Upper Tribunal
(Immigration and Asylum Chamber)
In the matter of a claim for Judicial Review Case Number: JR-2023-001472

JR-2023-LON-001472

THE IMMIGRATION ACTS

Heard at Field House
On 10th & 13th November 2023

Decision & Reasons Promulgated

11th March 2023

Before

THE HON. MR JUSTICE DOVE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT

Between

THE KING
on the application of
MARK NELSON

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Sarah Hannett KC and Donnchadh Greene instructed by Wilson Solicitors LLP
For the Respondent: Zane Malik KC instructed by Government Legal Department

Introduction

1. The applicant brings this claim for judicial review in relation to the ongoing decision of the respondent to make him subject to a condition of electronic monitoring imposed by the wearing of a global positioning satellite ("GPS") tag.

The factual background

2. The applicant is a national of Jamaica and was born on 30th January 1979. He arrived in the United Kingdom on 10th September 2000 and was ultimately granted indefinite leave to remain in the United Kingdom on 23rd October 2007. On 8th May 2017 the applicant was sentenced to a total of 48 months imprisonment as a result of his conviction for possession with intent to supply a class B drug, abstracting electricity and two offences of racially aggravated intentional harassment.

3. The respondent took action to deport the applicant including the making of a deportation order on 13th July 2018. The applicant responded to this deportation order by making human rights representations on 19th December 2018. This human rights claim was refused by the respondent without a right of appeal, in error, on 8th February 2019. The applicant made further representations on 21st March 2019, which were also refused without a right of appeal in error on 17th May 2019. These decisions were subsequently withdrawn and the applicant's human rights claim was refused with a right of appeal on 31st May 2019, a decision which the applicant appealed to the First-tier Tribunal ("FtT"). The applicant was entitled to be released from prison on 8th May 2019 but he continued to be detained under immigration powers. On 19th August 2019 the applicant was granted immigration bail by the FtT subject to conditions including weekly reporting, a residence condition, a prohibition on work and study and a requirement that he attend his probation meetings as he was still on licence.

4. On 2nd November 2021 the FtT heard the applicant's appeal against the refusal of his human rights claim and by a decision of the 17th November 2021 the applicants appeal was dismissed. On 1st December 2021 the applicant applied for permission to appeal the FtT decision. The FtT refused his application for permission to appeal and so on 15th March 2022 the applicant applied to the Upper Tribunal (Immigration and Asylum Chamber) ("UT") for permission to appeal. Notwithstanding this outstanding appeal, the applicant was detained under immigration powers on 5th May 2022. The following day he was served with removal directions which had to be cancelled on 13th May 2022 owing to the appeal to the UT remaining outstanding. On the same day the FtT granted the applicant immigration bail subject again to a number of conditions on this occasion including electronic monitoring. The condition was imposed pursuant to paragraph 2(3)(e) of Schedule 10 of the Immigration Act 2016 (see below). By virtue of the order of the FtT Judge dated 13th May 2022 "future management including any application for variation shall be exercised by the Secretary of State pursuant to paragraph 6(3) of Schedule 10 to the Immigration Act 2016".

5. On 17th May 2022 the applicant was fitted with a GPS tag and released from detention. Coincidentally on the same date the UT granted the applicant permission to appeal the decision of the FtT. On 29th June 2022 the applicant's solicitors wrote a pre-action protocol letter to the respondent challenging the decision to impose the electronic monitoring condition on the applicant and complaining amongst other matters that to do so breached the applicants Article 8 rights. On the same date the applicant's solicitors emailed the respondent reporting that the applicant's tag was too tight and

requesting that it be loosened as it was causing him discomfort and pain. Further, it was pointed out that the tag required frequent charging at least every 4-5 hours which was causing the applicant distress due to fear of the device running out of battery charge and the restrictive nature of having to charge the device so frequently.

6. The applicant's solicitors commissioned a forensic psychiatric report from Dr Nuwan Galappathie, who examined the applicant on 21st August 2022 and produced a report dated 31st August 2022. Dr Galappathie expressed the view that the applicant was suffering with severe depression related to his deportation proceedings and the imposition of the GPS tag. Dr Galappathie also considered that the applicant suffered from a generalised anxiety disorder which he considered had been caused by the GPS tag. Furthermore, Dr Galappathie was of the opinion that the distress of having a GPS tag had triggered the development of symptoms of PTSD in the applicant. He concluded that the applicant's depression, anxiety and PTSD had been caused by the imposition of electronic monitoring and the GPS tag, and that his mental conditions would be assisted by the removal of the tag. This report was sent to the respondent under cover of a letter dated 6th September 2022, in which the applicant's solicitors requested the respondent review the requirement for the electronic monitoring condition. The provision of this medical evidence was followed on 14th September 2022 by the applicant's solicitors serving on the respondent a copy of a Probation Service OASys report on the applicant assessing him as posing a low risk of reoffending, and stating that the Probation Service had no concerns about the applicant absconding.

7. On 17th September 2022 the UT heard the applicant's appeal against the FtT decision on his human rights appeal. Although, in accordance with the respondent's policy, a review of the electronic monitoring ought to have taken place either after receipt of the applicant's pre-action protocol letter on 29th June 2022 or three months after the initial imposition of the tag, that is to say by 17th August 2022, it was not until 10th October 2022 that the respondent undertook a review of the imposition of electronic monitoring. Whilst it was initially disputed, it is now conceded by the respondent that the review which was undertaken on 10th October 2022 was unlawful, in particular in relation to the assessment of psychiatric evidence within that review and the question of diagnosis. The review led to the decision that the imposition of electronic monitoring by way of a GPS tag should be maintained.

8. These proceedings were commenced on 7th November 2022. On 23rd November 2022 the applicant was visited at his home address and a new GPS tag was installed by the respondent's contractors. The GPS tag was not sufficiently charged by the installers and ran out of charge within an hour of being fitted. The applicant was concerned that despite charging the tag a light on it continued to flash. On 24th November 2022 the applicant told his reporting officer that the GPS tag was flashing, and he was advised that the reporting officer would contact the respondent in order for the tag to be checked.

9. Prior to progressing the account of the facts of this case further, it is probably helpful context to set out the respondent's position, as set out at the hearing, in relation to the period between 23rd November 2022 and 11th May 2023. The respondent's position was as follows:

> "The GPS tag, according to the respondent's investigation, was fully operational with no faults during the period between 23rd November 2022 and 11th May 2023. However, the respondent

is content for the Upper Tribunal to decide this Judicial Review claim on the basis that the GPS tag was not working for five distinct periods during that time as identified in the Applicants document at pages 110-111 of Core Bundle, volume 1. The Respondent is also content for the Upper Tribunal to proceed on the basis that this was not the fault of the Applicant, though she makes no concessions as to the Applicant's conduct."

10. At pages 110-111 of the Core Bundle is an analysis of the trail data collected from the applicant's GPS tag. The data shows, in summary, that the applicant's GPS tag was not working from 23rd November 2022 to 5th January 2023, or between 7th January 2023 and 23rd January 2023, or between 24th January 2023 and 2nd March 2023, or between 2nd March 2023 and 23rd April 2023. Another way of expressing this data is that out of the 197 days covered by this period the tag was only dialling in on 11 days.

11. On 2nd December 2022 the respondent was informed by the contractors who had installed the GPS tag that it was not sufficiently charged. The contractors indicated that the subject had entered a missing status since 23rd November 2022 and that this required a further visit in order to rectify the issue. It appears that in early January 2023 the respondent's contractors made various attempts to visit the applicant in order to investigate the problem with the GPS tag. None of these attempts were successful.

12. On 24th January 2023 it is clear that Ms Helen Symonds, Executive Officer in the respondent's EM hub, which is contained within the respondent's Foreign National Offenders Returns Command, was aware that the applicant's solicitors were questioning whether the tag had sufficient GPS signal. She asked the respondent's contractors to confirm the current status of the GPS device on the basis that it had last dialled in on 24th January 2023, and she required confirmation as to whether or not there was a problem with the GPS signal or with the battery of the device. In a further email reporting this enquiry to one of her colleagues Ms Symonds records that she had spoken with the applicant and the respondent's contractors "on a number of occasions, to arrange suitable times for EMS [the contractors] to visit, and they have either turned up late or on a different date, and he has not been available". On the advice of her colleague Ms Symonds then escalated the matter to the respondent's electronic monitoring Service Delivery Team.

13. The correspondence in relation to the investigation of the tag between the respondent's staff continued inconclusively, and on 1st February 2023 a Team Manager at the respondent's contractors, having apologised for failing to realise how urgent the query was, provided the following view:

"To confirm, we do still get data from this tag despite the failed installation status, but because the initial connection between the tag and the servers was not successful, we could never confirm with 100% accuracy that all relevant data is being transmitted to the systems successfully. An additional installation visit is required to run through the whole install process and ensure that the tag is calling in all the data successfully before the officers leave the site is the only real solution that would stop these issues from occurring again in the future. It has been noted that the signal around his address is relatively poor which has contributed to these installation issues previously, but if we are able to get an appointment made with Mr Nelson when he will be available then we can go out and resolve these issues once and for all."

