immigration Act 1971, "the 1971 Act". As will appear, he was later granted bail which resulted in his release on conditions attached to bail. The terms of the licence which applied during the second half of his custodial sentence also imposed restrictions on him during this period, and continue to do so. A deportation order was made on 3rd May 2013. There was an appeal against that and those proceedings were pending until 18th August 2014. Section 32(5) of the 2007 Act is the provision which requires the SSHD to deport foreign criminals unless she considers that certain exceptions apply. This claim further challenges the lawfulness of bail conditions (a curfew monitored by electronic tagging) imposed when the SSHD made a fresh deportation decision relying on a new assessment of conditions in the claimant's

country of origin on 10th December 2014. This claim does not concern the merits of the first set of proceedings and does not allege that the second decision was unlawful. The claimant does resist the new attempt to deport him, but not in this claim. The claim for judicial review is limited to the claim that the SSHD has no power to impose a curfew in circumstances such as the present. If there is such a power, it is not submitted that it was unreasonable for the SSHD to exercise it as she did. I shall use the term "curfew" although there is some controversy about it as I shall make clear below. By this term I mean a requirement that the person subject to it shall be present in identified premises (generally the place where the person is required to reside) at certain times (usually at night). A curfew imposed as a bail condition will often be subject to electronic monitoring, but may sometimes be subject to what is called a "doorstep condition" which requires the person to present themselves at the front door of the premises to a police or other officer to show that they are there. Sometimes curfews are imposed without any specified enforcement measures.

2. The main issue, therefore, is a pure point of law. Some account of the chronology is required in order to put the legal issue in its context. There are also some subsidiary issues which are more fact sensitive.

THE FACTS

3. The claimant is a Somalian national who came to the United Kingdom on 29th June 1998 at the age of 8 with his mother and siblings. He was subsequently granted indefinite leave to remain but has never applied for British citizenship. On 25th May 2010 he was convicted after a trial at the Central Criminal Court of 3 offences of attempting to cause grievous bodily harm, 1 offence of causing grievous bodily harm with intent, and 1 offence of dangerous driving. All the offences arose out of one incident when he participated in a very serious incident of public violence in the street, outside a club frequented by Somalians in London. In the early hours of the morning he left the club and drove a Range Rover at three people, trying but failing to do them really serious harm. He drove away but soon returned, this time succeeding in using the vehicle as a weapon to cause a fourth man really serious harm. On 18th June 2010 he was sentenced to a total of 6 years and 6 months detention in a young offender institution. This sentence reflected his youth and the fact that until that time he had been a person of good character. The SSHD initiated the process of deportation while he was serving that sentence and, on his release on licence, he was detained under the Immigration Acts between the 1st February 2013 and 25th April 2013. On 18th April 2013 he was granted bail by the First Tier Tribunal (FTT) but his release was delayed by an error. As required by the practice, the SSHD prepared a Bail Summary for that hearing. She opposed bail in that document, but contended that if bail was granted it should be conditional and requested an electronic monitoring condition. I shall call this "tagging" for the sake of brevity. The grant of bail appears in slightly different terms in different documents, but the document signed by the Judge and the claimant and his two sureties records that the claimant entered into a recognizance in the sum of £10 and that two people entered into sureties in more substantial sums which would be forfeited if the claimant failed to comply with the primary condition. The primary condition specified that the claimant must appear before a Chief Immigration Officer ("CIO") on 20th May 2013 at 10:00am at a specified place. The secondary conditions were as follows:-

> 1. The applicant shall live and sleep every night at [a specified address].
>
> 2. The applicant shall report to the UK Border Agency every Monday at [given times].
>
> 3. Bail is granted subject to (i) the applicant cooperating with the arrangement for electronic monitoring ("tagging") as set out in s.36 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 ["the 2004 Act"] and (ii) the UK Border Agency arranging electronic monitoring within two working days of this grant of bail. If electronic monitoring is not effected within two working days, then the applicant is to be released on condition that he/she complies with reporting conditions as stated above.

4. I have quoted paragraph 3 of the order granting conditional bail in full because an issue arises as to its construction. As is apparent from the use of the phrase "he/she" it is a standard form of order. This is confirmed by Guidance which I will further consider below.

5. By error, there was a delay in releasing the claimant and tagging was not arranged within two days of the grant of bail. He did not return home until 25th April and tagging was arranged on the following day. On that same occasion he was informed that a curfew had been imposed under s. 36 of the 2004 Act between 18:00 and 22:00 and, perhaps, 06:00 and 08:00. This order is an unusual curfew because it allows the claimant to be away from his home between 22:00 and 06:00. The claimant is not allowed employment in this country because of his immigration status. Ms. Patry told me that the original order was designed to test whether the claimant was residing at the specified address as required. At all events the claimant applied for a variation of this arrangement to the FTT which declined jurisdiction on 24th October 2013 saying that with effect from 20th May 2013 the bail conditions had been the responsibility of the CIO to whom he had surrendered on that date. The claimant therefore communicated with the CIO and the curfew was varied to 00:00-06:00, which is perhaps a more conventional condition of bail. This happened in December 2013.

6. The deportation order was sent to the claimant on 3rd May 2013. The SSHD was required to consider deportation and decided that the exceptions to automatic deportation consequent upon the conviction and sentence did not apply, having considered ss. 32(5) and 33 of the UK Border Act 2007. The claimant appealed successfully to the FTT which heard his case on 4th March 2014. He succeeded on the ground that he would be in danger if he were returned to Somalia. The SSHD appealed unsuccessfully to the Upper Tribunal Immigration and Asylum Chamber (Upper Tribunal Judge Warr) who promulgated his determination on 1st August 2014. The decision was sent to the SSHD's representative but was not, it seems, referred to the proper department for consideration of a further appeal. Eventually, an application for permission to appeal and an extension of time was made which was dismissed by Judge Warr on 3rd November 2014. He held that no good reason for an extension of time had been shown and said that in any event he would not have granted permission of the application had been in time. That decision was sent on 11th November 2014 and no further application was made by the SSHD to the Court

of Appeal Civil Division within the 28 day period provided by CPR 52D PD 4.3.3 from that date. Time for that expired on 9th December 2014. It is common ground that in correspondence between August and 9th December 2014 the SSHD was informing the claimant of alleged breaches of the curfew and threatening sanctions in respect of those breaches. I set out an example of one of these letters below. The claimant was responding through his solicitors that there had never been any jurisdiction to impose a curfew and that, even if there had, it arose only in respect of pending proceedings and contended that the first set of deportation proceedings were not pending after the time for appealing against the decision of the Upper Tribunal expired, on 18th August 2014. During the hearing Ms. Patry informed me that the SSHD had instructed her to concede that the original deportation proceedings were no longer pending after time for appeal expired and that therefore between 18th August and 9th December 2014 there was no jurisdiction to impose conditions because the claimant was no longer on bail in any pending proceedings. This concession was consistent with a decision of the Court of Appeal Civil Division in *R (Erdogan) v. SSHD* [2004] EWCA Civ 1087, [2004] INLR 503 and was plainly correct. No concession was made as to the consequences which should follow.

