Neutral Citation Number: [2016] EWCA Civ 409

Case No: C4/2015/3630

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Edis
CO/2668/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2016

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LADY JUSTICE BLACK
and
LORD JUSTICE GROSS

- -

Between :

THE QUEEN (on the application of ABDIWELI GEDI)	**Appellant**
- and -	
SECRETARY OF STATE FOR HOME DEPARTMENT	**Respondent**

- -
- -

Tom Hickman (instructed by **Ravi Naik** of **Irvine Thanvi Natas**) for the **Appellant**
Robin Tam Q.C. and **Carine Patry** (instructed by **Government Legal Department**) for the **Secretary of State for the Home Department**

Hearing date : 2 March 2016

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Approved Judgment

Sir Brian Leveson P and Lord Justice Gross:

1. This case concerns the power of the Secretary of State for the Home Department ("SSHD") and her immigration officials to impose conditions of curfew and electronic monitoring on those who have been released from immigration detention pending the conclusion of deportation proceedings. This turns entirely on the terms of the legislation but there are subsidiary issues relevant to this particular case both in relation to the adequacy of the evidence as to who made what decisions and (given the concession now made that the legislation originally claimed to confer the power did not do so) whether it was open to the court to conclude that the restrictions could be justified under different legislative provisions.

2. Before Edis J, the imposition and authority to impose restrictions upon Abdeweli Gedi ("the appellant") were considered in relation to four separate periods of time. These were (1) 25 April to 20 May 2013, (2) 20 May 2013 to 18 August 2014, (3) 18 August to 9 December 2014 and (4) from 10 December 2014. He found that the relevant restrictions were lawfully imposed in the first, second and fourth of these periods but directed an assessment of damages for false imprisonment (consequent upon an unlawful requirement to comply with a combination of curfew and electronic monitoring) in relation to the third period: see [2015] EWHC 2786 (Admin). With the leave of the judge, the appellant appeals the conclusions and reasoning which led to the adverse decisions in relation to the other three periods.

The Facts

3. The appellant is a Somali national who arrived in the United Kingdom on 29 June 1998 at the age of eight with his family. He was subsequently given indefinite leave to remain but has never applied for British citizenship. On 25 May 2010, he was convicted of three offences of attempting to cause grievous bodily harm, one offence of causing grievous bodily harm with intent, and one offence of dangerous driving. These convictions arose out of an incident where he left a nightclub in the early hours of the morning and drove a Range Rover at three people, trying but failing to do them serious harm. He drove away, but soon returned, where he this time succeeded in causing a fourth man serious harm. On 18 June 2010, notwithstanding his youth and prior good character, he was sentenced to a total of 6½ years' detention in a young offenders' institution.

4. While that sentence was being served, the question whether the SSHD should deport the appellant as a foreign criminal pursuant to the powers contained in s. 32(5) of the UK Border Act 2007 ("2007 Act") fell to be considered. In these circumstances, she exercised her power under s. 36(1) of the 2007 Act to detain the appellant on his release on licence on 1 February 2013.

5. On 18 April 2013, the appellant appeared before the First Tier Tribunal ("FTT") and was granted bail. The appellant entered a recognisance in the sum of £10 and his mother and uncle entered sureties together amounting to £3,800. These sureties would be forfeited if the appellant failed to comply with the primary condition of bail, which was to appear before a Chief Immigration Officer ("CIO") at Becket House Immigration Office, London on 20 May 2013 at 10:00 am. The document signed by the FTT judge recording the grant of bail further provided for secondary conditions:

> "1. The applicant shall live and sleep every night at an address specified in Rotherhithe.
>
> 2. The applicant shall report to the UK Border Agency [at Beckett House, London, every Monday between the hours of 10am and 4pm from Monday 22 April 2013 onwards]
>
> 3. Bail is granted subject to (i) the applicant cooperating with the arrangement for electronic monitoring ("tagging") as set out in section 36 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 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."

6. In the event, there was a delay and the appellant was not released until 25 April 2013. That same day, in an electronic monitoring commencement form, the UK Border Agency Case Owner requested that the contractor, Serco:

> "… arrange for the supply of the appropriate monitoring equipment and induction of [the appellant] between the hours of {18.00pm} and {22.00pm} on {Thursday 25 April 2013}…
>
> <u>Requirements</u>
>
> - [The appellant] must reside at the address specified in Rotherhithe.
> - He must be at this address between the hours of {18.00pm} and {22.00pm} every {day}, until further notice."