14. This email was forwarded by Ms Symonds to her colleague, and subsequently it appears that on 6th February 2023 it was decided the matter was to be left for the time being as

Ms Symonds needed to "wait for confirmation that a further visit can be requested while the JR is ongoing". It seems that advice was required from lawyers before further action could be taken.

15. It appears that nothing further happened until 21st April 2023, when a litigation case worker in the respondent's department communicated the grant of permission in these proceedings to Ms Symonds, and asked for her advice in relation to when the electronic monitoring condition in respect of the applicant was to be reviewed. As a result of this email, it appears Ms Symonds checked the Breaches Stream Spreadsheet and observed that notes had been added on 5th February 2023 "to say that no action was to be taken as the legal team are dealing with it". Ms Symonds noted in an email to her colleague in which this quote appears that no further visits had been arranged since 15th January 2023 and the last GPS dial in was on 24th January 2023. She asked her colleague if he was happy for her to undertake a review and inform the Breaches Team to take action in relation to further visits. Her colleague responded that he was "not sure about further activity as there is an ongoing JR". Her colleague was, however, content for her to undertake the review of the electronic monitoring condition.

16. A further review of the electronic monitoring condition was undertaken on 21st April 2023, but it contained the same legal error as the review of 10th October 2022. The review supported the continued maintenance of the electronic monitoring condition. Ultimately, after further internal correspondence, the applicant was fitted with a new GPS tag on 11th May 2023 which functioned fully thereafter.

17. Whilst the events pertaining to the applicant's GPS tag were ongoing the UT issued a decision on 26th January 2023 dismissing the applicant's appeal in relation to the FtT decision in his human rights appeal. On 7th February 2023 the applicant lodged his appeal against the decision of the UT with the Court of Appeal. On the 28th March 2023 permission was granted for this judicial review to proceed.

18. The respondent instructed Dr Giuseppe Spoto to undertake a psychiatric examination of the applicant and this occurred on 10th July 2023. Dr Spoto's opinion is that the applicant is suffering from an Adjustment Disorder which he describes as a relatively minor illness. Dr Spoto disagreed with the opinion of Dr Galappathie that the applicant was suffering from a generalised anxiety disorder or severe depressive episode with psychotic symptoms. He also found no evidence that the applicant was suffering from PTSD symptoms. He concurred with the view expressed in other reports that the risk of reoffending in the applicant's case was low, and considered that the prognosis in relation to the adjustment order was favourable. He considered that whilst it was frustrating for the applicant to be wearing a GPS tag, the applicant was likely to adapt and was therefore fit to continue to remain on the GPS tag if that was regarded as necessary by the court.

19. Following the receipt of this report the respondent conducted a further review of the applicant's electronic monitoring condition on 17th July 2023. In that review account was taken of the report of Dr Spoto and the conclusion was reached by the respondent that it remained appropriate for the electronic monitoring condition to continue. The applicant has been subject to that condition thereafter and up to the date of the hearing.

The grounds

20. The applicant advances his case on four grounds, which have to some extent resolved over the course of time. Ground 1 is the submission that it is a breach of the applicant's Article 8 rights to be the subject of continued use of a GPS tag. Ground 2 is the contention that the reviews of the applicant's electronic monitoring condition were based upon factual errors and an irrational analysis based upon irrelevant factors. This ground has to some extent been overtaken by events, on the basis that the respondent has conceded that the reviews undertaken on 10th October 2022 and 21st April 2023 were unlawful and thus in respect of this ground the applicant is entitled to a declaration to give effect to this concession.

21. The applicant's ground 3 is the submission that the collection of the applicant's trail data for the purpose of his article 8 immigration claim is beyond the statutory power and unlawful. Again, this ground has essentially been overtaken by events since the respondent has explained that the respondent has not accessed data from the electronic monitoring for use in the applicant's article 8 claim.

22. Ground 4 is a contention that the respondent had no lawful authority to impose an electronic monitoring condition and require the applicant to wear a GPS tag when it was inoperative and unable to send any consistent data to the respondent. It is submitted that requiring the applicant to wear a GPS tag which was not working was beyond the statutory power provided to enable the imposition of an electronic monitoring condition and, furthermore, not in accordance with the law or proportionate and therefore amounted to a breach of the applicant's article 8 rights.

The law

23. The relevant statutory provisions governing immigration bail are contained within Schedule 10 of the Immigration Act 2016. Since the applicant was being detained pending deportation the grant of bail by the FtT was empowered by paragraph 1(3)(b) of Schedule 10 of the 2016 Act. At paragraph 2(2) of Schedule 10 of the 2016 Act it is provided that in instances of this kind paragraph 2(3) shall apply, and in particular pursuant to paragraph 2(3)(a) if immigration bail is granted to a person such as the applicant "it must be granted subject to an electronic monitoring condition". Paragraph 2(5) of Schedule 10 of the 2016 Act provides for two exceptions to this mandatory requirement to impose an electronic monitoring condition. The two exceptions are where the imposition of such a condition on the person in question would be "impractical", or, alternatively, "contrary to the persons convention rights". Paragraph 3 of Schedule 10 of the 2016 Act sets out at paragraph 3(2)(a) to (e) a sequence of familiar factors to which the respondent or the FtT must have regard in deciding whether to grant bail and, if so, subject to what conditions. These matters include the likelihood of the person complying with a bail condition, whether they have been convicted of an offence, the likelihood of them committing an offence whilst on immigration bail or causing a danger to public health or being a threat to the maintenance of public order when on immigration bail and whether the detention of that person is in that person's interests or for the protection of another.

24. Paragraph 4 of Schedule 10 of the 2016 Act contains the definition of what is meant by an "electronic monitoring condition" for the purposes of the Schedule. Given the

importance of this element of Schedule 10 to the arguments it is necessary to set it out in full:

"4
(1) In this Schedule an *"electronic monitoring condition"* means a condition requiring the person on whom it is imposed ("P") to co-operate with such arrangements as the Secretary of State may specify for detecting and recording by electronic means one or more of the following—

(a) P's location at specified times, during specified periods of time or while the arrangements are in place;
(b) P's presence in a location at specified times, during specified periods of time or while the arrangements are in place;
(c) P's absence from a location at specified times, during specified periods of time or while the arrangements are in place.

(2) The arrangements may in particular—
(a) require P to wear a device;
(b) require P to make specified use of a device;
(c) require P to communicate in a specified manner and at specified times or during specified periods;
(d) involve the exercise of functions by persons other than the Secretary of State or the First-tier Tribunal.

(3) If the arrangements require P to wear, or make specified use of, a device they must—
(a) prohibit P from causing or permitting damage to, or interference with the device, and
(b) prohibit P from taking or permitting action that would or might prevent the effective operation of the device.

(4) In this paragraph *"specified"* means specified in the arrangements."

25. Paragraph 7 of Schedule 10 of the 2016 Act also applied to the applicant. At paragraph 7(2) it is established that the respondent must not exercise the powers provided by paragraph 6 (1) of Schedule 10 of the 2016 Act so as to remove an electronic monitoring condition unless paragraph 7(3) of Schedule 10 applies. Paragraph 7(3) applies where either it would be impractical for the person to continue to be the subject of an electronic monitoring condition or, alternatively, it would be contrary to that persons Convention rights for the person to continue to be subject to the condition.

26. The specific provisions of Article 8 are so well-known it is unnecessary to rehearse them in detail here. Their application in the present case, and the arguments of the parties, were addressed in the form of the structure set out by Lord Bingham in paragraph 17 of his opinion in the case of *R v Secretary of State for the Home Department Ex parte Razgar* [2004] UKHL 27. It is accepted by both the applicant and the respondent that the requirement to wear a GPS tag is an interference with the applicant's Article 8 rights. This is in consequence of the fitting of the physical device itself, the harvesting of the locational data which the device permits and the psychological impact of the subject of the GPS tag being aware that their movements are at all times being monitored and that surveillance is taking place. Thus, the first two questions posed by Lord Bingham in paragraph 17 of *Razgar* are undisputed and to be answered in the affirmative.