7. There were, therefore, 4 periods of time during which the claimant has been subject to conditional bail including a curfew and tagging. Before identifying them I should record that throughout the whole period the claimant has been subject to the conditions of the licence under which he was released from custody in February 2013. These terms involved supervision until the end of the licence period, on 3rd May 2016. Among other things, the claimant was required to:-

> "iv. Permanently reside at an address approved by your supervising officer and notify him or her in advance of any proposed change of address or any proposed stay (even for one night) away from that approved address."

There was no tagging requirement attached to the licence and the address was the same as that which was specified in the grant of immigration bail. This entirely lawful restriction on his liberty is relevant only to the amount of any damages he may be awarded in these proceedings but is certainly relevant to that. The existence of a licence designed to protect the public from the claimant may sometimes be a relevant factor in deciding what conditions should be attached to immigration bail during its currency. If so, no such argument has been deployed before me by either side.

THE ISSUES AND RELEVANT TIME PERIODS

8. The 4 periods are as follows:-

i) PERIOD 1: Between 25th April and 20th May 2013 the claimant was subject to the terms of bail imposed by the FTT. These did not include a curfew but permitted tagging and imposed a condition of residence which required the claimant to live and sleep at a specified address. Tagging and a curfew were in place with effect from 26th April 2013 by virtue of a direction of the SSHD. That direction was communicated to Serco, the tagging contractor later replaced by EMS, by a document which referred only to a curfew period in the evening and not to two periods, one in the evening and one in the morning. It

is common ground that at some stage both requirements were applied, but it is not clear how or when. During Period 1, the claimant now contends

a) **The main issue**: That there was no power to impose a curfew because there is no statutory power to do so and clear words would be required to create such a power since unless justified by statute it would amount to the tort of false imprisonment. This is the overriding submission advanced on behalf of the claimant, which I have called "the main issue" above.

b) **The construction issue**: That the terms of the FTT grant of bail (paragraph 3 above) did not permit tagging or a curfew on their true construction. This is because tagging was not arranged within 2 days of the grant of bail and it is submitted that the Order required the release of the claimant in those circumstances subject only to the reporting condition.

ii) PERIOD 2: On 20th May 2013 the claimant surrendered to the CIO bringing to an end the bail granted by the FTT. The CIO has jurisdiction to grant bail and did so. No document showing what conditions were imposed has been produced, nor has any reasoning supporting them been revealed. However, it is common ground that the original conditions of bail were continued. It may have been at this stage that the curfew period was extended to cover a period in the morning as well as the evening. Tagging was in place and continued. In December 2013 the curfew period was changed. During Period 2 the claimant contends that the curfew was unlawful by reason of his overriding submission and that the tagging was unlawful because the CIO intended to continue bail on the same terms as had been imposed by the FTT. The practice requires the CIO to adhere to the decision of the FTT unless there is a change of circumstances. Since the FTT order on its true construction allowed for release subject only to a reporting condition the CIO misdirected himself or herself and actually introduced new and more onerous terms than the FTT while intending not do so. This submission depends on the answer to the construction issue.

iii) PERIOD 3: On 18th August 2014 the original deportation proceedings came to an end, as is now conceded. Between that date and 9th December 2014 the claimant continued to be subject to the tagging and curfew. He received frequent letters from the Home Office of which that dated 10th November 2014 will stand as an example. It is headed "IMMIGRATION ACT 1971 – NOTICE TO AN OFFENDER WHO HAS FAILED TO BE PRESENT AT A TIME REQUIRED." It said this:-

> "This office has been advised by EMS that you have failed to be present at your home address on 02/11/2014 00:00-03:00 and 08/11/14 between the hours of 00:00-03:12 as required and notified in your conditions of release.
>
> "I am formally reminding you that the circumstances of your case have meant that we have been willing to grant you release as an alternative to detention.

> "You remain liable to detention under paragraph 2 Schedule 3 of the Immigration Act 1971, and by failing to report/Failing to be present as required, you also render yourself liable to prosecution under Section 24(1)(e) of the Immigration Act 1971. This carries a six month prison sentence, a fine of up to £5,000 or both.
>
> **"You must ensure that you are present during your curfew times of 0:00-6:00 every day, until further notice from the Home Office.**
>
> "Should you have difficulty in being able to meet this or any future appointment you should contact this office immediately."

The reference to failing to meet an appointment in the last paragraph is common to all these letters. It is a consequence of standard letters being used without adequate care. Section 24(1)(e) of the 1971 Act is an offence creating provision which provides as follows:-

> **24.— Illegal entry and similar offences.**
> (1) A person who is not a British citizen shall be guilty of an offence punishable on summary conviction with a fine of not more than level 5 on the standard scale or with imprisonment for not more than six months, or with both, in any of the following cases:—
> ……
> (e) if, without reasonable excuse, he fails to observe any restriction imposed on him under Schedule 2 or 3 to this Act as to residence, as to his employment or occupation or as to reporting to the police to an immigration officer or to the Secretary of State.

The only issue in relation to Period 3 is now the consequence of bail conditions having been continued and enforced when there was no power to do so. The SSHD submits that this did not amount to the tort of false imprisonment because there was no intention to restrict the movements of the claimant.

iv) PERIOD 4: On 10th December 2014 a new deportation order was made and the bail conditions continued uninterrupted in fact, although technically there was a new grant of conditional bail by the CIO. This was referred to in correspondence on behalf of the SSHD as "maintaining" the bail conditions which were unaltered. The issues in relation to Period 4 are the same as those in relation to Period 2. It is not submitted that there was no power to impose conditions because the claimant was not detained prior to the making of a deportation decision.

THE POSITION OF THE SSHD

9. The SSHD submits that the curfew and tagging were not unlawful during the first set of deportation proceedings and that they are not unlawful now in view of the fresh proceedings.

10. I shall set out the basis SSHD's claim that the jurisdiction which has been exercised exists in what appears to me to be a logical order, although it is not the same order as that which was used in the submissions of the SSHD. It is common ground that it is

for the SSHD to justify the exercise of a power which restricts the liberty of a person present in this country. In this case the person subjected to the power has been granted indefinite leave to remain. It is also common ground that such powers will not be held to exist unless it is crystal clear that Parliament intended to grant them by the relevant Act of Parliament.

11. The SSHD submits that the claimant was a person liable to be detained while deportation proceedings were pending in periods 1 and 2 and again in period 4. It is submitted that there are two sets of provisions which give a power to grant bail and a power to impose conditions on that bail. I will set these out separately.

STATUTORY ROUTE 1

12. Paragraph 22 of Schedule 2 to the 1971 Act applies to this claimant because of sub-paragraph 4A of Schedule 3 which reads

> (4A) Paragraphs 22 to 25 of Schedule 2 to this Act apply in relation to a person detained under sub-paragraph (1), (2) or (3) as they apply in relation to a person detained under paragraph 16 of that Schedule.