7. The UK Border Agency further produced a form IS.96 (Tag and Track) on 25 April 2013 addressed to the appellant, which among other things set out the same requirements. Tagging was carried out on 26 April 2013 and, as such, not within two working days of the grant of bail. In keeping with the electronic monitoring commencement and IS.96 (Tag and Track) forms, it is the appellant's evidence that on that same occasion Serco informed him that the SSHD had imposed a curfew between 18:00 and 22:00. His statement also asserts that, contrary to the forms, Serco also informed him that he was also subject to a morning curfew between 06:00 and 08:00. Further, he could not remember whether Serco had given him a letter but assumed that they did. It is likely that this would have been the IS.96 (Tag and Track) form which is, after all, addressed to him.

8. Both in the summary grounds of resistance and in the skeleton argument submitted on behalf of the SSHD, it was admitted that a curfew was also imposed between 06:00 and 08:00 although the factual evidential basis for that admission is not disclosed. Given that such a curfew is contradicted by the contemporaneous documentation, we are surprised by it as, it appears, was Edis J (who summarised the curfew at [5] as "between 18:00 and 22:00 and, perhaps, 06:00 and 08:00"): notwithstanding the concession, this does not appear to be a finding on the balance of probability but,

given that this was not the subject of specific argument, we say no more about it. To such extent as it becomes relevant, namely in determining damages for the tort of false imprisonment, whether the SSHD can resile from the formulation of its position and the effect of the judgment will have to be determined by argument directed to the issue and, potentially, oral evidence.

9. What is, however, clear is that the electronic monitoring commencement form and form IS.96 (Tag and Track) communicated to Serco and the appellant respectively show the Home Office operating as if a curfew had been imposed: that does not, however, amount to a clear demonstration that a relevant decision lawfully to impose a curfew was ever taken. As Mr Tam conceded, documentation which identifies restrictions affecting the liberty of the subject is important to demonstrate compliance with the rule of law and its absence is highly unsatisfactory. Without some evidence of by whom and in what circumstances the direction was given to Serco, we see no basis for concluding that there was, in fact, a decision under a specific statutory power to impose a curfew. Thus, although the SSHD communicated a curfew and required the appellant to comply with this direction, we are not satisfied that a lawful basis for this requirement has been established.

10. On 3 May 2013, the SSHD made an order to deport the appellant pursuant to s. 32(5) of the 2007 Act. She considered that none of the s. 33 exceptions to automatic deportation applied. On 20 May 2013, the appellant surrendered himself to the CIO, complying with the primary bail condition imposed by the FTT. This brought to an end the bail granted by the FTT. At the appearance, the CIO granted bail on the condition that the appellant appear before an immigration officer at Beckett House on 4 November 2013. The residence condition remained that the appellant was to reside at the Rotherhithe address and the reporting condition was altered so that the appellant was to appear at Beckett House on Mondays between 09:00 and 11:30. The appellant's recognisance and his mother and uncle's sureties remained constant.

11. Beyond these decisions, the documents submitted as part of these proceedings do not reveal whether the CIO continued the tagging condition or whether he took any action with regard to the appellant's curfew. However, again, Edis J was prepared to assume (at [8.ii] and [53] of his judgment) that the CIO was continuing the SSHD's initial curfew or imposing a curfew afresh. This piles a further assumption on the initial assumption and, again, we see no justification for either.

12. The appellant applied to the FTT for a variation of his curfew and, on 24 October 2013, the FTT declined jurisdiction on the ground that, with effect from 20 May 2013, bail conditions had become the responsibility of the CIO to whom he had surrendered on that date. The appellant therefore communicated with the CIO and, in December 2013, the curfew was varied to 00:00 to 06:00. At least it can now be said with confidence that the curfew (if available as a matter of law) was imposed by someone entitled to impose it.

13. From 24 December 2013 to 9 March 2015, Home Office Immigration Enforcement wrote to the appellant on twelve occasions as he had not reported to Beckett House (3 occasions) or had not complied with his curfew (9 occasions). The letters formally reminded the appellant:

> "… the circumstances of your case have meant that we have been willing to grant release as an alternative to detention. You remain liable to detention under paragraph 2 schedule 3 of the 1971 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 up to £5000 or both".

