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Police Powers: Article 5 ECHR and Crowd Control

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Facts

The recent House of Lords decision in *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5 raises issues relating to crowd control, public order and Article 5(1) ECHR. Of particular interest is the use of the novel 'purpose principle' in relation to Article 5. The case arose from crowd control and public order measures imposed on May Day 2001 following a number of anti-capitalism and anti-globalisation demonstrations in central London. Similar events in the previous two years had led to serious breakdowns in public order and the police, fearing a repeat of those events, deployed around 6,000 officers on the streets of London. The police were aware that demonstrations were going to take place but did not know details, the organisers having refused to cooperate with them. A large crowd converged on Oxford Circus around 14:00 and the police decided to place an absolute cordon around Oxford Circus to prevent violence and avoid personal injury or damage to property, with the intention of a controlled dispersal thereafter. The police informed the crowd of some 3,000 people that they were being contained to prevent a breach of

the peace at 16:00. They began a controlled dispersal on a number of occasions but had to suspend it each time because of the conduct of protesters within the cordon, two-fifths of whom were actively hostile, with some throwing missiles and pushing, in addition to the conduct of protesters outside the cordon. Excepting individual releases totalling around 400 people, dispersal was not completed until 21:30. The situation was described as ‘dynamic, chaotic and confusing’ and, although there was no crushing, the weather was cold and wet and there was no access to toilet facilities or shelter nor was any food or water provided (*Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5 [6]). Both appellants were caught within the cordon. One had attended the demonstration, the other was an ‘innocent bystander’. At first instance the judge held that there had been a deprivation of liberty but that it was justified under Article 5(1)(c) as necessary to maintain public order (*Austin v Commissioner of Police of the Metropolis* [2005] EWHC (QB) 480). The Court of Appeal, dismissing the appeal, held that the circumstances did not constitute a deprivation of liberty within Article 5(1) and while they could constitute false imprisonment the action was justified as a lawful exercise of police power ([2007] EWCA Civ 989). The appeal to the House of Lords was on narrower terms, arguing solely that the Court of Appeal had been incorrect to assert that the appellant’s rights under Article 5(1) were not infringed (*Austin* [2009] UKHL 5).

The House of Lords decision in *Austin v Commissioner of Police of the Metropolis*

The House of Lords found no cases relating to Article 5(1) and crowd control and accepted that neither the wording of Article 5(1) nor the leading cases of *Engel v Netherlands (No. 1)* (1976) 1 EHRR 647 or *Guzzardi v Italy* (1980) 3 EHRR 333 supported the thesis that “there is a balance to be struck at the initial stage when the scope of the article is being considered” (*Austin* [2009] UKHL 5 [23], [27]). They nonetheless proceeded to argue by analogy that there was a general principle permitting the balancing of individual interests against the aims of the restriction (*Austin* [2009] UKHL 5 [28]-[34]). This general ‘balancing’ principle led to the conclusion that the initial inquiry in relation to Article 5(1), before any consideration of the threshold question, should be whether the purpose of the action falls within Article 5(1) at all (*Austin* [2009] UKHL 5 [34], [37]). Applying this ‘purpose principle’ to crowd control it was held that Article 5(1) does not apply, so long as the measures taken are proportionate and not arbitrary (*Austin* [2009] UKHL 5 [34], [37]). Article 5 guards against the deprivation of liberty, which the ECtHR has held is more than the restriction of movement (*Guzzardi v Italy* (1980) 3 EHRR 333 [92]). The ‘threshold question’ concerns where to draw this line between the restriction of movement and the deprivation of liberty. It was considered by the House of Lords and proceeded along the same lines as recent cases such as *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12 and *Secretary of State for the Home Department v JJ* [2007] UKHL 45: the difference is one of degree or intensity in which one must take into account the broader facts and circumstances, including type, duration, effects and manner of implementation of the measure in question (*Austin* [2009] UKHL 5 [17-21]). It may, in addition, be helpful to make a comparison with the paradigm case of ‘classic detention’ in prison. However, the Lords found it unnecessary to reach a conclusion on whether the ‘threshold’ was crossed, given that Article 5(1) was held not to apply *ab initio* (*Austin* [2009] UKHL 5 [22], [47]).