13. Sub-paragraph 2 of paragraph 22 of Schedule 2 reads as follows

> (2) The conditions of a recognizance or bail bond taken under this paragraph may include conditions appearing to the immigration officer or the First-tier Tribunal to be likely to result in the appearance of the person bailed at the required time and place; and any recognizance shall be with or without sureties as the officer or the First-tier Tribunal may determine.

14. The SSHD submits that the grant of bail by the FTT was a recognizance and that there was therefore a power to include any condition which satisfied the statutory condition namely that it was likely to result in the attendance of the claimant as the required time and place. This wide power would be subject to judicial oversight by judicial review if, as it was, the bail was continued by the CIO in that the decision to impose any condition must be rational.

STATUTORY ROUTE 2

15. The second statutory route to the imposition of the curfew condition relies on Schedule 3 to the 1971 Act which by sub-paragraph 5 provides

> (5) A person to whom this sub-paragraph applies shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by the Secretary of State.

16. There is therefore a power to impose a "restriction as to residence". The SSHD does not argue that this creates a power to impose a curfew which requires its subject not only to reside at a particular place but to be at home during specified periods of the day. The SSHD submits instead that this provision is to be read with section 36 of the 2004 Act.

17. Section 36 of the *Asylum and Immigration (Treatment of Claimants etc) Act 2004* provides as follows:-

36 Electronic monitoring

(1) In this section–

(a) "*residence restriction*" means a restriction as to residence imposed under–

(i) paragraph 21 of Schedule 2 to the Immigration Act 1971 (c. 77) (control on entry) (including that paragraph as applied by another provision of the Immigration Acts), or

(ii) Schedule 3 to that Act (deportation),

(b)……..

(c) ……..

(d) "*immigration bail*" means–

(i) release under a provision of the Immigration Acts on entry into a recognizance or bail bond,

(ii) bail granted in accordance with a provision of the Immigration Acts by a court, a justice of the peace, the sheriff, the First-tier Tribunal , the Secretary of State or an immigration officer (but not by a police officer), and

(iii) bail granted by the Special Immigration Appeals Commission.

(2) Where a residence restriction is imposed on an adult–

(a) he may be required to cooperate with electronic monitoring, and

(b) failure to comply with a requirement under paragraph (a) shall be treated for all purposes of the Immigration Acts as failure to observe the residence restriction.

(3) Where a reporting restriction could be imposed on an adult–

(a) he may instead be required to cooperate with electronic monitoring, and

(b) the requirement shall be treated for all purposes of the Immigration Acts as a reporting restriction.

(4) Immigration bail may be granted to an adult subject to a requirement that he cooperate with electronic monitoring; and the requirement may (but need not) be imposed as a condition of a recognizance or bail bond.

(5) In this section a reference to requiring an adult to cooperate with electronic monitoring is a reference to requiring him to cooperate with such arrangements as the person imposing the requirement may specify for detecting and recording by electronic means the location of the adult, or his presence in or absence from a location–

(a) at specified times,

(b) during specified periods of time, or

(c) throughout the currency of the arrangements.

(6) In particular, arrangements for the electronic monitoring of an adult–

(a) may require him to wear a device;

(b) may require him to make specified use of a device;

(c) may prohibit him from causing or permitting damage of or interference with a device;

(d) may prohibit him from taking or permitting action that would or might prevent the effective operation of a device;

(e) may require him to communicate in a specified manner and at specified times or during specified periods of time;

> (f) may involve the performance of functions by persons other than the person imposing the requirement to cooperate with electronic monitoring (and those functions may relate to any aspect or condition of a residence restriction, of a reporting restriction, of an employment restriction, of a requirement under this section or of immigration bail).

18. The submission advanced by Ms. Patry on behalf of the SSHD is that the word "curfew" describes inaccurately what actually occurred. The use of specified times when the claimant was required to be at home was a direction under section 36 of the 2004 Act and was a means of testing whether the claimant was complying with his residence restriction. This was the monitoring with which he was required to comply. This approach to the case emerged most clearly in a late witness statement by Mr. Kenneth Welsh, the Assistant Director of Criminal Casework at the Home Office, dated 11th September 2015. An application was made to adduce this at the hearing by the SSHD which was not opposed. At paragraph 13 he says this, in relation to the failures to be present at the home address referred to in the warning letters:-

> "These are considered serious failings because ultimately the decision not to detain Mr. Gedi is subject to various restrictions in order to manage risk. If Mr. Gedi fails to report, or appears to be failing to comply with his residence requirement, this will lead to a concern that the risk is not being managed. It is on this basis that Mr. Gedi received warning letters, reminding him of the restrictions and penalties he could face if he failed to comply with the restrictions. However, I would note that Mr. Gedi has never been detained nor had any other penalty imposed on him as a consequence of his failure to comply with the various restrictions. This is because took the view overall that the residence requirement had not been breached." [sic: the identity of the person who took that view is not revealed in the witness statement].

19. Mr. Welsh describes the breaches of the curfew by the claimant as "partial breaches" of the tag regime which means that he was never absent for the whole period of the curfew. In essence he sometimes got home late, but always got home and was present for some of the required period but not all of it. In paragraph 26 of the witness statement he says

> "Whilst Mr. Gedi committed several partial breaches we remained satisfied that he was meeting his residence requirement so on that basis we took no action other than to issue warning letters."

20. Mr. Welsh explains the policy not to ask the FTT to impose a curfew in the Bail Summary document (a policy which changed because of this case on the 24th July 2015) as follows:-

> "….prior to the legal challenge raised by Mr. Gedi, the Home Office was confident that the imposition of a curfew was a condition of residence associated directly with and intrinsically linked to the imposition of a tag."

21. This appears to acknowledge the difference between the two powers under consideration. The FTT has power to grant immigration bail as defined in section 36(1)(d) of the 2004 Act as does the immigration officer. That power exists under paragraph 22(2) of Schedule 2 to the 1971 Act. The power under paragraph (5) of Schedule 3 is vested in the SSHD only and not the FTT and arises whenever a person liable to be detained under the deportation provisions is not detained. It appears to me that this power is not a power to grant bail at all but simply a power to impose specified conditions on a person who has not been detained, or, having been detained, has been granted bail under paragraph 22(2) of Schedule 2. Section 36(2) and 36(4) of the 2004 Act allow electronic monitoring of a residence restriction and a bail restriction and would not both be necessary if the residence restriction under paragraph 2(5) of Schedule 3 to the Act was a condition of the grant of immigration bail. The July 2015 change of policy appears to be a response to a fear that the power to grant bail under paragraph 22(2) of Schedule 2 is wider than that to impose a residence restriction under paragraph 2(5) of Schedule 3. If that is right, it would appear that the CIO may have had a power to impose a curfew under paragraph 22(2), but not under the provision on which s/he in fact relied namely Schedule 3 paragraph 2(5). The distinction between the two different statutory powers to impose restrictions on the freedom of a person who is either "in bail" or "not detained" is most directly the subject of submissions in a Note by Mr. Hickman dated 21st September. I had raised during the hearing the broad construction which the courts habitually give to the power to grant bail in criminal proceedings under the Bail Act 1976 and invited counsel to consider what relevance that may have to the present case and to submit written submissions if they chose to do so. In essence he says that there is no proper comparison between the power to grant bail regulated by the Bail Act 1976 and Immigration Bail under paragraph 22(2) of Schedule 2 of the 1971 Act. He further submits that in any event the curfew in this case was imposed under Schedule 3(5) which does not relate to a grant of "bail".