27. The third question, namely whether such interference with Article 8 caused by the GPS tag is "in accordance with the law", is contentious. The general principles in relation to the application of the "in accordance with the law" standard was considered by Lord Sumption JSC in the case of *R (on the application of Catt) v Commissioner of Police of the Metropolis & another* [2015] UKSC 9. The case concerned the retention by the police of records of events. It was accepted it was lawful for the police to have made the records, but their retention on a searchable database was submitted to amount to an unlawful interference with Article 8 rights. The relevant requirements in relation to whether or not an interference with a person's Article 8 rights in respect of their private life was "in accordance with the law" was analysed by Lord Sumption in the following terms:

> "11. The requirement of article 8(2) that any interference with a person's right to respect for private life should be "in accordance with the law" is a precondition of any attempt to justify it. Its purpose is not limited to requiring an ascertainable legal basis for the interference as a matter of domestic law. It also ensures that the law is not so wide or indefinite as to permit interference with the right on an arbitrary or abusive basis. In *R (Gillan) v Comr of Police of the Metropolis* [2006] 2 AC 307, para 34, Lord Bingham of Cornhill observed that "the lawfulness requirement in the Convention addresses supremely important features of the rule of law":
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> "The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality."
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> In the context of the retention by the police of cellular samples, DNA profiles and fingerprints, the Grand Chamber observed in *S v United Kingdom* (2008) 48 EHRR 1169, para 99, that there must be:
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> "clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness."
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> For this purpose, the rules need not be statutory, provided that they operate within a framework of law and that there are effective means of enforcing them. Their application, including the manner in which any discretion will be exercised, should be reasonably predictable, if necessary with the assistance of expert advice. But except perhaps in the simplest cases, this does not mean that the law has to codify the answers to every possible issue which may arise. It is enough that it lays down principles which are capable of being predictably applied to any situation."

28. Lord Sumption went on to observe that the principle statutory framework in that case, namely the Data Protection Act 1998, was one of general application. It made provision for Data Protection Principles to establish a comprehensive code supplemented by a statutory Code of Conduct and further mandatory guidance. Whilst there were

discretionary elements in this statutory scheme, bearing in mind the wide variety of circumstances to which they might apply, their ambit was limited by the application of the Code of Practice and the guidance and also by the discretion invested in the Information Commissioner as to whether or not to take action in respect of breaches of the Data Protection Principles. Lord Sumption observed that given the plethora of circumstances in which questions of compliance might arise, and the inevitable need for the exercise of judgment, codification of precisely what data would be obtained about an individual and for how long it would be stored was impossible. Any person who thought that the police might hold personal information about them had a right to have access to it and, once aware of it, to bring a complaint before the Information Commissioner. In the light of these conclusions Lord Sumption formed the view that the retention of data in the police information systems with which the case was concerned was in accordance with the law, and the real question was whether or not the interference was proportionate to the objective of maintaining public order and preventing or detecting crime.

29. The question of whether or not an interference with Article 8 rights was "in accordance with the law" was raised in the case of *R (Bridges) v Chief Constable of South Wales* [2020] 1 WLR 5037. The Divisional Court and, subsequently, the Court of Appeal considered that the general principles applicable to the "in accordance with the law" standard were well established, in particular by the discussion set out by Lord Sumption JSC in *Catt.* In the Court of Appeal both the parties and the court adopted the exposition of the relevant legal principles from paragraph 80 of the Divisional Court judgment as follows:

> "The general principles applicable to the 'in accordance with the law' standard are well established: see generally per Lord Sumption JSC in *Catt* [2015] AC 1065, paras 11—14; and in *R (P) v Secretary of State for Justice* [2019] 2 WLR 509, paras 16—31. In summary, the following points apply.
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> (1) The measure in question (a) must have 'some basis in domestic Law' and (b) must be 'compatible with the rule of law', which means that it should comply with the twin requirements of 'accessibility' and 'foreseeability': *Sunday Times v United Kingdom* (1979) 2 EHRR 245*; Silver v United Kingdom* (1983) 5 EHRR 347; and *Malone v United Kingdom* (1984) 7 EHRR 14.
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> (2) The legal basis must be 'accessible' to the person concerned, meaning that it must be published and comprehensible, and it must be possible to discover what its provisions are. The measure must also be 'foreseeable' meaning that it must be possible for a person to foresee its consequences for them and it should not 'confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself': Lord Sumption JSC in P [2019] 2 WLR 509, para 17.
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> (3) Related to (2), the law must 'afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise': *S v United Kingdom*, 48 EHRR 50, paras 95 and 99.

> (4) Where the impugned measure is a discretionary power, (a) what is not required is 'an over-rigid regime which does not contain the flexibility which is needed to avoid an unjustified interference with a fundamental right' and (b) what is required is that 'safeguards should be present in order to guard against overbroad discretion resulting in arbitrary, and thus disproportionate, interference with Convention rights': per Lord Hughes JSC in *Beghal v Director of Public Prosecutions* [2016] AC 88, paras 31 and 32. Any exercise of power that is unrestrained by law is not 'in accordance with the law'.
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> (5) The rules governing the scope and application of measures need not be statutory, provided that they operate within a framework of law and that there are effective means of enforcing them: per Lord Sumption JSC in *Catt* at para 11.
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> (6) The requirement for reasonable predictability does not mean that the law has to codify answers to every possible issue: per Lord Sumption JSC in *Catt* at para 11."

30. At paragraph 83 of the judgment the Court of Appeal accepted a submission that, as a matter of principle, the question of whether an interference was in accordance with the law should be considered with a relativist approach in mind, such that the more intrusive the act which was complained of, the more precise and specific the law would have to be in order to justify it.

31. The case of *Bridges* concerned the implementation of a new form of technology involving the deployment of surveillance cameras to capture digital images of persons which, through the use of live automated facial recognition technology known as AFR, were processed and compared with digital images of persons on the South Wales Police Force's watch list. It amounted to overt rather than covert surveillance. In essence the Court of Appeal concluded, contrary to the Divisional Court, that there were concerns in relation to the legal framework in place in respect of the operation of this technology. Those concerns arose in two key areas. The first was the question of the choice of who could be placed on the watch list for the purposes of the operation of the technology. The second was the question of the choice of where the technology could be deployed. The critical concern was that there were no criteria for determining either of these important questions and that this failure contravened the requirement of being "in accordance with the law". The policies under which the technology was being operated did not sufficiently set out the terms of which the discretionary powers would be exercised by the police, and therefore it was concluded they did not have the necessary quality of law so as to satisfy the "in accordance with the law" standard.

32. A further illustration of the principles can be found in the European Court of Human Rights case of *Uzun v Germany* [2011] 53 EHRR 24. The case concerned the long-term observation of the applicant, who was suspected of participation in offences carried out by an extremist terrorist movement. He was the subject of various surveillance techniques, but in particular two transmitters were installed in the car of his accomplice to undertake surveillance via GPS. At his trial in relation to terrorist activities the court ruled that the surveillance information obtained by GPS was admissible. The applicant was convicted and following an unsuccessful appeal against conviction brought his claim before the ECHR contending a violation of Article 6 and 8. It was held by the court that although GPS surveillance might be less intrusive than other methods of

visual or acoustic surveillance, nevertheless the observation of the applicant by GPS constituted an interference with his private life. The court set out its conclusions in relation to the particular features of the legal framework which rendered the use of GPS surveillance "in accordance with the law" in the following paragraphs:

> "69. In examining whether domestic law contained adequate and effective guarantees against abuse, the Court observes that in its nature conducting surveillance of a person by building a GPS receiver into the car he or she uses, coupled with visual surveillance of that person, permits the authorities to track that person's movements in public places whenever he or she is travelling in that car. It is true that, as the applicant had objected, there was no fixed statutory limit on the duration of such monitoring. A fixed time limit had only subsequently been enacted insofar as under the new art.163f(4) of the Code of Criminal Procedure, the systematic surveillance of a suspect ordered by a public prosecutor could not exceed one month, and any further extension could only be ordered by a judge. However, the Court is satisfied that the duration of such a surveillance measure was subject to its proportionality in the circumstances and that the domestic courts reviewed the respect of the proportionality principle in this respect. It finds that German law therefore provided sufficient guarantees against abuse on that account.
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> 70. As to the grounds required for ordering a person's surveillance via GPS, the Court notes that under art.100c(1) No.1(b), (2) of the Code of Criminal Procedure, such surveillance could only be ordered against a person suspected of a criminal offence of considerable gravity or, in very limited circumstances, against a third person suspected of being in contact with the accused, and if other means of detecting the whereabouts of the accused had less prospect of success or were more difficult. It finds that domestic law thus set quite strict standards for authorising the surveillance measure at issue.
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> 71. The Court further observes that under domestic law the prosecution was able to order a suspect's surveillance via GPS, which was carried out by the police. It notes that in the applicant's submission, only conferring the power to order GPS surveillance on an investigating judge would have offered sufficient protection against arbitrariness. The Court observes that pursuant to art.163f(4) of the Code of Criminal Procedure, which entered into force after the applicant's surveillance via GPS had been carried out, systematic surveillance of a suspect for a period exceeding one month did indeed have to be ordered by a judge. It welcomes this reinforcement of the protection of the right of a suspect to respect for his private life. It notes, however, that already, under the provisions in force at the relevant time, surveillance of a subject via GPS has not been removed from judicial control. In subsequent criminal proceedings against the person concerned, the criminal courts could review the legality of such a measure of surveillance and, in the event that the measure was found to be unlawful, had discretion to exclude the evidence obtained thereby from use at the trial.
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> 72 The Court considers that such judicial review and the possibility to exclude evidence obtained from an illegal GPS surveillance constituted an important safeguard, as it discouraged the investigating authorities from collecting evidence by unlawful means. In view of the fact that GPS surveillance must be considered to interfere less with a person's private life than, for instance, telephone tapping (an order for which has to be made by an independent body both under domestic law and under art.8 of the Convention), the Court finds subsequent judicial review of a person's surveillance by GPS to offer sufficient protection against arbitrariness. Moreover, art.101(1) of the Code of Criminal Procedure contained a further safeguard against abuse in that it ordered that the person concerned be informed of the surveillance measure he or she had been subjected to under certain circumstances."