14. Meanwhile, the appellant had appealed to the FTT against the deportation order. In a decision dated 17 March 2014, his appeal was successful on the grounds that the FTT concluded that the appellant would be in danger if he returned to Somalia. This would constitute a breach of Articles 2 and 3 of the European Convention on Human Rights ("ECHR") and, as such, fell within one of the exceptions to automatic deportation contained in s. 33 of the 2007 Act. The SSHD unsuccessfully appealed this decision to the Upper Tribunal (Immigration and Asylum Chamber) ("UT"), which promulgated its determination on 1 August 2014. On 3 November 2014, the UT refused the SSHD's application for an extension of time and permission to appeal and the SSHD did not appeal those refusals to this court.

15. Thus, as was conceded by Ms Carine Patry for the SSHD before Edis J, the original deportation proceedings came to an end on 18 August 2014, when the time limit within which the SSHD had to appeal the decision of the UT promulgated on 1 August 2014 expired. However, the appellant continued to be subject to tagging and a curfew. As Ms Patry further conceded, the SSHD had neither jurisdiction nor justification to impose those conditions because the appellant was no longer on bail pending proceedings. However, as stated, the appellant continued to receive letters from the Home Office in respect of breaches of the bail reporting condition or curfew.

16. On 10 December 2014, a new decision to deport the appellant was made. The decision letter noted that the FTT decision dated 17 March 2014 found that despite the appellant falling within an exception to automatic deportation contained in s. 33 of the 2007 Act, he remained a danger to the community and that, therefore, he had not rebutted the presumption specified in s. 72(2) of the Nationality, Immigration and Asylum Act 2002; this meant that he was excluded from the protection afforded by the Refugee Convention. The letter gave the appellant 20 working days to rebut the presumption. Accompanying the decision letter was a further letter also dated 10 December 2014 from the Home Office Immigration Enforcement caseworker. Among other things, it stated:

> "In light of the SSHD's position therefore, Mr Gedi remains liable to deportation and his current reporting and monitoring conditions shall remain in place. Mr Gedi retains his current entitlement to Indefinite Leave to Remain (ILR)."

17. Before leaving this recitation of the facts, it is worth adding that, in light of the confusion this case has raised, in July 2015, the Director of Criminal Casework at Immigration Enforcement issued guidance that electronic monitoring and curfews should be requested from the FTT as conditions of bail on a foreign criminal's release from detention on bail.

The Law and the Approach of the Judge

18. The statutory framework is important but, unfortunately, that does not mean that it is easy to follow. Having identified that s. 32 of the 2007 Act makes provision for a foreign criminal to be subject to automatic deportation, s. 36 provides:

> Detention
>
> (1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State—
>
> > (a) while the Secretary of State considers whether section 32(5) applies, and
> >
> > (b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order.
>
> (2) Where a deportation order is made in accordance with section 32(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 (c. 77) (detention pending removal) unless in the circumstances the Secretary of State thinks it inappropriate.
>
> (3) A court determining an appeal against conviction or sentence may direct release from detention under subsection (1) or (2).
>
> (4) Provisions of the Immigration Act 1971 which apply to detention under paragraph 2(3) of Schedule 3 to that Act shall apply to detention under subsection (1) (including provisions about bail).
>
> (5) Paragraph 2(5) of Schedule 3 to that Act (residence, occupation and reporting restrictions) applies to a person who is liable to be detained under subsection (1).

19. Thus, for the grant of bail, it is necessary to turn to Schedule 3 of the Immigration Act 1971 ("the 1971 Act"). Paragraph 2 provides for recommendations for deportation by the court and by notice. It also provides:

> "(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).
>
> …
>
> "(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) [of paragraph 2 of Schedule 3 to the 1971 Act] as they apply in relation to a person detained under paragraph 16 of that Schedule."

20. Moving to Schedule 2, paragraph 22 provides that an individual who is detained may be released on bail by a Chief Immigration Officer ("CIO") or the FTT and goes on at sub-paragraph 2 to provide for the conditions that may be attached to a grant of bail:

> "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."

21. Paragraph 2(5)-(6) of Schedule 3, insofar as is relevant, provides for the type of restrictions that may be imposed on a foreign criminal liable to be detained pending the SSHD making a deportation order under paragraph 2(1), where the foreign criminal has been informed of a decision to make a deportation order under paragraph 2(2), and, where a deportation order is in force against him, under paragraph 2(3). The restrictions are:

> "(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—
>
> > (a) a person liable to be detained under sub-paragraph (1) above, while by virtue of a direction of the Secretary of State he is not so detained; and
> >
> > (b) a person liable to be detained under sub-paragraph (2) or (3) above, while he is not so detained."