22. The witness statement's approach to the "curfew" (and the submissions made by Ms. Patry) are undermined by the words repeatedly set out in the warning letters. I do not see how a person holding the views set out in the witness statement could properly write the warning letters in the terms which were used, see paragraph 8(iii) above. Those letters say, in terms, that there is a curfew between 00:00 and 06:00 and breach of it may be punished by six months imprisonment or a fine, and by detention consequent upon the withdrawal of bail. They appear to be standard form documents (the last line refers to a failure to keep an appointment which appears to be a survival from a form designed to cover more than one type of breach of bail). The present position of the SSHD as explained by Ms. Patry is that these letters are misleading. They unambiguously use the word "curfew" which she says is not an apt word for the true nature of the restriction imposed on the claimant. She suggests that they should have said something like:-

> "The results of tagging revealed some evidence that you are not complying with the residence restriction. The view has been taken that they do not establish this, but we remind you that if you do not live and sleep every night at the specified address you are in breach of that restriction and may be liable [penalties as before]."

23. Paragraph 26 of the Summary Grounds of Defence put the matter this way:-

> "Insofar as it is said that correspondence from the SSHD to the claimant has indicated that the claimant could face sanctions for failing to comply with his curfew, it should be clear that this in fact is merely shorthand for the sanctions which could be imposed for the failure to comply with the residence requirement. Indeed, it is noteworthy that no sanction has ever been imposed for simply failing to comply precisely with the terms of the curfew itself."

24. This route to the power which the SSHD now says was exercised in this case is, therefore, based on the combination of the power to impose a residence restriction and a power to use tagging to monitor it. There is an obligation to co-operate with monitoring and, it is said in paragraph 25 of the Summary Grounds of Defence:-

> "Insofar as the claimant asserts that the SSHD is merely entitled to impose a requirement that a person co-operate with monitoring of whether they are at their residence during certain times, but falls short of requiring them to be there during those times, this argument is entirely circular. A requirement to co-operate with monitoring during certain times is, in effect, a requirement to be in the residence at certain times. Otherwise there is no co-operation."

25. It appears to me that paragraphs 25 and 26 of the Summary Grounds are inconsistent with each other. One (25) says that there is a requirement to be in the residence at certain times. The other (26) says that there was not, as does Mr. Welsh. He implies that no sanctions were imposed on the claimant because there was no curfew. Mr. Welsh's proposition and paragraph 26 of the Summary Grounds appear to me to agree with the submission of the claimant at paragraph 51 of the Skeleton Argument that:-

> "On a proper construction of its meaning, section 36(5)(b) merely authorises the Secretary of State to require a person to co-operate with arrangements for monitoring their whereabouts at certain times or during specified periods of time. It would therefore enable the Secretary of State to require a person to cooperate with monitoring of whether they are or are not at their residence between, for instance, 00:00 and 06:00. However it falls short of <u>requiring</u> a person to be in their residence during this period of time. The section allows the Secretary of State to monitor and obtain evidence that may support a case that a person is not in fact residing at a specified address, but no more."

There is no doubt that the letters sought to enforce a curfew. That is what they say.

DISCUSSION

THE LAWFULNESS OF CURFEWS IN PRINCIPLE

26. The claimant's position in these proceedings is very clear. I mean no personal criticism of Ms. Patry (whose submissions were helpful) when I say that the position of the SSHD is not. The failure to document or at least to produce for this hearing any documents evidencing the grant of bail by the CIO on 20th May 2013 and again on 10th December 2014 is unsatisfactory. The SSHD has apologised to the court for this failure and I acknowledge that, and I hope that systems can be improved so that in future the factual position can be made rapidly clear by the production of appropriate records. It is also unfortunate that the terms of the warning letters are now repudiated by the SSHD on whose behalf they were written. A curfew and tagging were in place between 18th August 2014 and 9th December 2014 when it is now agreed that there was no power to impose them. This meant that the bail in December 2014 was expressed as a continuation of something which should have stopped months before. In the respects identified in the paragraphs above the submissions now made appear inconsistent with each other and in part consistent with a submission made by the claimant. The possibility that the FTT (and an immigration officer) may have wider powers when granting bail under Schedule 2 paragraph 22(2) than the SSHD does when imposing a residence restriction under paragraph 2(5) of Schedule 3 appears to have been considered only in the light of these proceedings and to have been reflected in the July 2015 policy change which I discuss in paragraphs 20 and 21 above. That change was only revealed in a very late witness statement and the reasons for it have not been fully explored in evidence or submissions.

27. In these unhappy circumstances, I start my analysis of the legal position from the beginning. The provisions which I have to construe concern restrictions which may be imposed on a person who is liable to detention. Under Schedule 2 paragraph 22(2) those restrictions may be attached to a grant of bail. Under Schedule 3 paragraph 2(5) restrictions may be imposed on a person who is liable to be detained, but is not detained. The provisions do not confer free-standing powers to impose restrictions on persons not otherwise subject to legal process. "Bail" means the conditional release from imprisonment of a person who, but for the grant of bail, would not be released. The phrase "unconditional bail" is incomplete because there is always a condition to surrender at some time in the future. In some criminal cases the terms of bail may be very onerous and may amount to house arrest. I have been shown the immigration bail grant in the case of Omar Othman, otherwise known as Abu Qatada, by which the Special Immigration Appeals Commission imposed very substantial conditions including a curfew. It was, in effect, a very similar order to the old control orders, but imposed as conditional bail. I am told that SIAC made this order using its power under paragraph 22 of Schedule 2 to the 1971 Act. Mr. Hickman doubts this, suggesting that SIAC, as a superior court of record, has an inherent power to grant bail. It seems to me that SIAC probably did have paragraph 22(2) in mind because the order recites the release of the applicant "on his own recognisance (£nil)" which complies with the jurisdictional requirement of that paragraph.

28. Although the Bail Act 1976 is commonly used to impose substantial restrictions on freedom in criminal proceedings it contains no specific power to impose a curfew or a condition of residence. Section 3 of that Act provides, among other things

"(6) He may be required to comply, before release on bail or later, with such requirements as appear to the court to be necessary—

(a) to secure that he surrenders to custody,

(b) to secure that he does not commit an offence while on bail,

(c) to secure that he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person,

(ca) for his own protection or, if he is a child or young person, for his own welfare or in his own interests,

(d) to secure that he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence.