33. Before leaving the case of *Uzun* it is worthwhile noting that at paragraph 80 of the judgment the court concluded that the interference by way of the GPS surveillance was

proportionate. The court noted in particular that, although the applicant had been subject to surveillance measure by different authorities amounting to a more serious interference in his private life, the GPS surveillance had been carried out for a relatively short period of some three months, and then essentially only at weekends when he was travelling in the car of his accomplice. It was not therefore total and comprehensive surveillance. The Court also took account of the fact that the surveillance related to very serious crimes namely the attempted murders of politicians and civil servants by bomb attacks. In all of those circumstances therefore the GPS surveillance had been proportionate to the legitimate aims which it pursued.

34. Following the hearing we afforded the parties the opportunity to make further submissions in relation to the scope of the "in accordance with the law" requirement. This was in the light of the applicant's reliance upon on the case of *R(Kambadzi) v SSHD* [2011] UKSC 23; [2011] 1 WLR 1299. The applicant's contention was that this authority supported the proposition that during the periods following the respondent's failure to competently review the continuation of the tagging his continued tagging was not "in accordance with the law". This proposition relied upon the public law error in those reviews or the failure to conduct them in accordance with the respondent's policy.

35. The claimant in the case of *Kambadzi* was a citizen of Zimbabwe who, whilst present in the UK without leave, committed offences of assault and sexual assault leading to a sentence of 12 months imprisonment. Having served his sentence, the claimant was thereafter detained in Immigration Detention pending the making of a deportation order. Eventually a deportation order was made, and the claimant applied for judicial review seeking his release on the basis that his detention was unlawful as there had been a failure to carry out regular reviews of his detention pursuant to rule 9(1) of the Detention Centre Rules 2001 and the defendant's policy. The Supreme Court held that as a result of the failure to comply with the policy in relation to undertaking lawful reviews the claimant's detention had been unlawful during the periods when it had not been reviewed, and he was entitled to bring a claim for false imprisonment as a trespass to the person. It was accepted by the claimant in that case that at all times the well-known principles in relation to the lawfulness of continuing detention set out in the case of *Hardial Singh* had been complied with. However, it was equally accepted by the defendant that no reviews had been undertaken in respect of the claimant's continuing detention and therefore the defendant's policy had not been complied with. In addressing the question of the claimant's claim for damages for false imprisonment Lord Hope set out at paragraph 35 of his judgment that the question was whether or not the review pursuant to the policy was essential to the legality of the continued detention of the claimant or whether it was a sufficient answer to that damages claim for the defendant to say that there was authority to detain throughout the claimant's detention comprised in the terms of the statute.

36. Lord Hope went on to consider and analyse the question of the lawfulness of the failure to undertake reviews in accordance with the Rules and the policy, and whether this could support the provision of a remedy in the form of an action for false imprisonment for the claimant. He expressed his conclusions in the following terms:

> "50. The initial decision to detain will be held to be lawful if it is made under the authority of the Secretary of State pending the making of a deportation order. But it cannot be asserted in the light of what was said in *Hardial Singh* that the initial decision

renders continued and indefinite detention lawful until the deportation order is made whatever the circumstances. Nor can it be said that it has that effect after the deportation order is made pending the person's removal from the United Kingdom when the person is being detained under paragraph 2(3). The authority that stems from the initial decision is not unqualified.

51. The question then is what is to be made of the Secretary of State's public law duty to give effect to his published policy. In my opinion the answer to that question will always be fact-sensitive. In this case we are dealing with an executive act which interferes with personal liberty. So, one must ask whether the published policy is sufficiently closely related to the authority to detain to provide a further qualification of the discretion that he has under the statute. Unlike the 2001 Rules, chapter 38 of the manual is concerned with the lawfulness of the detention. That is made clear in the opening paragraphs: see para 18 of the above. It has been designed to give practical effect to the *Hardial Singh* principles to meet the requirement that, to be lawful, the measures taken must be transparent and not arbitrary. It contains a set of instructions with which officials are expected to comply: see paragraph 1(3) of Schedule 2 to the 1971 Act. As I see it, the principles and the instructions in the manual go hand in hand. As Munby J said in para 68, the reviews are fundamental to the propriety of continued detention. The instructions are the means by which, in accordance with his published policy, the Secretary of State gives effect o the principles. They are not only commendable; they are necessary.

52. The relationship of the review to the exercise of the authority is very close. They too go hand in hand. If the system works as it should, authorisation for continued detention is to be found in the decision taken at each review. References to the authority to detain in the forms that were issued in the appellant's case illustrate this point. Form IS 151 F, which is headed "Monthly Progress Report to Detainees", concludes at the top of p3 of 3 with the words "Authority to maintain detention given", on which the officer's comments are invited and beneath which his decision is recorded. The discretion to continue detention must, of course, be exercised in accordance with the principles. But it must also be exercised in accordance with the policy stated in the manual. The timetable which para 38.8 sets out is an essential part of the process. These are limitations on the way the discretion may be exercised. Following the guidance that *R (Nadarajah) v Secretary of State for the Home Department* [2004] INLR 139 provides (see paras 39 and 40 above), I would hold that if they are breached without good reason continued detention is unlawful. In principle it must follow that tortious remedies will be available, including the remedy of damages.

53. There remains however the question of causation: what if the Secretary of State is able to show that, despite the failure to give effect to the policy, continued detention was nevertheless compatible with the *Hardial Singh* principles? Is it an answer for the Secretary of State to say that, as he could have authorised continued detention had lawful procedures been followed, no tort was committed? Is there room in such a situation for an award of damages?

54. These questions are brought into sharp focus in this case. Mr Husain accepts that the Secretary of State would have been able to justify the need for the appellant's detention under the *Hardial Singh* principles at all times had he been required to do so. But in *Roberts v Chief Constable of the Cheshire Constabulary* [1991] 1 WLR 662,667 Clarke LJ said that it was nothing to the point to say that the detention would have been lawful if a review had been carried out or that there were grounds which would have justified detention. The statutory requirement with which he was dealing in that case existed in order to ensure that members of the public were not detained except in certain defined circumstances. In all other circumstances, he said, every member of the public

> is entitled to his liberty. I would apply that reasoning to this case. It is true that the reviews were not required by the statute. But there was a public law duty to give effect to the provisions about reviews in the manual. If the reviews were not carried out – unless for good reason, which is not suggested in this case – continued detention was not authorised by the initial decision to detain. It is no defence for the Secretary of State to say that there were good grounds for detaining the appellant anyway. Unless the authority to detain was renewed under the powers conferred by the statute he was entitled to his liberty. The decision in *Lumba* [2011] 2 WLR 671 leads inevitably to this conclusion."

37. In the applicants' further submissions, the question of whether a distinction should be drawn between on the one hand the power to detain in *Kambadzi,* and, on the other hand, the duty to impose an electronic monitoring condition pursuant to paragraph 2 of Schedule 10 of the 2016 Act should be drawn so as to distinguish between the operation of these two regimes. The applicant drew attention to the decision of the Supreme Court in the case of *R(O) v SSHD* [2016] UKSC 19 which related to a claimant who had been detained pursuant to paragraph 2(1) of Schedule 3 to the Immigration Act 1971, which provides that where a recommendation for deportation made by a court is in force in respect of a person (and that person is not detained in pursuance of the sentence or order of a court) the person shall be detained pending the making of a deportation order unless the SSHD directs him to be released pending further consideration of his case or he is released on bail. During a period of the claimant's detention the defendant had unlawfully failed to apply her policy relating to detention of the mentally ill pending deportation. In the Court of Appeal, it had been concluded that paragraph 2(1) of Schedule 3 of the 1971 Act indicated that a person "shall" be detained there was no discretionary decision about the detention of the claimant which was capable of being vitiated by the unlawful failure to apply a policy. In the Supreme Court Lord Wilson JSC disagreed with this approach. Although there was a difference in the language of paragraphs 2(1) of Schedule 3 from that in paragraph 2(2) of Schedule 3 of the 1971 Act the preferable analysis was that "the mandate to detain conferred by paragraph 2(1)… is subject to two conditions". The first condition was compliance with *Hardial Singh* principles. The second condition was that the defendant would consider in accordance with her own policy whether to exercise the power expressly given to her to direct release. Thus, it was concluded that the failure to comply with the policy during the period concerned was unlawful.