The ‘purpose principle’

The primary interest in this case arises from the novel ‘purpose principle’. The cases relied upon to develop this principle concern, in the main, references to taking into account the general circumstances, which may include the balancing of the interests of the individual against the community, in relation to the threshold question, or in relation to one of the permissible grounds of deprivation of liberty; they do not support the thesis. The cited passage from *O’Halloran & Francis v UK* (2008) 46 EHRR 21 (Application no. 15809/02) concerns whether the action crossed the threshold of being an unfair trial. In *Guenat v Switzerland* (1995) 81-B DR 130 the ECtHR held that the intensity was not “sufficiently severe” to constitute a deprivation of liberty; again a threshold question. *N v UK* (2008) 47 EHRR 39 (Application no. 26565/05) also concerns the threshold question: the appellant’s potential suffering was not of sufficient intensity, taking into account the potential impact on States if, in every case where deportation would result in a lower level of care, they were unable to remove illegal aliens for fear of an Article 3 violation. *X v Federal Republic of Germany* (1981) 24 DR 158 is a difficult case, as highlighted by Lord Walker’s “unease” regarding the decision, however, it is arguable that the ECtHR held that Article 5(1) did not pertain to the case because the children were being questioned, not because this was a justifiable purpose, but rather because they would have been free to leave, had they so requested (the police could not have legally held them as they were under the age of criminal responsibility). Therefore this, again, concerned the threshold issue: there was no deprivation of liberty, therefore Article 5(1) did not apply. *Nielsen v Denmark* (1989) 11 EHRR 175 did not, as suggested by Lord Hope, come close to the “paradigm case”, rather the ECtHR emphasised that “the restrictions on the applicant’s freedom of movement and contacts with the outside world were not much different from restrictions which might be imposed on a child in an ordinary hospital...in general, conditions in the ward were said to be ‘as similar as possible to a real home’ [70]. This case concerns the applicability of Article 5(1) to the actions of private persons, and its analogy to *Austin* appears stretched. At the very least it does not support the ‘purpose principle’. Lord Hope’s analysis of *Saadi v UK* (2008) 47 EHRR 17 (Application no. 13229/03) highlights the need for proportionality in all actions which impact upon Convention rights, however, this is neither novel nor does not support the ‘purpose principle’ as it applies to a later stage in the consideration of Article 5(1) – whether a sub-paragraph applies; the proportionality of an action does not exclude it from the remit of Article 5(1).

In addition Article 2 was seized upon to assert that, although there is no reference to the interests of public safety or public order in Article 5, the right to life, which may be at risk from mob violence, requires that such interests be taken into account (*Austin* [2009] UKHL 5 [34]). This is unnecessary: where it is reasonably suspected that a person’s life is, or will soon be, in danger the police may intercede and would be justified in doing so under Article 5(1)(c). Article 5(1) applies, but the deprivation of liberty is deemed justifiable.

The final plank in the argumentation is that the framers of the Convention could not have meant for crowd control measures to come within Article 5(1) for if they had they would have included language similar to that of Article 10(2)! (*Austin* [2009] UKHL 5 [36]). Articles 8-11, which all contain similar ‘qualifying’ paragraphs as Article 10(2), are of a different order to those without such qualifications (*R v DPP* (e.p. *Kebilene*) [2000] 2 AC 326, HL, 343). In cases concerning interferences with

Article 6 arising from counter-terrorist activities the courts' interpretation has permitted them to take security interests into account without comparing that right to Articles 8-11, nor suggesting that the purpose, if legitimate, means that the Article does not come into play (see, for example, *Home Secretary v MB* [2007] UKHL 46; *Kebilene* [2000] 2 AC 326). Surely liberty is not worth less than a fair trial nor the purpose of crowd control greater than counter-terrorism? The ECtHR, in *A and Others v United Kingdom*, judgment of 19th February 2009 (Application no. 3455/05), recently reaffirmed the limited nature of the justifications for the deprivation of liberty under Article 5(1):

“paragraphs (a) to (f) amount to an exhaustive list of exceptions and ... only a narrow interpretation of these exceptions is compatible with the aims of Article 5. If detention does not fit within the confines of the paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee” [171].

If the interests of the State, relating to national security in a time of national emergency, cannot force a detention beyond the remit of subparagraphs (a) to (f) to fit within them then surely neither can an appeal to the need to balance the interests of the community against those of the individual. The right to liberty is fundamental and justifications to infringe that right ought to be limited and narrowly construed; that is why there is no ‘qualifying’ paragraph, not because the framers of the Convention ‘overlooked’ the potential difficulties arising from crowd control, as suggested in *Austin* ([2009] UKHL 5 [36]).