22. There are also provisions relating to bail pending appeal both in relation to statutory appeals and appeals against a deportation order. Paragraph 29 of Schedule 2 deals with the former (with a reference back in paragraph 3 of Schedule 3 in relation to the latter) and provides that such a person may be released on bail by a CIO, a police inspector or the FTT and that:

> (5) The conditions of a recognizance or bail bond taken under this paragraph may include conditions appearing to the person fixing the bail to be likely to result in the appearance of the appellant at the time and place named; and any recognizance shall be with or without sureties as that person may determine.

23. The gravity of compliance with bail conditions is underlined by the creation of a criminal offence in s. 24(1)(e) of the 1971 Act which provides:

> (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 5on 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; ...

24. Finally, it is appropriate to add reference to s. 36 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 ("2004 Act") on the basis that it was under this legislation that the SSHD initially argued that the power to impose curfew requirements derived. It provides for electronic monitoring in these terms:

> "(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) ...
>
> (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).

25. Edis J concluded (and the SSHD does not now contend to the contrary) that a requirement to co-operate with tagging is a requirement to assist in ensuring that presence or absence from an address is detectable. He went on (at [51]):

> "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 s. 36(2)(a) of the 2004 Act."

26. On the other hand, Edis J decided that the SSHD and CIOs in principle have power to impose a curfew on a foreign criminal who is awaiting deportation, but is not in detention, under both paragraph 22(2) of Schedule 2, which provides for the conditions that may be attached to a grant of bail by a CIO or the FTT, and paragraph 2(5) of Schedule 3 to the 1971 Act: see [28]-[52].

27. Edis J reached a conclusion as to the principle and decided that the evidence showed that the SSHD had, in fact, imposed a curfew at some time immediately prior to the appellant's tagging on 26 April 2013 with the authority to do so under paragraph 2(5) of Schedule 3. Furthermore, when the appellant appeared before a CIO on 20 May 2013, as he was required to by the bail conditions imposed by the FTT, the judge also decided that the CIO had power to impose a curfew (afresh) under both paragraph 22(2) of Schedule 2 and paragraph 2(5) of Schedule 3, having assumed, as we have seen, that this was, in fact, what occurred: see [53], [54] and [57].

28. In the light of Ms Patry's concession that no decision-maker could have lawfully imposed a curfew from 18 August 2014, that is to say the date that the appellant's successful appeal against the SSHD's deportation order became final, the judge concluded that this amounted to the tort of false imprisonment ([65]-[67]). In the final relevant period, however, which began when the SSHD made a fresh deportation decision on 10 December 2014, Edis J held that the SSHD once again had the power to impose a curfew under paragraph 2(5) of Schedule 3.

The Appeal

29. For the appellant, Mr Hickman advanced both a "narrow" and a "broad case". Whereas the broad case challenged the legality of the imposition of a curfew under s.36 of the 2004 Act and para. 2(5) of Schedule 3 to the 1971 Act, the narrow case assumed that the SSHD had power to impose curfews under those provisions. However, he submitted that the curfew here was unlawful because it had not been imposed as a condition of bail, either by the FTT or the CIO or, at the least, there was no documentation which showed that it had. Importantly for Mr. Hickman's submissions, para. 22(2) of Schedule 2 to the 1971 Act was not relied upon in the documentation in the present case.

30. However inadequate the documentation, Mr Hickman argued that as a matter of reality, on 26 April 2103, the SSHD (or someone on her behalf as evidenced by the instructions to the appellant from the monitoring company) had purported to impose a curfew. It had not, however, been imposed as a condition of granting bail by the FTT or the CIO. He argued that the practice of doing so had not been reflected in the Enforcement Instructions and Guidance issued by the SSHD, or in any immigration rules or policy. The bail granted by the FTT had included a provision to "live and sleep" at a specified address but no more. It was the monitoring company only that informed the appellant of the curfew.