38. The applicant further submitted that there were other authorities in support of the contention that a breach of public law was capable of forming the basis of a contention that an interference with Article 8 was not "in accordance with the law". The principle authority upon which the applicant relies is the case of *Malcolm v Secretary of State for Justice* [2011] EWCA Civ 1538, which was a case brought by a life sentence prisoner in relation to a period in 2007 when he was provided with only 30 minutes open air recreation every day whilst detained in a segregation unit, whereas under paragraph 2(ii) of Prison Service Order 4275 he was entitled to a minimum of one hour in the open air every day. The judge at first instance, Sweeney J, concluded that Article 8(1) was not engaged on the facts of the case. That was a conclusion with which Richards LJ (giving the judgment in the Court of Appeal with which the other members of the court agreed) accepted. Richards LJ went on, however, to conclude that had he been satisfied that Article 8(1) was engaged then the defendant would have had difficulties in respect of the provisions of Article 8(2). At paragraph 32 of his judgment, he recorded as follows:

> "32. PSO4275 was a published policy to guide the exercise of prison officers' discretion under Rule 30 of the Prison Rules 1999. The prison officers at HMP Frankland failed to give effect to the mandatory requirements of PSO4275 as regards to the opportunity to be given to those in the segregation unit to spend a minimum of 1 hour in the open air. If they did not have good reason for that failure, I have little doubt that in a public law challenge they would be found to have acted unlawfully. One does not need to look further than the passages in *R(Lumba) v Secretary of State for the Home Department* sighted by Ms Kaufmann for the proposition that a decision-maker must follow his published policy unless there are good reasons for not doing so; a proposition that applies equally to a policy published by the Secretary of State for the guidance of those exercising powers under rules made by him… When determining whether an interference is "in accordance with the law", even the Strasbourg Court looks at domestic law (see, for example, *Eriksson v Sweden* (1989) 12 EHRR 183 at [62] – [63]); *a fortiori* the national court must look at domestic law when deciding whether the requirement is satisfied; I can see no possible basis for contending that the principles of public law do not form part of domestic law for this purpose."

39. The applicant has also drawn attention to other cases in different contexts in which the respondent has conceded that a public law error in decision making justified the conclusion that an interference with Article 8 caused by the decision in question was not "in accordance with the law". In the context of a prisoner's transfer to a particular unit within a prison, the failure to provide an opportunity to comment either in principle or upon the relevant policy which had yet to be published at the date of the decision, led to the respondent conceding that the decision to transfer was not in accordance with the law in *R (Syed) v Secretary of State for Justice* [2017] 4 WLR 101. This position was subsequently confirmed when the Court of Appeal considered that case. In relation to the removal of a claimant from other inmates in breach of the Youth Offender Institution Rules 2000 it was, again, conceded that this public law error rendered the decision not "in accordance with the law" for the purposes of Article 8 see: *R (AB) v Secretary of State for Justice* [2017] 4 WLR 153. Finally in *R(HM) v Secretary of State for the Home Department* [2022] 1 WLR 5030 it was again conceded that the application of a blanket policy in relation to the search and seizure of mobile phones together with their data, which was a breach of public law, was also conceded to render the interference with Article 8 constituted by the application of that policy not "in accordance with the law".

40. Returning to the structured approach derived from the case of *Razgar,* if an interference with Article 8 is concluded to have been in accordance with the law, then the fourth question to be addressed is whether or not that interference is necessary in the democratic society. If it is then it is necessary to finally consider whether the interference is proportionate with the legitimate aim which is sought to be achieved by the decision under challenge.

41. Beyond the contentions in relation to human rights, and to some extent integrally linked with them, the applicant places reliance upon the public law principles set out in *Padfield v Ministry of Agriculture Fisheries and Food* [1968] AC 997. This principle is that where a statute confers a discretion upon a decision-maker, that discretion must be exercised so as to promote and not to defeat the object of the legislation which has granted the discretion. In *R v Braintree District Council ex parte Halls* [2000] 32 HLR 770 Laws LJ stated that the question required by the *Padfield* principle was not whether the exercise of discretion was incapable of promoting the policy of the relevant act but

rather "what was the decision-maker's purpose in the incident case and was it calculated to promote the policy of the Act?".

Policy.

42. The respondent has a policy in relation to immigration bail, and whilst the version presented to the hearing was version 16, and the version current at the time of these events was version 11, we were advised that there was no material difference between these two versions for the purposes of this application. The policy addresses the approach to be taken in relation to the administration of bail subject to an electronic monitoring condition by GPS tag. It notes, for instance, that trail data from the tag will be held by the supplier of the electronic monitoring tag and only accessed by the respondent under certain circumstances and where "proportionate and justified in the circumstances in accordance with data protection law" as per the respondent's policy. Amongst those circumstances is whether there has been a breach of immigration bail conditions, and including where contact via electronic monitoring has been lost, with a view to locating the individual subject to the condition. The data may also be sought from the electronic monitoring supplier when it may be relevant to a claim made by an individual under Article 8.

43. In particular, the policy explains that the use of electronic monitoring requires regular review and provides the following in respect of that requirement:

> "The use of EM and all supplementary conditions to EM must be reviewed by a decision maker in any case allocated to them:
> • on a quarterly basis
> • when they receive any representations on the matter, including requests to vary the condition, from the individual or a person acting on their behalf
> • when considering the response to a breach of immigration bail
> • when a request is made by another decision maker
> The purpose of the review is to ensure that the individual remains suitable for both EM and any supplementary condition or conditions and any EM or conditions continue to be necessary and proportionate in light of the facts at the date the review is undertaken. The review will also provide an opportunity to consider whether the device type remains the most appropriate. In all cases regard must be had to the matters set out in exercising the power to grant immigration bail, and the guidance set out in Use of EM. It will be necessary to consider movement between devices in both directions such as from fitted to non-fitted as well as non-fitted to fitted.
> Factors to be taken into consideration will include, but are not limited to:
> • the overall time spent on EM
> • the time on the particular device type
> • the risk of absconding
> • the risk of harm posed to the public
> • the risk of re-offending
> • the expected time until removal
> • any vulnerabilities
> • compliance with immigration bail"

44. The policy goes on to consider the purpose and substance of the reviews that it is contemplated must take place on a quarterly basis. The substance of the policy is set out as follows:

"The general expectation is that a person who poses a greater risk of harm and has been less compliant with immigration bail will remain on EM longer than a compliant person who poses a lower risk of harm. These considerations will also impact on how appropriate it is to use a non-fitted device where the person poses a high risk of harm or has been non-compliant with their bail conditions. A person's failure to comply with the conditions attached to a fitted device may be considered an indication of the likelihood of non-compliance with conditions attached to a non-fitted device. The risk of harm posed by that person will influence the degree of tolerance that will be had to such potential non-compliance. This expectation is subject to practicality considerations as the available resources are applied to those who pose a greater risk to the public and/or of absconding over an extended period. Should there be no issue in regarding the availability of resource (that is, available devices and the necessary resource to monitor them) decisions will be made on Convention Rights grounds or on the basis that it is impractical to do so given the person's individual circumstances (as detailed further in paragraph 2 (9) of Part 1 of Schedule 10 to the Immigration Act 2016).

…

Whilst EM Reviews provide the opportunity to consider whether the use of EM is or remains appropriate they do not provide a linear progression in all cases. It is possible that EM may not be appropriate for a period of time even where the EM duty would otherwise apply but a change of circumstances may make it appropriate at a later date. It may be possible to move a person between device types where there are changes in a person's vulnerability or their compliance with their bail conditions.

Decisions to remove a person from EM, where the duty applies, will be based either on the basis that there is a breach of a person's Convention Rights or on practicality grounds.

Decision makers must use the 3-month EM Review pro-forma to carry out reviews and must consider:

• the need for continued monitoring

• whether the device type continues to be appropriate

• the continued necessity of the supplementary condition or conditions – whether each supplementary condition is still necessary or if the circumstances changed sufficiently that each supplementary condition no longer serves its intended purpose

• the proportionality of the supplementary condition – whether the current restrictions imposed by that condition are still appropriate as follows:

- curfews - both in terms of timing and length, whether there is a basis on which to alter the curfew, for example if family circumstances have changed significantly or they have been transferred from a radio frequency device to a GPS device
- inclusion or exclusion zones – in terms of the location, size and number of zones, for example does the reason for setting the zone still apply

• any challenge to the supplementary conditions or conditions – whether there has been a challenge to the supplementary condition or conditions from the individual or legal representatives, whether an argument has been made and how strong this is."