(e) to secure that before the time appointed for him to surrender to custody, he attends an interview with a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act);

and, in any Act, *"the normal powers to impose conditions of bail"* means the powers to impose conditions under paragraph (a), (b), (c) or (ca) above.

(6ZAA) The requirements which may be imposed under subsection (6) include electronic monitoring requirements.

……

(6ZAB) In this section and sections 3AA to 3AC*"electronic monitoring requirements"* means requirements imposed for the purpose of securing the electronic monitoring of a person's compliance with any other requirement imposed on him as a condition of bail."

29. In the criminal context, therefore, a general power to impose conditions for specified purposes has been used over a number of years to impose conditions which might otherwise constitute tortious infringements of freedom. Specific provision is made for electronic monitoring and for certain other types of bail condition, but the power remains very general. A reporting condition requires the subject to be present in a police station for a brief period of time and would, if imposed without power, amount to a false imprisonment according to the submission of the claimant. A requirement to "live and sleep every night" requires presence in an address for a period of time each night, even though the period of time is not precisely identified. A curfew is the same in its nature as that kind of residence requirement although it is more prescriptive in its terms and more intrusive. I accept the argument that merely because a practice is convenient or expedient does not mean that it is lawful. However, the Bail Act is now nearly 40 years old and has been amended many times. Parliament has not thought it necessary to attempt to list the types of conditions which may lawfully be imposed on a grant of bail notwithstanding the way in which it has been construed by the courts. It seems to me that the technical differences pointed out by Mr. Hickman in his Note of 21st September between immigration bail under paragraph 22(2) of Schedule 2 to the 1971 Act and bail granted under the power regulated by the Bail Act 1976 do not prevent me from drawing a parallel between the two regimes.

30. In each of the three cases I am considering (namely Schedule 2 paragraph 22(2) bail; Bail Act 1976 bail and restrictions imposed under Schedule 3 paragraph 2(5) to the 1971 Act) the person who is to be subject to the condition is liable otherwise to be

detained. In the criminal context that involves remand in custody and in the immigration context that involves detention in a place specified under the Immigration (Places of Detention) Direction 2014 (No. 2). The justification for this power is found in the criminal context from the fact that the person has been charged with a criminal offence and one or more statutory conditions for refusing bail has been made out (I am not here going to address bail granted by a police officer). In the present immigration context the justification for detaining a person is that a deportation decision has been made in respect of that person. Those events, charging with an offence and the making of a deportation decision, are events which Parliament has decided may justify the complete removal of the liberty of the person concerned. When considering whether a restriction on freedom may be justified by a broadly expressed statutory power it is important to take into account the fact that Parliament granted that power for use in cases where otherwise detention might be required. Parliament has authorised the complete loss of liberty of a person, but granted powers to impose restrictions on him if he is released. The power to decide whether to detain or to allow restricted liberty is to be construed as a whole when deciding whether Parliament intended to grant powers by general words to impose restrictions which might otherwise be unlawful. Those restrictions will vary widely between cases and it would not be practicable for Parliament to identify all restrictions which might be required in a list. If actual imprisonment by the state might be lawful, it is easier to justify the use of an onerous condition which falls far short of imprisonment even though it otherwise might amount to a tort of false imprisonment. With that introduction I turn to the provisions which I am required to construe.

31. The provisions of the 1971 Act with which I am concerned are contained in Schedule 3 which deals with deportation cases. One provision which is important in the present context is imported from Schedule 2. It is helpful to place them together in a logical order as follows:-

> "(2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision)of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.
>
> "(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise)[1].
>
> "(4A) Paragraphs 22 to 25 of Schedule 2 to this Act apply in relation to a person detained under sub-paragraph (1), (2) or (3) as they apply in relation to a person detained under paragraph 16 of that Schedule."
>
> Paragraph 22(2) of Schedule 2 to the 1971 Act provides: "The conditions of a recognizance or bail bond taken under this paragraph may include conditions

[1] These words appear to support the argument that release on bail and release by order of the SSHD are not the same thing.

> appearing to the immigration officer or the First-tier Tribunal to be likely to result in the appearance of the person bailed at the required time and place; and any recognizance shall be with or without sureties as the officer or the First-tier Tribunal may determine.
>
> "(5) A person to whom this sub-paragraph applies shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by the Secretary of State.
>
> "(6) The persons to whom sub-paragraph (5) above applies are—
>
> …….
>
> (b) a person liable to be detained under sub-paragraph (2) or (3) above, while he is not so detained."

32. I do not accept Mr. Hickman's submission that as a matter of the construction of their language paragraph 2(5) and (6) of Schedule 3 mean that no restriction imposed under 2(5) which amounts to false imprisonment (which he equates to "detention" for the purposes of this argument) is lawful. The submission is contained in paragraph 52 of his Skeleton Argument:-

> "Paragraph 2(2)[2] merely empowers the Secretary of State to impose restrictions as to residence, employment or occupation. But this does not extend to a power to subject a person to an imprisonment; on the contrary, the power applies on its terms to a person who "is not ... detained". Moreover, explained in paragraph 45 above, immigration detention is only lawful in specified places of detention (which do not include peoples' homes or other residences). The approach taken by the Secretary of State is contrary to the statutory regime and essentially seeks to add to the specified places of immigration detention by detaining persons subject to immigration control in homes and other residences, through the mechanism of electronic monitoring. That is unlawful."

33. In my judgment the power to impose the specified conditions under paragraph 2(5) arises where the person is not in immigration detention under the power conferred by the Act to detain in a specified place. This may be the result of a grant of bail, or a decision by the SSHD to release from detention, or the fact that the person was never detained in the first place. The fact that such a person is not detained in that sense does not mean that his liberty may not be subject to other less onerous restrictions which would otherwise amount to a false imprisonment. Detention under the 1971 Act is a very specific restriction on liberty and the power to impose the 4 types of condition allowed by paragraph 2(5) arises wherever a person who is liable to be detained in that sense is not so detained. The scope of the power is not limited by the

[2] I think he means paragraph 2(5).

fact that the subject is liable to be detained but is not detained. On the contrary, as I have suggested above, this context justifies a wider power to restrict freedom than might arise in other circumstances.