31. As for the second period, he submitted that when, on 20 May 2013, the CIO bailed the appellant, the highest that the SSHD puts the matter is that the curfew continued under the IS.96 form (Track and Tag); this, again, was administrative only. He

argued that there is no evidential basis for the court concluding that a curfew was imposed as a condition of bail. Finally, on 10 December, when the new decision to deport was promulgated, all that was notified to the appellant was that the "current reporting and monitoring conditions shall remain in place": if no lawful curfew had been imposed, it could not 'continue'. In all cases, he submitted that the existence of a different power (if there was one) which could have been exercised to impose a curfew does not render lawful the imposition of an unlawful curfew.

32. Mr Tam responded by relying on the conclusion of Edis J (at [52]) which he argued is correct, namely, that the power of the SSHD under paragraph 2(5) of Schedule 3 to impose restrictions as to residence existed in parallel with the power under paragraph 22(2) of Schedule 2 to the 1971 Act to impose restrictions as to residence, including the power to impose a curfew. That is what the CIO did on 26 April and continued on 20 May. From 2014, the SSHD continued the old bail conditions which had hitherto obtained and, pursuant to paragraph 2(5) she was entitled to do so.

33. As it seems to us, there is no answer to Mr. Hickman's narrow case. It is significant, as already noted, that the SSHD's original stance, relying on s.36 of the 2004 Act, failed before the Judge. Further and as made clear in Mr. Welsh's refreshingly frank witness statement, it had been assumed that the imposition of a curfew was a condition of residence associated directly with and intrinsically linked to the imposition of a tag; accordingly, a "formal request" to the FTT to impose a curfew as a condition of bail did not need to be made. Against this background, it is hardly surprising that there is no documentary evidence of either the FTT or the CIO imposing a curfew as a condition of bail. This is a defect which is fatal to the position of the SSHD in this case.

34. Turning to Mr. Hickman's broad case, the issue turns on whether a curfew can, in law, be imposed under para. 2(5) of Schedule 3 of the 1971 Act. The judge described a curfew as a form of "restriction as to residence" and Mr Tam argued that while it was more specific – particularly as to exact time periods – than a generic requirement to reside at an address or to "live and sleep each night" at that address, these were simply questions of the degree of specificity involved. There was, in principle or fact, no difference between any of these forms of residence requirements. Indeed, were it to be otherwise, a residence condition does not even require the individual to spend any substantial period of time within the identified address at all. Thus, he submitted, Edis J was correct to reject that approach.

35. For our part, we simply do not accept that a right to impose a "restriction as to residence" under paragraph 2(5) of Schedule 3 to the 1971 Act necessarily incorporates a right to impose a curfew. Mr Tam agrees that the words of the 1971 Act refer to bail conditions that are aimed at securing the appearance of the individual at a specified time and place and the residence requirement provides a mechanism for a degree of oversight. Thus, whether by electronic monitoring or by door-step visit, the authorities can be satisfied that oversight of the whereabouts of those subject to such a restriction is maintained. The requirement, however, imposes a specific level of restriction on what those subject to it can do: it is neither more nor less than that they must reside at the specified address. Different people will reside where they live, however, in different ways. Ignoring employment commitments (on the basis that those liable to be detained are not allowed to work unless explicitly granted permission to do so), although many will want to sleep at night, others may well want

to visit friends until the late hours and sleep during parts of the day. Both will be residing at the address at which they sleep.

36. In addition, this curfew (at least in its initial period) was not being used to provide specificity to the residence requirement and did not, in reality, support that requirement at all. The hours which, on any showing, it is common ground were imposed in April 2013 were between 18.00 and 22.00. Very many people will want to be out and about during the evening (rather than at home) and it is absurd to say that if an individual is absent from where he lives and sleeps between these hours, it means that he does not reside there.

37. Furthermore, it is important to underline the need for the clearest legislative authority for a requirement of this nature. As the appellant was repeatedly reminded, failure to observe any restriction imposed on him under Schedule 2 or 3 to the 1971 Act as to residence, employment or occupation constitutes a criminal offence. Even assuming a curfew requirement of, say, 02:00 to 05:00 (when most people would be in bed), returning after 02:00 would not, of itself, lead to the conclusion that the individual concerned no longer resided at the address identified. Electronic monitoring might provide evidence sufficient to justify the inference of non-residence (as would other evidence of change of residence) but not being present between 00:00 and 02:12 (to take the example of the breach letter of 21 December 2013) does not justify the threat that "failing to be present as required" creates a liability to prosecution under s. 24(1)(e) of the 1971 Act.

