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The purpose of the right to liberty under the ECHR, Article 5

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Summary

The Grand Chamber of the European Court of Human Rights (ECtHR) recently held there to be no infringement of the right to liberty under the ECHR, Article 5 in the case of *Austin v United Kingdom* (2012) app.no.39692/09 (hereafter '*Austin (ECtHR)*'). This will come as a relief to sections of the law enforcement communities across the Council of Europe member states as well as being a vindication of the outcome if not the exact reasoning of the House of Lords (HL) in *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5 (hereafter '*Austin (HL)*'). This analysis will present the facts and reasoning of the domestic judgments and that of the ECtHR before arguing that the judgements err in their application of the law and set a dangerous and needless precedent.

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The Facts of *Austin v United Kingdom*

The case concerns the ‘kettling’ of a crowd during May Day protests in 2001. The police were aware the protests would take place but some of the protest groups had refused to cooperate and had not sought authorisation. In addition, the crowds converged on Oxford Circus several hours earlier than the police had anticipated. In part due to the sudden arrival of the crowd, the police imposed a cordon at 14:00. Approximately 40 per cent of the crowd were actively hostile. The ECtHR judgement states that there was a crowd of ‘2,000 people within the cordon at the peak time and 1,000 in the crowd outside it’ (*Austin (ECtHR)* [20]). This differs slightly from the HL judgment which stated that there were ‘some 3,000 people...within the circus and several thousands more...gathered outside’ ([2009] UKHL 5 [3]). Initial attempts to release people from the cordon had to be delayed due to crowd violence and the full cordon was not raised until 21:30, with between 200 and 400 persons being released beforehand. The HL case concerned two claimants, Ms Austin, who participated in the protest, and Mr Saxby, who was an ‘innocent bystander’ ([2009] UKHL 5). They were joined by two other ‘innocent bystanders’ in the appeal to ECtHR.

The Domestic Decisions

At first instance, the Queen’s Bench held there to have been a justifiable deprivation of liberty under Article 5(1)(c) in order to prevent a breach of the peace ([2005] EWHC 480 (hereafter *Austin (QB)*). The Court of Appeal dismissed the claimant’s appeal, ruling that there had been no deprivation of liberty as the circumstances did not cross the threshold from a ‘mere’ restriction of movement, protected under the Fourth Protocol, Article 2 which has not been ratified by the UK, to a deprivation of liberty within the meaning of Article 5 ([2007] EWCA Civ 989). The House of Lords also dismissed their appeal on the basis that there was no deprivation of liberty ([2009] UKHL 5). The HL decision initially treaded around the usual (and notoriously unstable) ground of the threshold test, discussed further below. Lord Hope, giving the leading judgment, was unable to find any case-law on all fours with the facts of the case but relied on the classic cases of *Engel v Netherlands (No. 1)* (1976) 1 EHRR 647 and *Guzzardi v Italy* (1980) 3 EHRR 333 to support the thesis that a balance must be struck between the rights of the individual and the aims of the restriction. This ‘balancing’ formed the basis of Lord Hope’s novel ‘purpose principle’, under which he argued that if the purpose of the action was public safety and the actions were proportionate, necessary and taken in good faith then Article 5 would not apply *ab initio* ([2009] UKHL 5 [34]). Lord Hope held that these requirements were satisfied by the facts and therefore there was no need to decide whether the action crossed the threshold from a restriction of movement to a deprivation of liberty thereby excluding the right to liberty under Article 5 from certain forms of public policing.

The Decision of the ECtHR

The appeal was heard by the Grand Chamber in Strasbourg. In the interim the ECtHR in *Gillan v United Kingdom* had commented that coercion was indicative of a deprivation of liberty within the meaning of Article 5(1), although they had declined to rule on the issue, focusing instead on Article 8 ((2010) 50 EHRR 45 app.no.4158/05 [57]). This suggested the ECtHR might be moving towards some welcome clarity on the difficult threshold question. Instead *Austin* further muddied the waters.

The threshold test

Before considering the approach in *Austin*, it is necessary to sketch the contours of the ‘threshold’ test. There is no bright line; rather the distinction between the restriction of movement and deprivation of liberty is ‘merely one of degree or intensity, and not one of nature or substance’ (*Guzzardi v Italy* (1981) 3 EHRR 333 app.no.7367/76 [93]). The correct starting point is the concrete situation in the specific case, which must take account of ‘criteria such as the type, duration, effects and manner of implementation of the measure in question’ (*Guzzardi* [92]). The relevant case law is highly ambiguous. For example, neither house arrest for twelve hours a day and all weekend (*Trijonis v. Lithuania* App. No. 23333/02, judgment of 17 March 2005) nor ten hours daily curfew constituted deprivations of liberty (*Raimondo v. Italy* (1994) 18 E.H.R.R. 237 (A/281-A)) but the restriction of a man for a matter of minutes while forcibly taking blood was a deprivation of liberty (*X v Austria* (1979) 18 DR 154).

The ‘type and manner’ test

The ECtHR seized on the requirement to consider ‘the type...and manner of implementation’ as enabling it ‘to have regard to the specific context and circumstances’, concluding that ‘restrictions on freedom of movement *or liberty* in the interests of the common good’ will not constitute a deprivation of liberty if such restrictions

are rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose’ (*Austin (ECtHR)* [59] emphasis added).