34. I have placed paragraph 22(2) of Schedule 2 and paragraph 2(5) of Schedule 3 one after the other at paragraph 31 above and it is important to read them together. They are not mere duplication. Both paragraphs apply to a person subject to a deportation decision or order, such as the claimant, and they are different. Paragraph 22(2) of Schedule 2 imposes a general power to impose conditions of bail but the limiting factor is that they must appear to be likely to result in the appearance of the bailed person at the specified time and place. Without seeking to explain the limits which that requirement may produce in any other case, it appears to me that any condition which makes it harder for the bailed person to abscond and disappear may rationally be said to be likely to result in his appearance as required. Similarly, a condition which makes it harder for him to commit an act of terrorism also, in addition to other benefits it may confer, makes it more likely that he will attend as required. A residence restriction requiring him to live in and sleep at his home every night is such a condition, and a curfew condition is to the same purpose. The curfew has the advantage that its terms are clear and capable of monitoring by tagging. Everyone knows what is, and what is not permitted. Certainty is desirable in the interests of the liberty of the bailed person who is not liable to be detained (as I have used that term) because he interprets the word "reside" differently from the CIO or FTT.

35. Mr. Hickman makes two general submissions on the construction of both relevant powers in the 1971 Act which I must address. First, he relies on the rule that statutes must be construed in a way which does not confer a power to commit what would otherwise be tortious acts in the absence of clear words. Secondly, he refers to other legislation where a power to impose a curfew has been expressly conferred and notes its absence from the present statutory scheme.

"Crystal Clear"

36. Mr. Hickman correctly submits that in *Morris v Beardmore* [1981] AC 446 the House of Lords affirmed the need for express statutory language to authorise a tort. Lord Diplock said at 455:

> "if Parliament intends to authorise the doing of an act which would constitute a tort actionable at the suit of the person to whom the act is done, this requires express provision in the statute…"

37. In *Entick v Carrington* (1765) 19 St Tr 1029 Lord Camden CJ held that a statute which was said to authorise tortious conduct

> "could not be extended beyond the letter…….one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant." (1062 and 1066).

38. In *SSHD v GG* [2010] QB 585 the Court of Appeal dismissed an appeal from the Administrative Court holding that there was no power to authorise personal searches, in the absence of explicit statutory wording, under the Prevention of Terrorism Act 2005 (control order regime). Sedley LJ stated:

> "It is in my judgment axiomatic that the common law rights of personal security and personal liberty prevent any official search of an individual's clothing or person without explicit statutory authority. That these are rights customarily defined by correlative wrongs rather than by affirmative declarations is an artefact of our constitutional history; but it makes them no less real and the courts' vigilance in defence of them no less necessary."

39. Dyson LJ (as he then was) agreed with the reasons given by Sedley LJ and also invoked the words of Lord Hoffmann in *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115 at 131 [29]:

> "In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

40. Finally, Mr. Hickman refers to the recent *Black Spider Letters case*, where Lord Neuberger articulated the *Simms* principle in terms that a statute authorising an interference with basic rights must be "crystal clear" if it is to be given such an effect (*R (Evans) v A-G* [2015] UKSC 21, [2015] 2 WLR 813 at [58]).

41. In the present case Parliament has authorised detention (in the sense which I have explained) in terms which are "crystal clear". A person subject to this regime does not have a right to unrestricted liberty, or any liberty except that afforded by the rules of the institution where he may be detained. He has no right to go home. Conditions attached to release from lawful detention do not restrict freedom, they extend it. In this case the claimant acquired a right to go home. In addition to authorising detention, Parliament has also conferred a broad power to impose conditions on a bail recognizance to avoid detention where possible. The two provisions are to be read together. In these circumstances that broad power should be construed to include measures which would otherwise be tortious as acts of false imprisonment where they afford the subject greater freedom than detention and where they are likely to result in his appearance as required in the grant of bail or are rationally imposed under paragraph 2(5) Schedule 3. This applies both to the broadly expressed power to grant bail under paragraph 22(2) of Schedule 2 and to the meaning to be given to the term "restriction as to residence" in paragraph 2(5) of Schedule 3.

Other Statutes

42. Mr. Hickman's second broad submission relies on other statutes where a power to impose a curfew is specifically granted. He points out that section 2(1) and (2) of the

Terrorism Prevention and Investigation Measures Act 2011 empowers the Secretary of State to impose measures set out in Schedule 1 to the Act. The first of these, in para 1 of Schedule 1, is a power to *"impose restrictions on the individual in relation to"* the residence in which he resides, including *"a requirement, applicable overnight between such hours as are specified, to remain at, or within, the specified residence"* (1(2)(c)). Similarly, section 253 of the Criminal Justice Act 2000 provides expressly for curfews in cases where a person is released from a custodial sentence on licence. There is no equivalent to these provisions in respect of persons released from immigration detention.

43. In my judgment there is limited assistance to be derived from statutes which confer powers outside the context of release from detention. The two contexts in which restrictions may be imposed under these Acts are different from the present. An order under the 2011 Act is made against a person who is not otherwise subject to any restriction on his freedom: he is not a person who is liable to be detained but eligible for conditional release. It is hardly surprising that Parliament has closely defined the powers of the Secretary of State in that situation. Similarly, the person subject to a custodial sentence is being punished for a crime under a sentence of a court. Again, the powers of the Secretary of State to affect the conditions of the punishment are spelt out. In some of the cases to which section 253 applies the person is entitled to automatic release on licence, in others not. In all cases release is consequential upon a determination that further detention for punitive reasons is no longer appropriate. In a long determinate sentence the conditions of the licence may be in force for many years. In the kind of case with which I am concerned, there may be delays but the conditions only last as long as the proceedings. I do not intend to attempt to construe the scope of the powers to impose conditions on such a licence. I merely point out that the context is different and different considerations apply. I am therefore not persuaded by consideration of these two Acts that a power to impose a curfew can only exist where it is granted in specific terms.

CONCLUSIONS ON THE STATUTORY POWERS

44. For these reasons I accept the submission of the SSHD that there is a power to impose a curfew and a residence restriction under paragraph 22(2) of Schedule 2 to the 1971 Act. That paragraph is incorporated into Schedule 3 as I explain above, and the residence restriction is therefore one to which section 36(1) of the 2004 Act applies and tagging is permitted.

45. Schedule 3 paragraph 2(5) endows the SSHD with a power to notify any person liable to be detained under Schedule 3 of a restriction on residence, occupation, employment and of any reporting requirement. This power is not granted to the FTT which acts under the general power I have just analysed. It is also not limited by the condition that the conditions must be likely to result in the appearance of the bailed person. No doubt because of the absence of that statutory requirement the list of conditions available to the SSHD is short. It was not initially argued before me that a night-time curfew at a home address is a form of "restriction as to residence" which can therefore lawfully be imposed under this provision. There is no challenge in these proceedings to the condition which required the claimant to live and sleep every night at the address[3], and the claimant has never challenged the requirement in his licence set out

[3] This is a very common bail condition in criminal proceedings.

at paragraph 7 for which there is also no express statutory warrant. In paragraph 66 of his Skeleton Argument Mr. Hickman referred to the "live and sleep" condition as a requirement in "standard form". Obviously it does not mean that the claimant is liable to detention and criminal penalty if he suffers from insomnia or prefers to listen to music all night and sleep during the day. It means that he must be at home every night.