38. Dealing with the words of the 1971 Act aimed at securing the appearance of the individual at the specified time and place, Mr Tam argued that the powers conferred could be exercised to further the object which it is sought to achieve by deportation, including that of removing an offender whose presence is not conducive to the public good: see *R (Lumba) v SSHD* [2011] UKSC 12, [2012] 1 AC 245 at [106] – [108] per Lord Dyson. Thus, if a person may, under these powers, be detained to prevent re-offending as well as to prevent absconding, the conditions of bail pursuant to which he is released from such detention may therefore be aimed at preventing re-offending. That may be so; it is not, however, a justification for extending the construction of the terms of bail beyond the scope of that which is authorised by the statute.

39. In the circumstances, we have come to the conclusion that the imposition of a curfew on this appellant had no statutory justification over the entire period that he was subject to it. So far as concerns paragraph 2(5) of Schedule 3 to the 1971 Act, a right to impose a "restriction as to residence" does not necessarily incorporate a right to impose a curfew. Whether, in appropriate circumstances and by the appropriate authority, a curfew might have been imposed as a condition of bail under paragraph 22(2) of Schedule 2 to the 1971 Act does not arise for decision (if it is in dispute) because we are not satisfied that the curfew to which the appellant was subject was, in fact, imposed as a condition of bail either by the CIO or the FTT.

40. With regard to whether consequently the appellant has an action for false imprisonment, Edis J decided (at [65]-[67]) that the appellant did have such an action in relation to period 3 where the SSHD conceded there was no lawful justification for the curfew in that period. Although there was neither a cross appeal in relation to period 3 in respect of this finding nor a respondent's notice in relation to the other three periods, Mr Tam sought to challenge the finding on the basis that it was raised

in the skeleton argument and did not, therefore, take the appellant's counsel by surprise. The failure to comply with the CPR cannot, however, be sidestepped by reference to a skeleton argument and we are not prepared to deal with the argument in the context of this case although we note Mr Tam's proposition that compliance with a requirement is not the same as being physically confined and that a person is not to be regarded as "detained" whenever they are complying with such a condition (which will not necessarily amount to a deprivation of liberty for the purposes of Article 5 of the ECHR: see *SSHD v JJ* [2007] UKHL 45 [2008] 1 AC 385).

41. For the purposes of this judgment, it is sufficient to say that we do not go behind the conclusion reached by Edis J in relation to period 3 or the inevitable impact of that conclusion in relation to the other periods. This flows from the absence of an effective respondent's notice. Having said that, we would not want it to be thought that this decision is any authority for the proposition that a finding of false imprisonment will (or should) follow in circumstances such as these.

Conclusion

42. For our part, we would allow this appeal on the grounds both that no sufficient authority to impose the curfew has been evidenced and that neither s.36 of the 2004 Act nor paragraph 2(5) of Schedule 3 to the 1971 Act justify the imposition of a curfew. In the circumstances, we invite the parties to agree an order reflecting this judgment.

Lady Justice Black:

43. I agree with Sir Brian Leveson P and Lord Justice Gross that the appeal should be allowed. In view of the intricacy of the provisions which govern the questions arising in this case, I add this short judgment simply in order to set out my present understanding of the interaction between section 36 of the UK Borders Act 2007, paragraph 22(2) of Schedule 2 to the Immigration Act 1971 (conditions appearing likely to result in the person's appearance at the required time and place) and paragraph 2(5) of Schedule 3 to the Immigration Act 1971 (restrictions as to residence, employment or occupation, and reporting).

44. The spur for the appellant's detention after he had served his sentence of imprisonment was the process of deportation. In view of his conviction, the Secretary of State was obliged by section 32(5) of the UK Borders Act 2007 to make a deportation order in respect of him, subject only to the provisions of section 33 of the Act. There are three distinct periods in the process:

    i) Whilst the Secretary of State is considering whether section 32(5) applies;

    ii) Where the Secretary of State "thinks that section 32(5) applies", pending the making of the deportation order;

    iii) Following the making of the deportation order under section 32(5).

45. Section 36 of the Act contains provisions concerning the detention of a foreign criminal in each of the three periods. The President and Gross LJ have set the section out in full but in summary, up to the making of the deportation order, the person

concerned "may" be detained under the authority of the Secretary of State (section 36(1)) and, when a deportation order has been made, the Secretary of State "shall" detain the person unless "in the circumstances the Secretary of State thinks it inappropriate" (section 36(2)).