Alternative approaches to Article 5(1)

Although Lord Hope, like the Court of Appeal, found it “unnecessary to reach a concluded view on these points”, his subsequent discussion appears to rule out the applicability of 5(1)(b) or 5(1)(c) on the basis that the tests under those sections, which must be construed strictly, “are highly specific to the individual” whose right to liberty is being guaranteed (*Austin* [2009] UKHL 5 [36]). He concluded that this would require the police to assess every individual to decide whether it was necessary to restrict their liberty, which would clearly have been unfeasible in the circumstances. Lord Neuberger, the only other Lord to discuss the issue, stated baldly that neither 5(1)(b) nor 5(1)(c) could apply in the circumstances (*Austin* [2009] UKHL 5 [51]). It is clear from the Court of Appeal’s judgement in *Austin* that at common law the police may legitimately target “innocent bystanders” if this is the only means by which a breach of the peace will be averted, this aspect of the judgement not being subject to appeal. This is reinforced by *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55, where Lord Rodger stated clearly, albeit obiter, that there is no requirement of “a causal nexus between the persons affected by the measure taken by the police and the potential breach of the peace” [84]. The definition of breach of the peace adopted in *Steel v United Kingdom* (1999) 28 EHRR 603 appears to limit breach of the peace to individuals who are causing harm, or appear likely to cause harm, to persons or property or who act in a manner the natural consequences of which would be to provoke others to violence [55], however, that case concerned persons who were accused of breach of the peace, not innocent bystanders. It is possible that the ECtHR would consider a broader definition on the facts presented in *Austin* which may engage Article 5(1)(c), particularly given the emphasis in *Steel* on the clarification of the concept by the

domestic courts and the fact that *Austin* and *Laporte* post-date *Steel* ((1999) 28 EHRR 603 [55]). An alternative arises from the obligations placed on citizens in proximity to a breach of the peace. Lord Diplock, in *Albert v Lavin* [1982] AC 546, explained the principles surrounding breach of the peace as:

“every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so....this is not only the right of every citizen, it is also his duty, although, except in the case of a citizen who is a constable, it is an imperfect obligation” (p 565).

It may be arguable, although certainly not unproblematic, that this “imperfect obligation” could engage Article 5(1)(b). Although the magnitude of the crowd control in *Steel* was of a significantly different order than in *Austin*, both cases are concerned with the maintenance of public order and both use the same legal base of breach of the peace. The fact that the actions in *Steel* were held to engage Article 5(1) appears to contradict Lord Hope’s conclusion that “measures of crowd control will fall outside the area of [Article 5(1)’s] application” (*Austin* [2009] UKHL 5 [37]), although undoubtedly the action cannot be arbitrary (see, for example, *Steel* (1999) 28 EHRR 603 [54]). It is a pity that their Lordships did not consider in greater depth the possible applicability of Articles 5(1)(b) or 5(1)(c), including the reliance placed at first instance upon *Brogan v United Kingdom* (1988) 11 EHRR 11, in justifying the applicability of Article 5(1)(c).

Alternatively, *Austin* may simply not constitute a deprivation of liberty, as asserted by the Court of Appeal. Although the procedure in approaching the threshold test is settled, requiring the consideration of the broader facts and circumstances, including type, duration, effects and manner of implementation of the measure in question, the case-law is highly ambiguous. It has been held that house arrest for twelve hours a day and all weekend is not a deprivation of liberty (*Trijonis v. Lithuania* App. No. 23333/02, judgment of 17 March 2005), nor is ten hours curfew a day (*Raimondo v. Italy* (1994) 18 EHRR 237 (A/281-A)); however, the restriction of a man for a matter of minutes while forcibly taking blood was held to be a deprivation of liberty (*X v Austria* (1979) 18 DR 154). Lord Hope stated that if deprivation were to be judged merely on the length of the restriction then “it would be hard to regard what happened in this case as anything other than a deprivation of liberty” (*Austin* [2009] UKHL 5 [18]), however, as noted, the threshold test encompasses more than mere duration. It is arguable that taking the purpose of the cordon into account, when considering the broader facts and circumstances, in addition to the ambiguous case-law, could result in a finding that there had been a restriction of movement rather than a deprivation of liberty. This would have been a more principled approach, adopting existing jurisprudence, rather than creating a principle whereby Article 5 simply does not apply *ab initio* to crowd control so long as the measures taken are proportionate and not arbitrary.