46. While drafting this judgment, it occurred to me that if a "live and sleep condition" is properly imposed using a power to impose a "residence restriction" (as the claimant appeared at that stage to accept) then specifying the times to which it relates so that it becomes a curfew does not necessarily change that. I therefore sent a Note to Counsel which asked two questions:-

    i) Does the Claimant accept that the requirement that he should live and sleep every night at this home is a restriction as to residence which can validly be imposed under paragraph 2(5) of Schedule 3?

    ii) Does the SSHD conceded that a curfew between 10:00pm and 08:00am is not a "restriction as to residence" for the purposes of paragraph 2(5) of Schedule 3? If not what should I find on the issue.

47. These questions invited both sides to consider whether to change the way their oral argument had proceeded. Both accepted the invitation. I received written answers. The Claimant now submits that a "live and sleep" condition cannot be imposed without a specific authority and, there being none, was unlawful. He also submits that The CIO and the SSHD did not impose a "live and sleep" condition but a curfew. This is beside the point. The point under consideration is more theoretical and is this: if a "live and sleep" condition is lawful why is not a curfew which has the same effect but which is far more sensibly expressed? Finally, Mr. Hickman submits that a curfew is a step further than a "live and sleep" condition. I am not persuaded by his submissions that this is so, at least in this case. The night time curfew initially started rather early and then permitted the claimant to be out of his house all night between 10:00pm and 06:00am. The variation to require him to be present between 00:00am and 06:00am seems to me to be, in substance, simply a different way of phrasing a "live and sleep" condition which avoids the potential absurdity (in Mr. Hickman's phrase) of rendering it an apparent breach of bail for a person to be awake at home.

48. The SSHD now submits that paragraph 2(5) of Schedule 3 does give a power to impose a curfew as a residence restriction. I have already held that such a construction does not offend against the "crystal clear" rule for reasons set out at paragraph 41 above. I am less receptive to the submission which was advanced at the oral hearing, namely that such a restriction can lawfully be imposed under section 36 as an inevitable accompaniment to tagging. Indeed the July 2015 policy change appears to be based on a recognition that there is not much merit in this. As I have pointed out above, the SSHD appears through Mr. Welsh to accept the claimant's submission on this issue. It appears to me that a requirement to co-operate with monitoring under section 36 means only that the person subject to it must ensure that he facilitates the functioning and use of equipment which will show whether he is at a given address at certain times. Any power to require him to be there at those times must have its origin elsewhere. I have held that it may lawfully be imposed under Schedule 2 paragraph 22(2) which is incorporated into Schedule 3 to the 1971 Act.

Although not asked to do so I also hold that it may be imposed as a residence restriction under paragraph 2(5) of that Schedule.

49. I have set out paragraphs 25 and 26 of the Summary Grounds above. The SSHD's submission on this issue is therefore also that there never was a curfew at all. It was only a means of monitoring a residence restriction. This is flatly contradicted by the letters which threaten that there is a curfew and that unless it is complied with a prison sentence may follow. If there truly was no power to impose a curfew and these threats were false, it seems to me that by writing them the SSHD was restricting the freedom of movement of the claimant without any legal basis for doing so. That is the gist of the cause of action for false imprisonment. The fact that the curfew may have been imposed unlawfully (as it was during period 3) does not mean that it was not a curfew. It means that it was an unlawful curfew.

50. I now move to the detail of the SSHD's submission that a curfew was justified under Section 36 of the 2004 Act. If the person subject to a residence restriction imposed under Schedule 2 or 3 which is controlled by tagging fails to co-operate with the tagging, section 36 of the 2004 Act provides

> "(2) Where a residence restriction is imposed on an adult–
>
> (a) he may be required to cooperate with electronic monitoring, and
>
> (b) failure to comply with a requirement under paragraph (a) shall be treated for all purposes of the Immigration Acts as failure to observe the residence restriction."

51. This means that the power to prosecute for failing to observe a residence restriction arises where there is a failure to co-operate with tagging, see section 24(1)(e) of the 1971 Act set out above. In my judgment a requirement to co-operate with tagging is a requirement to assist in ensuring that presence or absence from an address is detectable. This definition suffices for the present because the equipment only showed when the claimant was, and was not, at home. It did not show where he was if he was not there. However, absence from a place does not involve a failure to co-operate with monitoring unless presence there was required in order to facilitate monitoring (for example because the tag is to be fitted at that time or place). The subject is absent and, because he has co-operated with the electronic monitoring, the SSHD knows it and can prove it. He may have breached some other condition of bail but not the requirement imposed under section 36(2)(a) of the 2004 Act.

52. In my judgment a curfew associated with a residence condition is a "restriction as to residence". This is so whether it was imposed under paragraph 22(2) of Schedule 2 (which is part of Schedule 3) or under paragraph 3(5) of Schedule 3, or both. Breach of its terms is therefore an offence under section 24(1)(e). In this respect I am departing from the approach taken by the SSHD (at least in part of her submissions and in the evidence served on her behalf). In case I am wrong about this, I also address the submission by Mr. Hickman that the existence or otherwise of a power to impose a curfew (which he would say is not a form of restriction as to residence) under paragraph 22(2) of Schedule 2 is irrelevant because the SSHD acted throughout under Schedule 3 paragraph (5) and section 36. He says that the CIO did not extend bail on a recognisance and did not require attendance at any given place.

53. I have already observed that the documentation does not include any clear statement as to the basis on which the CIO acted in May 2013 and the SSHD in December 2014. It appears to me (doing the best I can in absence of appropriate documents) that that the CIO in May 2013 and the SSHD in December 2014 thought they were doing two things

    i) "Maintaining the bail" as granted by the FTT as they were required to do by the practice unless circumstances changed this included a requirement that the claimant co-operate with tagging but not a curfew; and

    ii) Imposing a curfew under Schedule 3(5) to the 1971 Act and section 36 of the 2004 Act. This first occurred on 26th April 2013 during the period covered by the FTT grant of bail. It was not part of that grant of bail and can only have been done at that stage on this statutory basis since no grant of bail under paragraph 22(2) occurred on that day and bail at that stage was under the jurisdiction of the FTT and not the CIO. If I am wrong about the power to impose a curfew under Schedule 3(5) as a restriction as to residence then the SSHD had no power to act as she did on that day and the curfew between 26th April 2013 and 20th May 2013 was unlawful. This is because I have rejected the other suggested bases for it.

54. As from the 20th May 2013, however, the position changed. It appears to me that in "continuing bail" the CIO was exercising the power under paragraph 22(2) of Schedule 2, and was acting additionally under the power in paragraph 2(5) of Schedule 3. If I am wrong that both powers included a power to impose a curfew, but right in my conclusion that paragraph 22(2) does confer such a power then in my judgment that power was lawfully exercised. I do not know what terms as to surrender were imposed because I have not seen any relevant documents. By now, however, a deportation order had been made and his continued detention was permissible under paragraph 2(3) of Schedule 3:-

> "(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise)."