45. The policy also provides information in relation to a decision support tool which utilises automated business rules, as well as providing further detail in relation to the minimum time period which it is expected a person would be spending on an electronic monitoring device whether fitted or non-fitted. The policy also engages with the use of data collected by the GPS tag. Notwithstanding the reference in the policy to the

decision support tool, in his third witness statement Mr Stephen Murray, Area Director of Satellite Tracking Services for the respondent, states at paragraph 9 that this decision support tool for automated decision taking has not been used in the applicant's case as it awaited launch at the time of him writing that witness statement and was still in development.

Submissions and conclusions.

46. The questions which arise in relation to the applicant's ground 1 relate both to the question of whether or not the imposition of a GPS tag is unlawful and in breach of Article 8 in principle, as well as the question of whether or not it is unlawful and in breach of Article 8 in the particular circumstances of the applicant. It appears to us that ground 4 is a distinct development of that ground, arising understandably by way of amendment during the course of the proceedings, to reflect one of the particular circumstances of this case, namely that it is agreed that for a significant period of time the GPS tag was inoperative and was not sending data to the respondent's contractor. We propose therefore to commence our analysis with the broader issues in relation to whether or not the imposition of a GPS tag is in principle unlawful and in breach of Article 8 prior to moving to consider the particular circumstances of this applicant, including in particular the implications of his being required to wear an inoperative tag and the question of whether the continuation of the requirement to wear the GPS tag is lawful.

47. The applicant submits that the aims and objects of paragraphs 2(2) and 4 of Schedule 10 to the 2016 Act are clearly to enable the respondent to maintain appropriate levels of contact with the person granted immigration bail, and reduce their risk of absconding or noncompliance, along with minimising the potential delay in becoming aware of any noncompliance, and ultimately facilitating the person on immigration bail being returned. Those objects can be identified both from reading the legislation itself and also from an understanding of the respondent's bail policy. The applicant's submission is that if the GPS tag is not functioning, then the purpose of the legislation cannot be met and it is thus unlawful in the *Padfield* sense for the person to be required to wear the tag. In response to the question as to whether or not immediately at the point of the tag ceasing to function its imposition is unlawful the applicant responds that the answer to this question is one of fact and degree. There will come a time where it must be concluded that the requirement to wear the malfunctioning GPS tag is not capable of promoting the policy of the 2016 Act since it is not fulfilling any of the objectives that have been identified above.

48. In response to these submissions the starting point of the respondent is to contend that it is not possible to derive an overriding policy of the kind contended for by the applicant from this legislation. The respondent places reliance upon the decision of the Supreme Court in the case of *Patel & others v SSHD* [2013] UKSC 72. That was a case in which it was submitted that as a result of the policy of the Nationality Immigration Asylum Act 2002, which established a new statutory code relating to appeals including the provision of "one stop notices", the defendant was under a duty to issue removal directions whenever deciding to refuse leave to remain. At paragraphs 28 and 29 of Lord Carnwath's judgment (with which the other judges agreed) he concluded that this argument depended upon a misapplication of the *Padfield* principle. Firstly it did not thwart the policy of the act to proceed on the basis that unlawful overstayers should be

allowed to leave of their own volition. Secondly, the language of the statute was clearly one of discretion, creating a power to direct refusal. The appellant's arguments rewrote the statute so as to replace the discretion with a duty to direct removal and as such the submissions were illegitimate. On this basis it is contended by the respondent that in the present case it is simply not possible to derive an overriding purpose of the kind suggested by the applicant from the language of the statute so as to apply the *Padfield* principle to circumstances in which the GPS tag is not functioning.

49. Furthermore, the respondent submits that it is incorrect to attempt to determine the issue of whether or not the respondent has lawful authority to require the wearing of the GPS tag as a matter of fact and degree. The question has to be determined on the basis of an examination of the language of the statutory power so as to see whether or not, in principle, the wearing of the tag can be legally justified. In particular, paragraph 4 of Schedule 10 of the 2016 Act provides that the respondent may require a person under an electronic monitoring condition "to co-operate with such arrangements as the Secretary of State may specify for detecting and recording by any electronic means" their location during specified periods of time whilst those arrangements are in place. The respondent submits, therefore, that provided a device is fitted with the intention to detect and record that data and it is designed to do so then the respondent has lawful authority to require the wearing of it as part of an electronic monitoring condition. The equipment would meet the requirements of an electronic monitoring condition and thus be lawful. The references within paragraph 4(3) to the "arrangements" requiring the person to wear or make specific use of a device is necessarily a reference to the class of device which is to be used and not the specific device in question. For all of these reasons even if a specified device is fitted with the intention of gathering data but it immediately malfunctions, or malfunctions during the course of its use, requiring it to be worn is nonetheless within the scope of what is empowered by the 2016 Act.

50. We are unconvinced that the arguments advanced by the respondent based upon the case of *Patel* are of any great assistance in the present case. That case arose in a materially different context to the present case and sought to use the *Padfield* principle to establish a duty based on what was submitted to be the policy of legislation in respect of statutory material clearly written to give rise to a discretion. The observations of Lord Carnwath do not assist in relation to the question of determining what the overall policy of legislation is in order to establish whether or not a decision would thwart the policy or purpose of that act. The purpose of the 2016 Act is to be derived from an analysis of its legislative provisions. In our view the respondent is on far firmer ground in submitting that the 2016 Act authorises the imposition of an electronic monitoring condition which can include arrangements to require the person bailed to wear or make specified use of a device which can detect and record that person's location during specified times whilst the arrangement is in place. There is no dispute that what was fitted to the applicant in the present case was fitted with the intention and was in principle capable of detecting and recording the information required. Indeed, even during the period when it was mainly malfunctioning there were times when it achieved this. In that what was fitted to the applicant was in principle designed, intended and capable of detecting and recording the information required by the electronic monitoring condition we are satisfied that there was lawful authority to fit it.

51. The applicant submits, as set out above, that the question of whether or not the fitting of the GPS tag was lawfully authorised was a question of fact and degree depending

upon whether it was working. We disagree. Bearing in mind that we are at this stage considering whether or not in principle it is lawful to fit a GPS tag we are unable to accept, given its mechanical nature and its dependency upon a signal for it to operate, that whether it is in fact able to detect and record the necessary data at any specific moment in time dictates whether the wearing of it is lawful. The fact would remain that the GPS tag would in principle be capable of undertaking such detecting and recording so as to have been fitted in accordance with the lawful authority granted by the provisions of the 2016 Act. The existence of that lawful authority does not come and go depending on the operation of the device. Furthermore, the fitting of a device in the circumstances which we have described is intended or calculated to further the purpose of the legislation and its temporary malfunctioning does not change that conclusion. There is, therefore, no breach of the *Padfield* principle. Its failure to be operational may have other consequences which are dealt with below in the context of Article 8.

52. For the reasons which we have set out above, provided the GPS tag to be worn by the bailed person is in principle designed and capable to detect and record the data specified in the statutory regime, and fitted with the intention of it doing so, then its imposition as part of an electronic monitoring condition is not rendered unlawful by issues such as the device temporarily malfunctioning or, for instance, the relevant signal dropping out for whatever reason.

53. The applicant makes further submissions that the imposition of a GPS tag is, in principle, a breach of Article 8. As has been set out above, it is accepted by the respondent that the requirement to wear a GPS tag is an interference with the applicant's article 8 rights. The applicant submits further that the use of GPS tagging is not in accordance with the law. The applicant's submissions are that, applying the principles set out above from *Catt* and *Bridges,* and bearing in mind the intrusive nature of the garnering of granular data about the applicant's whereabouts and movements, the imposition of a GPS tag pursuant to an electronic monitoring condition is neither accessible or foreseeable. There is no guidance which is specific in relation to the duration of the requirement to be electronically monitored: the policy in that respect is crude and open ended. The applicant further expresses concern in relation to the circumstances in which the detailed trail data may be accessed and why access to that data might be appropriate.

54. In response to these submissions the respondent submits that, in principle, the requirement to wear a GPS tag is "in accordance with the law" as authorised by domestic law in the form of the 2016 Act. The law is accessible in that it is set out in detail in the 2016 Act, and in relation to time limits those provisions specify that the requirement to wear the GPS tag will cease either, when the person departs the UK, or is granted indefinite leave to remain, or, in accordance with the specific provisions of the statute, it is impractical or contrary to the person's human rights for the condition to be maintained.

55. As to the usage of the data gathered by the GPS tag, in addition to the policy, the respondent relies upon the witness evidence of Mr Murray which provides as follows:

"9. The Home Office staff can request the trail data from EMS for HO purposes if at least one of the following criteria are met :
• Breach of immigration bail Conditions including absconding

• Allegations of EM Breaches or Intelligence of immigration bail Condition Breaches Received.
• Article 8 Representations / Further Submissions
• External Agency Requests.
• Subject Access Requests.

