

## BAIL AND CURFEW

Tim Buley  
Landmark Chambers

### Introduction



- SSHD has long taken for granted (without much challenge) her power to impose “curfew” on persons released from detention
- Called into question, and severely limited, by recent cases, notably *R (Gedi) v SSHD* [2016] 4 WLR 93 and a few subsequent cases:
  - No power to make curfew condition of temporary admission / release
  - Seems to be power to impose curfew as condition of bail, but only where express consideration is given to doing so and as to need for that
  - Upshot is that many curfews were unlawful
  - Current authority supports view that curfew amounts to a deprivation of liberty and hence gives rise to (modest) damages for false imprisonment
- New bail regime in force from 15 January 2018 untested, may alter position

## Legal provisions (old release regime)



Temp admission No power to grant bail as a condition of temp admission

### BAIL

- Para 22 of Schedule 2 to the IA 1971:

“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”

## Legal provisions (old release regime)



- Para 2(5) of Schedule 3 IA 1971:

*“(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”*

- Section 36 of the AI (Treatment of Claimants) Act 2004:

*“(2) Where a residence restriction is imposed on an adult—*

*(a) he may be required to co-operate 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.”*

## GEDI [2016] 4 WLR 93



- Somali national detained with a view to deportation. Bail granted by FTT subject to (a) a condition to reside at a particular address and (b) requirement to “cooperate” with electronic monitoring.
- When monitoring put in place, further “curfew” condition communicated by SSHD (to be at address at particular times, on pain of prosecution).
- He challenged curfew as false imprisonment.
- Edis J held ([2015] EWHC 2786 (Admin)) that:
  - (except for one period) curfew was lawful; and
  - Unlawful curfew period gave rise to false imprisonment and damages

## GEDI (1): “Electronic monitoring”



- The court first noted with approval Edis J’s unchallenged holding that the “electronic monitoring” was not a curfew:

*24 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 para 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 section 36(2)(a) of the 2004 Act.”*

- In short, monitoring a person tells you whether they are at the residence or not. It does not mean they have to be there.

## GED I (2): “Residence”



- Requirement to reside at a particular place (para 22 of Sched 2)? Also does not empower imposition of a curfew:

*34 For our part, we simply do not accept that a right to impose a “restriction as to residence” ... necessarily incorporates a right to impose a curfew. ... 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. ... 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.*

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## GED I (3): Para 22 of Schedule 3



- In relation to SSHD’s argument that para 22 of Schedule 3 empowers a curfew, court held that on the facts, no curfew had been imposed under this power.
- Frustratingly, it therefore held that it was not necessary or appropriate to decide whether this provision gives power to impose a curfew.
- So ultimately does not decide question of whether a curfew can be imposed on a grant of bail.

## GEDJ (4): False imprisonment?



- Edis J held that, where curfew had restricted movement for 6 hours / day, that amounted to false imprisonment and gave a right to damages:

*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.*

- The CA declined to rule on this issue in the absence of a Respondent's Notice from the SSHD. So again there is a frustrating lack of final decision on this issue.

## Jollah (1): [2017] EWHC 330 (Admin)



- The issues arose again in R (Jollah) v SSHD. In the first case, Lewis J was critical of the parties for the way they chose to litigate the matter in the abstract, and declined to rule on a number of the issues.
- The one point he ruled on was on false imprisonment.
- On that issue, he held that, in the absence of an argument which satisfied him that Edis J had been clearly wrong on the question of whether a curfew gives rise to false imprisonment, he should follow the ruling in that case. But he recognised that the CA might take a different view.
- Again, somewhat frustrating and inconclusive way to resolve that issue!

## *Jollah (2): [2017] EWHC 2821 (Admin)*



- *Jollah* came back before Lewis J in *Jollah (2)*, decided November 2017.
- Lewis J would have ruled on issue of power to impose curfew under para 22 of Schedule 3 to the IA 1971.
- It then emerged that the SSHD had already conceded, in earlier litigation, that the detention which preceded the grant of bail had been unlawful, which meant that there was clearly no power to impose the curfew. So this issue was not addressed.
- Lewis J awarded £4000 damages for the 2 ½ years of false imprisonment.

## *Lupepe [2017] EWHC 2690 (Admin)*



- In meantime, Lewis J decided *Lupepe* in Oct 2017.
- Challenge to curfew succeeded on basis that SSHD had had regard to unlawful unpublished policy in deciding to seek curfew from FTT (Ground 3, paras 61-69).
- Lewis J rejected various other arguments, that it was unlawful to impose curfew to prevent offending, and that it was an abuse of power to impose a curfew on grant of CIO bail where FTT had not been invited to do so.
- For present purposes mainly notable because it was assumed (though not the subject of argument) that there is power to impose a curfew under para 22 of Schedule 2 to the IA 1971 Act.

## NEW BAIL REGIME



- New bail regime introduced by Immigration Act 2016, came into force finally in January 2018.
- Section 61 gives effect to Schedule 10 which provides detail regime for bail.
- Detailed consideration beyond this talk, will be addressed by Graham Denholm in Part 2 of this seminar in May.
- Most notable structural feature is abolition of temporary admission and release. All persons liable to detention who are not detained will henceforth be released on bail.
- Act received Royal Assent shortly before CA decision in *Gedi*.
- Can a curfew be imposed? So far untested in case law.

## NEW BAIL REGIME (*relevant provisions*)



- Para 2(1) of Schedule 10 lists various conditions that may be imposed.
- Paras 2(2) and (3) provides that for those subject to deportation, this must include an “electronic monitoring” condition unless that would be impractical or would breach ECHR rights.
- Relevant here, the conditions referred to in para 2(1) include:
  - (e) *an electronic monitoring condition (see paragraph 4);*
  - (f) *such other conditions as the person granting the immigration bail thinks fit.*
- So, does that empower the imposition of a curfew?

## NEW BAIL REGIME: MONITORING CONDITION



- Electronic monitoring condition defined in para 4 of Schedule 10 (see separate handout).
  - Strongly arguable that, in light of *Gedi*, this gives no power to impose a curfew (though I very much doubt that Parliament appreciated that!).
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## NEW BAIL REGIME: CATCH-ALL



- Para 2(1)(f) of Schedule 10 appears to grant unlimited power to impose any suitable conditions on bail, so that may empower curfew.
  - But *arguable* that it does not do so, in light of reasoning in *Gedi*.
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**Landmark Chambers**

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