55. When the claimant surrendered to the CIO on 20th May 2013 as required by the Order of the FTT the position was as described by the FTT when the claimant applied to vary the curfew condition in October 2013:-

> "Unfortunately your client's conditions are no longer under the jurisdiction of the tribunal. Your client's primary condition was to surrender to the Chief Immigration Officer on Monday 20th May 2013. As of this date the Chief Immigration Officer takes over responsibility of all bail conditions including electronic monitoring. To vary your client's bail conditions you will need to make this request to the Chief Immigration Officer and the case worker dealing with your client."

56. In parallel with the position in criminal cases, a person who surrenders in answer to bail is detained until a new grant of bail is made. As Mr. Hickman now submits in his Note of 21st September 2015

> "Schedule 3 para 5 of the IA 1971 does not relate to a grant of "bail" but provides that conditions may be imposed by the SSHD whilst a person liable to be detained is not so detained."

57. In the state of confusion created by the circumstances of this case, I am required to decide whether the CIO had power to impose a curfew on 20th May 2013 when s/he released the claimant after he had surrendered. In my judgment such power plainly existed under paragraph 22(2) of Schedule 2 even if it did not under Schedule 3 paragraph 2(5). Given that it was an order made by a person with jurisdiction to make it and given that it is not challenged on any ground other than jurisdiction I conclude that it was a lawful order even if the CIO thought he was acting under another power, or if s/he did not specify what power was being applied. The consequence of the use of one power rather than the other on this assumption would be for the means of enforcement. If it is not a "restriction as to residence" but is a lawful condition of bail, then breach is not a criminal offence under section 24(1)(e) of the 1971 Act, but is only enforceable by withdrawal of bail. No sanctions have ever been deployed against this claimant and I am not required to decide on their lawfulness.

58. The imposition of the curfew in December 2014 after the new deportation decision was additionally complicated by the muddle over Period 3 which meant that the SSHD considered that she was simply continuing conditional bail when in fact the claimant had not been liable to be detained since 18th August 2014 and no enforceable conditions applied. However, there is no doubt that on 10th December 2014 the claimant again became liable to be detained under paragraph 2(2) of Schedule 3 to the 1971 Act. He was not detained but informed that the bail conditions, including the curfew and tagging would continue. The recognisance effected in the first set of proceedings had now expired and there is no evidence that a new one was effected. Therefore the jurisdiction under paragraph 22(2) of Schedule 2 did not apply. At this point the only jurisdiction to impose a curfew was as a restriction as to residence under paragraph 2(5) of Schedule 3. If, contrary to my decision, that provision did not permit the imposition of a curfew then the curfew now in force is unlawful and has been since that date.

59. For these reasons the claimant's challenge to the imposition of the curfew in periods 1, 2 and 4 fails. There was a power to impose it during those times. Between 20th May 2013 and 18th August 2014 it originated from paragraph 22(2) of Schedule 2 to the Act 1971 and (I consider) from paragraph 2(5) of Schedule 3 to the same Act. Between 25th April 2013 and 20th May 2013 and again from 10th December 2014 to date it depended only on paragraph 2(5) of Schedule 3. On the main issue I find for the SSHD.

THE CONSTRUCTION ISSUE

60. I have set out the terms of the grant of conditional bail by the FTT at paragraph 3 above. I have been shown Guidance by the President of the FTT Immigration and Asylum Chamber, Mr. Clements. I mean him no discourtesy when I say that I have not found it helpful in construing this Order. The document represents sound

guidance for Judges dealing with immigration bail, but was not available to the claimant. The person to whom the terms of a grant of bail must be made clear is principally the person being admitted to bail. I do not think that a document which he did not see is a useful aid to construction. The grant appears to me, nevertheless, to be quite plain in its terms and not, as Ms. Patry at one point suggested, "ambiguous". It is not a statute or a conveyance of property and it is to be construed in the real world as it might be understood by the person who is subjected to its terms. The first consideration is that the FTT decided that tagging was required in this case. The FTT did not want to delay the release of the claimant if the tagging was slow in being fitted and drafted the order to give effect to that wish. There is no rational justification for deciding that if tagging was late it should not be used when it became available, nor do I think that any sensible person being granted bail would read a grant of bail as having that meaning unless it was inescapable. That construction would mean that tagging was a reward granted to the SSHD for prompt action rather than a bail condition imposed because of a genuine need. If the need for tagging was genuine, it would not disappear after two days. The grant of bail is to be read having regard to these fairly obvious matters which would not be lost on the claimant himself. The claimant himself does not appear to have questioned the curfew or tag at that time which perhaps offers some confirmation of this.

61. The technical way to achieve what is clearly the intention of the FTT is to construe clause 3(ii) of the grant as self-contained. The fact that the claimant is released subject to the reporting condition if the tagging is not arranged within two days has no effect on the provision in clause 3(i). As and when he can co-operate with tagging because arrangements are in place, he is required by clause 3(i) to do so. After release but before he is asked to co-operate with tagging, he is subject to the reporting condition. No part of the third secondary condition has any effect on the first or second secondary condition.

62. I was informed that a judge of the FTT has decided otherwise in another case. I doubt if the argument before him was as extensive and capable as that before me. I consider that he came to the wrong conclusion.

63. Therefore, the bail granted by the FTT did require the claimant to co-operate with the tagging when arrangements for it were made on 26th April 2013.

THE ALLEGED ERROR BY THE CIO

64. It follows from the above that the CIO did not err when deciding to continue the tagging.

FALSE IMPRISONMENT

65. During period 3, for nearly four months, the claimant was subject to a curfew and tagging when he should not have been. Letters to enforce the curfew were sent, but he was not arrested and not otherwise punished.

66. I have been addressed as to the law by reference to Clerk & Lindsell 21st Edition 15-23/15-28. This is because both sides accept that it accurately states the law. The SSHD submits that she had no intention to detain the claimant in his home between the hours of 00:00 and 06:00 (or during the earlier time regime) and therefore that this

element of the tort is not made out. In the light of the warning letters I reject that submission. They were calculated to ensure that he stayed at home during that time in fear of imprisonment if he did not. The tag on his ankle and the equipment in his home demonstrated to him that the SSHD meant business when issuing those threats.

67. False imprisonment is the unlawful imposition of constraint on another's freedom of movement from a particular place, see paragraph 15-23 of Clerk & Lindsell. I have used the expression "house arrest" above. It appears to me that for the State to threaten a person with imprisonment if he leaves his home is plainly a sufficient constraint to constitute this tort and it is now conceded that those threats during this period were without lawful justification. It appears to me that the elements of this tort are made out during this period.

68. It is agreed that damages will be assessed at a subsequent hearing and that there will be a hearing in the near future at which the form of Order consequent on this judgment will be determined as the parties are not in agreement about that. Therefore at this stage I make no further order except that I direct that any application for permission to appeal against this decision may be made at the next hearing and extend time for that purpose.