10. All requests for GPS Trail Data are strictly monitored by the Home Office Service Delivery Team embedded within the Ministry of Justice and any requests that do not meet this specific criterion are rejected. I can report that since his induction onto GPS electronic monitoring, Mr Nelson's GPS Trail data has not been accessed at all for Article 8 purposes. It has been accessed once due to a request from Mr Nelsons legal representatives. Regarding accessing trail data for Article 8 submission purposes. In the event of the receipt of Article 8 representations or further submissions from an individual, authorised Home Office staff dealing with those submissions, may request access to the full trail data to support or rebut the claims. This will hopefully negate the need to request 'substantiating' evidence from third parties which can cause unnecessary delays in considering the claims. For example, if the claim was that the individual has formed a relationship with a new partner and that partner has children, one of whom has severe medical needs. Individual submits that he/she has a crucial part to play in the child's medical regime and sleeps at the hospital 3 times per week with the child whilst the partner cares for the other children. GPS trail data would confirm this without the need to contact the hospital administration staff."

56. It is important to bear in mind that at this stage of our decision we are addressing the question of whether in principle it is a breach of Article 8 to require a person to wear a GPS tag as part of an electronic monitoring condition relating to their immigration bail. We consider that the concession which was made by the respondent that the requirement to wear a GPS tag is an interference with a person's article 8 right was properly made. As the respondent accepted the requirement to wear such a device involves not merely its physical fitting to the person concerned, but also the harvesting of locational data in relation to their movements and whereabouts, and the understandable concern of that person that they are being supervised or watched. The concession is in line with the approach taken in the case of *Uzun*.

57. The next question which arises when examining the position in principle is whether the imposition of such a GPS tag is in accordance with the law, that is to say whether the standards of accessibility and foreseeability provided in the authorities are met by the material which is before us. We have reached the conclusion that, in principle, the requirements are met. Firstly, so far as accessibility is concerned it is important to appreciate that in addition to the legislative framework which clearly sets out the powers of the respondent in connection with electronic monitoring conditions, there is also, supplementing these provisions, the detailed policy on immigration bail which the respondent publishes to inform the way in which the powers will be operated. In terms of accessibility and foreseeability the points made by the respondent as to when the legislation provides for electronic monitoring to cease are well made.

58. The policy also provides important safeguards so as to ensure, in particular through the mandatory regular review process, that a continuing requirement to wear a GPS tag is consistent with the requirements of practicability and the proper protection of the bailed person's human rights. That regular review process also ensures that the factors relevant

to whether or not the continued wearing of the GPS tag is purposeful are addressed. Thus, in our judgment the policy plays an important role in ensuring that the operation of an electronic monitoring condition is carried out in accordance with the law bearing in mind, of course, that a policy of this kind cannot foresee or plan for every conceivable eventuality.

59. Thus, in principle we are satisfied that the inclusion of a requirement to wear a GPS tag as part of an electronic monitoring condition is in accordance with the law and consistent with the purposes of having such a condition in the first place. The final question in relation to article 8 is, of course, one which is highly fact sensitive and dependant upon the particular circumstances of the individual whose case is being considered.

60. Having considered the questions arising in relation to GPS tagging under an electronic monitoring condition in principle, it is now necessary to consider the specific features of the applicant's case beyond those generic issues, in particular in the context of article 8. The specific issues to be considered relating to this applicant's circumstances are; firstly, the significance of the admitted failure to apply the respondent's bail immigration policy in respect of regular lawful reviews of the electronic monitoring condition; secondly, the significance of the periods of time when it is accepted that the tag was not operative; thirdly, the question of whether or not as matters stood at the time of the hearing it was lawful for the applicant to be required to wear the GPS tag.

61. As set out above it is accepted that, firstly, there ought to have been a review of the electronic monitoring condition in the applicant's case by the 17th August 2022, but in fact no such review took place until 10th October 2022. It is now conceded that that review was unlawful for the reasons set out above. A further review was due in accordance with the policy on 10th January 2023, and in fact no review took place until 21st April 2023. When a review was undertaken it was affected by the same error of law as contained in the review of 10th October 2022. The applicant submits that this failure to review is a public law error which means that the imposition of the electronic monitoring condition during this period was not in accordance with the law. This is a submission which was at least in the first instance advanced on the basis of the case of *Kambadzi.* In further submissions on this topic, as set out above, the applicant drew attention to the authorities which we have already rehearsed as giving rise to the proposition that an error of domestic public law was sufficient to render a decision interfering with article 8 as not "in accordance with the law".

62. The respondent submits that the authority of *Kambadzi* is of no assistance in resolving this issue. Firstly, that was a case which did not address the requirements of article 8 or the "in accordance with the law" criteria. In fact, it was a case concerned with the position at common law in respect of a claim for damages for false imprisonment or trespass to the person. The Supreme Court specifically did not address article 5 and the case was not, therefore, one about human rights.

63. We consider that there is force in the submissions made by the respondent about the case of *Kambadzi.* It does appear that that case was not only a case concerned with a common law right to damages and not human rights, but it also arose in a differing statutory context. However, in our view the applicant is on far firmer ground when making the further submissions based on the case of *O* and *Malcolm*.

64. Our analysis of the issues is as follows. Firstly, it is clear that the immigration bail policy, and in particular the requirement for there to be regular reviews, is an integral part of the legal framework governing the imposition and continuation of electronic monitoring. Whilst it is true that under the statutory regime the imposition of electronic monitoring is mandatory, that is to say a duty rather than a discretion as the continuation of detention may have been in *Kambadzi,* it is nonetheless a duty which has specific statutory exceptions contained within schedule 10 of the 2016 Act. In particular, the legislative regime specifies that the electronic monitoring condition should not continue if its continuation would be either impractical or in breach of the human rights of the bailed person. Neither of those considerations are static, and the existence of those exceptions is undoubtedly an important feature which underpins the need for the policy. As the case of *O* demonstrates, an apparently mandatory duty can when properly understood be subject to qualifications in its practical operation. Here, the duty to impose the electronic monitoring condition and the wearing of the GPS tag is specifically qualified by the terms of the legislation and its identification of exceptions in relation to practicality and human rights considerations. It is also subject to the respondent applying the policy which has been published for the purpose of undertaking the administering of this regime, unless there is good reason for not applying the policy.

65. Thus, the process of regular reviews is an integral part of the lawful administration of an electronic monitoring condition and, as has been set out above, a key feature of concluding that in principle the regime fulfils the requirements of accessibility and foreseeability so as to meet the "in accordance with the law" standard. Failure to comply with these integral elements of the legal framework by failing to review the circumstances in which an electronic monitoring condition has been imposed on a regular basis therefore clearly undermines the legality of continuing to impose such a condition. For the reasons given in the case of *O,* the fact that a later review might conclude that the imposition of the condition had been practicable and in accordance with the applicant's human rights, does not eliminate or obscure the failure to conduct a review at all, or the failure to conduct a review lawfully. Such a conclusion may, however, be directly relevant to the subsequent question of relief, as it was in *O.* It may be open to the Respondent to contend after a failure to comply with the policy that even if the policy had been complied with at the appropriate time it would not have led to the conclusion that the GPS tracker was impracticable or a breach of the human rights of the person on bail required to wear it. As in *O,* the outcome in those circumstances in terms of relief could be nominal damages and appropriate declaratory relief, and no doubt careful consideration would be given to appropriate limitations on costs in those circumstances.

66. A further route to the same conclusion arises from the well-established proposition that a decision-maker must apply a relevant policy they have established when making a decision to which the policy applies unless there are clear reasons for departing from it. This proposition can be seen at work in the case of *Malcolm,* and finds expression in high authority in the Supreme Court case of *Mandalia v Secretary of State for the Home Department* [2015] 1 WLR 4546; [2015] UKSC 59 at paragraphs 29 to 31. In the present case the requirements of the policy were not met either as to the regularity of the reviews or the reviews being conducted lawfully. The respondent has not identified any reason, let alone a good reason, why that policy was not adhered to in the applicant's case. It follows that this amounts to a public law error on the part of the

respondent and one which renders the requirement to wear the GPS tag during the period when reviews should have been but were not carried out, or alternatively were carried out incompetently, not "in accordance with the law", albeit the same observations in relation to relief set out above remain pertinent. The period which this concerns is the period from the 29th June 2022 to 17th July 2023.