46. The appellant was subject to a number of different regimes following his release on 25 April 2013. Initially, he was on bail granted by the FTT; during this period, he was first subject to a notice of intention to deport, which had been given in February 2013, and then a deportation order, which was made on 3 May 2013 under section 32(5) of the UK Borders Act 2007. From 20 May 2013, the appellant was on bail granted by the CIO; during this period he appealed the deportation order successfully, the appeal process ending on 18 August 2014. From 18 August 2014 until 9 December 2014, there was no relevant immigration process going on and it is conceded that conditions could not lawfully have been imposed on the appellant. On 10 December 2014, a fresh decision was taken to deport the appellant, notified to him in a letter headed "Decision to deport pursuant to the Immigration Act 1971 and the UK Borders Act 2007". He was informed that his "current reporting and monitoring conditions shall remain in place"; Edis J viewed this as, in reality, a new grant of conditional bail by the CIO.

47. In the light of these various regimes, it is necessary to consider, at least, detention under section 36(1) (pending the making of a deportation order) and detention under section 36(2) (where a deportation order is made). In both cases, certain provisions of Schedule 3 to the Immigration Act 1971 apply. Being comprised of numerous references from one provision to another, the statutory framework is not easy to explain intelligibly but I will attempt to assemble the fragments as clearly as I can.

48. In the case of section 36(2), the terms of the subsection are such that the Secretary of State directly exercises the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 and various paragraphs of Schedule 2 to the Immigration Act 1971 apply as a result. In the case of section 36(1), the same result is achieved but by means of section 36(4) which provides that the provisions of the Immigration Act 1971 which apply to detention under paragraph 2(3) of Schedule 3 shall apply to detention under section 36(1).

49. What provisions of the Immigration Act 1971 apply to detention under paragraph 2(3) of Schedule 3? It is only necessary to identify those which have a bearing on the present problem. Paragraph 2(4A) of Schedule 3 (the terms of which the President and Gross LJ have set out above) provides that paragraphs 22 to 25 of Schedule 2 to the Immigration Act 1971 apply to a person detained under paragraph 2(3) of Schedule 3 "as they apply in relation to a person detained under paragraph 16 of that Schedule". This unhelpful additional cross-reference is necessitated because paragraph 22 of Schedule 2 is focussed on people detained under paragraph 16 of Schedule 2 (those liable to examination or removal). Those detained under paragraph 16 may be released on bail in accordance with paragraph 22; by virtue of paragraph 2(4A) of Schedule 3, so can those detained under paragraph 2(3) of Schedule 3.

50. As the President and Gross LJ have said, paragraph 22 of Schedule 2 provides for release on bail by a CIO or the FTT upon a person entering into a recognizance designed to secure his appearance before an immigration officer at a time and place notified to him (paragraph 22(1A)) and the conditions of recognizance may include

conditions appearing likely to result in his appearance at the required time and place (paragraph 22(2)). Paragraphs 23 to 25 can be left to one side as they are not relevant in the present case.

51. Also applicable in section 36(1) and 36(2) cases are the provisions of paragraph 2(5) of Schedule 3. Again, these become applicable by different routes. In section 36(1) cases, the sub-paragraph is applied in terms by section 36(5). In section 36(2) cases, it comes in by virtue of paragraph 2(6) of Schedule 3, as a consequence of the fact that in such cases the Secretary of State can exercise the power of detention under paragraph 2(3). Paragraph 2(5) is quoted by the President and Gross LJ above and provides for the imposition of "restrictions as to residence, as to … employment or occupation and as to reporting".

52. Given that it is common ground that the provisions which we should consider are paragraph 22 of Schedule 2 and Paragraph 2(5) of Schedule 3, I do not intend to consider further the routes by which they become applicable to this case, although, in view of the different phases in the appellant's immigration history following his release in April 2013, it seems likely that, at times, the path to these two paragraphs must go by way of provisions to which I have not so far referred.

53. Like the President and Gross LJ, and for the reasons they give, I cannot accept that imposing a restriction as to residence under paragraph 2(5) of Schedule 3 includes imposing a curfew. Paragraph 2(5) cannot therefore be relied upon as the authority for the imposition of any curfew in this case, in my view.

54. As to paragraph 22(2) of Schedule 2, I share the view taken by the President and Gross LJ that no curfew was, in fact, imposed as a condition of bail here. That is as far as it is necessary to go to decide the case and I do not propose to express any view, therefore, as to the ambit of paragraph 22(2).