67. The second specific aspect of the applicant's case which has to be considered is the fact that between 23rd November 2022 and 11th May 2023, a period of 197 days, the GPS tag was not functioning so as to collect and transmit data about the applicants whereabouts on all but 11 days. We have set out above our conclusions in relation to whether in principle the fitting of a non-functional tag which was nonetheless designed and intended to collect that data was a breach of the *Padfield* principle and whether there was no lawful authority to impose it. However, the question arises as to whether, even if the requirement to wear a GPS tag which was not working was authorised by schedule 10 of the 2016 Act, nonetheless the continuation of the wearing of the GPS tag was a breach of article 8. In other words, ignoring the findings that we have made in relation to the failure to apply the respondent's policy in respect of review during this period, and assuming that the requirement to wear the GPS tag was "in accordance with the law", was the wearing of the tag proportionate to the aim for which the electronic monitoring condition was imposed?

68. We emphasise that in making this assessment we are focusing upon the particular circumstances of this applicant. Obviously, if a GPS tag has been fitted with lawful authority, but then for whatever reason it either malfunctions or signal drops out for a few days whilst arrangements are put in place to repair or replace it, then such small interruptions are of limited if any consequence. It is only to be expected, as with any piece of mechanical technology, that the GPS tag will not work perfectly all of the time. There will be episodes from time-to-time when the GPS tag may need repair and this is all part and parcel of the electronic monitoring condition system.

69. The difficulty for the respondent is that in the applicant's case the periods of time for which the GPS tag was non-functional were very extensive. It appears that from an early stage the respondent was aware that the GPS tag was not working correctly, and that from around January 2023 the respondent was aware that it was not transmitting data to the tagging contractor. Thereafter it appears that many weeks went by without any meaningful action being taken to correct the problems until the visit on 21st April 2023 leading to the fitting of a new and effective tag on 11th May 2023. We are unable to accept that this lengthy period of requiring the applicant to wear a tag which was known not to be functional was proportionate or properly related to the legitimate aims of the legislation. During this lengthy period the conceded interference with the applicant's article 8 rights was essentially pointless. He was required to wear the GPS tag for many weeks whilst it was serving no useful purpose at all. During this period therefore there was inadequate justification for the interference caused by the electronic monitoring condition, and it is clear that appropriate steps should have been taken far sooner to either repair or replace the tag so that the applicant would have been wearing it for the purpose intended.

70. The applicant's claim in this judicial review is brought against the continuing decision to impose an electronic monitoring condition upon him or alternatively, to fail to conclude that he falls within the exceptions contained within Schedule 10 of the 2016

Act and specifically the exception related to his human rights. The final element therefore of this decision addresses the question of whether or not as at the date of the hearing the continued imposition of a GPS tag was lawful. Although there was some question raised in relation to it at the hearing, for the purposes of this assessment we assume that the most recent review which was due around the time of the hearing was undertaken and undertaken lawfully. The question which therefore arises is whether or not in the particular circumstances of this applicant the continued imposition of electronic monitoring and the GPS tag meet the requirements of proportionality. In making that assessment it appears to us to be appropriate to seek to identify the factors weighing in favour and against the electronic monitoring condition and the GPS tag being retained. That enables an appropriate analysis to be undertaken of the proportionality requirement.

71. Starting with the factors which weigh in favour of the continuation of electronic monitoring of the applicant, it is clear that weight must be attached to the importance of enforcing immigration control and securing the prompt enforcement of immigration decisions when they are reached. Further, weight inevitably attaches in the applicant's case to the potential risk of further offences including, based upon the applicants' previous convictions, offences which are racially aggravated. A particularly weighty factor in support of the continued imposition of the electronic monitoring condition by way of the GPS tag is that the applicant is at risk of absconding in the light of the fact that he is close to the end of the litigation process in respect of his human rights appeal. His case has been considered both by FTIAC and the UT, and the only remaining outstanding potential process is appeal to the Court of Appeal, as to which permission to appeal was at the date of the hearing pending. The applicant is therefore close to being at the point of being appeal rights exhausted unless his application for permission to appeal to the Court of Appeal is granted.

72. The points in favour of the applicant include that he was compliant with the immigration bail which he was granted without an electronic monitoring condition between 19th August 2019 and 5th May 2022. He had, therefore, been on bail for three years without being electronically monitored and without there having been any concerns or breaches during that period. Indeed, it is reported in correspondence from the Probation Service that he complied with his licence requirements after release from custody.

73. A further factor in support of the applicant's case arises from his personal circumstances and the circumstances of his family. There is evidence before us from the applicant and his partner about the impact that the tag has had upon his mental wellbeing and that of his partner and children. There is, as noted above, medical evidence from Dr Gallapathie which links the imposition of the GPS tag to the applicant's development of severe depression, generalised anxiety disorder and PTSD. This medical evidence has to be tempered by the fact that the respondent obtained his own psychiatric evidence which provides a somewhat different opinion. It is not possible for us to comprehensively resolve the differences between the psychiatric experts in this case, but we conclude that some weight should be given in the applicant's favour to the impact on his mental wellbeing and that of his family. At the very least Dr Spotto indicates in his opinion that the deterioration in the applicant's mental health was caused by the immigration proceedings generally, and that wearing the GPS tag is a major contributory factor in that overall process.

74. A further factor in support of the applicant is that the risk of him reoffending is identified as being low, a position accepted by the respondent in his most recent review of the electronic monitoring condition. Further, it must be taken in the applicant's favour that, as set out above, there have been periods when he has been required to wear the tag when it has not been functioning and also its continued use has not been the subject of an appropriate application of the immigration bail policy. During parts of this period when the GPS tag was not working the applicant will have believed he was being monitored. Again, it is a factor which is in the applicant's favour that the electronic monitoring condition had been in place at the time of the hearing for 18 months which, obviously, is a significant period of time.

75. In undertaking the analysis of proportionality in this case it is important to emphasise that none of the factors in this case are in and of themselves dispositive of the question. Each of the factors which have been identified and our overall assessment of the circumstances of this case have to be weighed in the balance and an overall conclusion reached.

76. Weighing up the various relevant factors pertaining to the circumstances of this case in favour and against the continuation of the imposition of the electronic monitoring condition by way of a GPS tag we have concluded on balance that the factors in favour of retention of the electronic monitoring condition and the GPS tag support the continuation of its imposition.

77. We should emphasise that this decision is very finely balanced, but the importance of maintaining a prompt and effective system of enforcement of immigration control together with the risks of absconding and the potential proximity of the end of the applicant's appeal proceedings all attract significant weight in the balancing exercise. It has to be recognised that the conclusion which we have reached arises in a dynamic context, in which circumstances can readily change as recognised by the immigration bail policy's requirement for regular review. Were the Court of Appeal to grant permission to appeal, or were there to be further significant delays in the resolution of the applicant's case, a different conclusion might be reached in the course of the regular review of the applicant's case. As a result of the dynamic nature of the assessment which needs to be made, and the potential for circumstances to change so as to re-order the striking of the proportionality balance, there is a particular importance in the imposition of conditions of this kind being regularly reconsidered in accordance with the application of the respondent's policy.

78. The final matter to be addressed as it was raised with us at the hearing is the question of the respondent's compliance with the duty of candour. We have concluded that there is no requirement in this case for further investigation to be undertaken as to whether or not there were breaches of the duty of candour. Ultimately, we are satisfied that all of the relevant information necessary for this matter to be justly disposed of has been brought before the UT.

79. That said, it is very clear from the history of this litigation that there were periods in which perfectly legitimate questions were not being properly grappled with by the respondent. The efficient conduct of the litigation was not assisted by, for instance, a failure to engage with the need to produce an agreed list of issues for the purposes of

the hearing. It is disappointing to note that it was not until the start of the hearing that the respondent properly addressed the question which obviously needed to be engaged with in relation to the accepted factual basis upon which the judicial review was to be premised. We acknowledge that this is perhaps the first case in which issues of this kind in relation to GPS tagging have been raised (certainly no other domestic decision has been drawn to our attention) and it is to be hoped that in any future cases the material necessary to address some of the issues which have been outlined above will be provided promptly.

80. Having set out our conclusions in relation to the legal issues which were raised with us in the context of this judicial review we shall await the submissions of the parties in respect of the appropriate form of an order to give effect to our decisions.

Postscript

81. Following the circulation of our decision in draft to the parties a draft agreed order giving effect to our decision has been and remains the subject of discussion and negotiation. We are grateful to the parties for this and endorse the terms of the order so far as they relate to the declarations to be made. We note there are issues which remain to be resolved in respect of costs. We look forward to receiving a further draft order in due course. It has also emerged that in contrast to the assumption that we made in paragraph 70 there was no further review on the 4th November 2023 as required by the respondent's policy. We have been advised by the parties that the applicant was permitted by the respondent to submit representations for the review by 24th November 2023 and following an extension of time the applicant made representations on 4th December 2023. The review was subsequently conducted on 21st December 2023. It follows that in addition to the period identified in paragraph 66 above there was an additional relevant period between 4th November 2023 and 21st December 2023. This is reflected in the draft order.

Ian Dove
Mr Justice Dove
President of the Upper Tribunal
Immigration and Asylum Chamber