This is incorrect: it is clear from *Guzzardi* that the ‘type’ and ‘manner of implementation’ refer to the circumstances of the detention or restriction of movement in terms of their deviation from the ‘paradigm case’ of incarceration in a jail not the objective that the measure serves. *Guzzardi* explicitly states that the ‘nature or substance’ of the measures are irrelevant in determining whether the threshold has been crossed (*Guzzardi* [93]). It is in relation to the sub-paragraphs of Article 5(1) that the ‘purpose’ or ‘specific context’ is of relevance. The ECtHR attempted to justify this novel departure by reference to the fact that in contemporary society the public may be required to endure a restriction on their free movement or deprivation of liberty such as at football matches or when traveling by public transport (*Austin (ECtHR)* [59]). In relation to football matches or public transport any restriction of movement or deprivation of liberty arises from an implied condition of entry which also justifies, for example, authorities searching people or their possessions. This is not comparable with the police restricting people’s movement or depriving their liberty when they are in a public place. There is a greater similarity between the restrictions imposed on a motorway but it is not the nature of this situation which makes it fall below the threshold but its duration and effects; typically being of a short duration, in the person’s vehicle.

The ECtHR went on to comment that the applicants had conceded that at the moment the cordon was imposed there was no deprivation of liberty and that the ‘Court is unable to identify a moment when the measure changed from what was, at most, a restriction on freedom of movement, to a deprivation of liberty’ (*Austin (ECtHR)* [67]). In support of this the ECtHR stated that the circumstances which required the imposition of the cordon subsisted until the cordon was raised (*ibid*). However, this reasoning fails to take any

account of what had changed: the duration and effect of the measure on those caught within the cordon. It is precisely these criteria that must be considered in determining whether the threshold has been crossed, not the reason for imposing the cordon. This point was accepted at first instance with Tugendhat, J noting that '[t]he physical conditions in Oxford Circus were for a short period quite acceptable...But as time passed the conditions became increasingly unacceptable' (*Austin (QB)* [6]).

In addition to the dubious basis of its reasoning, the ECtHR's judgement revealed the 'safeguards' over this 'type and manner' test, the requirement that the public order measure must be necessary, unavoidable 'to avert a real risk of serious injury or damage' and the minimum required, to be virtually non-existent. As noted in the dissenting opinion of Judges Tulkens, Spielmann and Garlicki, the Metropolitan Police Service had deployed 6,000 experienced officers and it appears from the domestic judgements that the decision to 'kettle' the crowd was taken for reasons of expediency: it was not the least invasive action possible and it indiscriminately caught people who were taking no part in the protest (*Austin (ECtHR)* dissenting judgment [10]). This is echoed, albeit faintly, in the judgement at first instance where Tugendhat, J notes that placing a three-sided cordon around Oxford Circus was '[o]ne means to achieve the prevention of injury or loss to third parties' (*Austin (QB)* [509]). The majority judgement does not consider less intrusive alternatives, instead it emphasised that '[s]ubsidiarity is at the very basis of the Convention' and heavy reliance is placed on the findings of fact at first instance (*Austin (ECtHR)* [61]).

It is obviously correct that the ECtHR should rely on the facts proven at first instance, and accepted by the domestic appellate courts, although it is notable that the ECtHR have had no difficulty in challenging assertions made by Governments or findings of fact held in domestic courts in previous cases (for example, *Gillan v United Kingdom*). However, the judgement at first instance did not inquire into whether the measure was necessary and unavoidable 'to avert a real risk of serious injury or damage' as this test did not form part of the Article 5 jurisprudence until this ruling by the ECtHR. Instead the evidence provided, and accepted by the Court, focuses on the potential for a breach of the peace which is not on all fours with a real risk of serious injury or damage (*Austin (QB)* [168]-[512]). The conclusions relating to the defence of necessity in relation to the claim for false imprisonment are closer to the 'type and manner' test although it is arguable that the conclusions are more clearly stated in the case than the discussion merited (*ibid* [168]-[501];[573]-[579]). Given this, one would have expected the ECtHR to inquire whether the criteria of their new test was met. The brief summary of the first instance decision overlooks many of the nuances in the lengthy and detailed judgement including some important findings, such as that the police were not detaining the crowd for the sole reason of protecting the members of the crowd, rather they were also concerned with questioning and/or searching members of the crowd; it was this combined intention that pushed the case, in the view of the Tugendhat, J, over the threshold to a deprivation of liberty (*Austin (QB)* [510]). The ECtHR fail to comment on this and it is therefore unclear whether the 'type and manner' test accommodates such dual purposes, although detaining a crowd for investigative reasons appears to undermine the requirement of necessity and the minimum intrusion necessary to avert a real risk of injury or property damage. Another example of relevant facts being overlooked concerns the reversed burden of proof imposed in the context of a potential breach of the peace (*Austin (QB)* [555]). Tugendhat, J held that this was not discharged by the claimants, however, he stated that had the burden of proof not been reversed the Commissioner could not have proven that his actions were reasonable (*ibid* [554]). Is there also a reversed burden of proof in relation to

the ‘manner and type’ test? If not, how can the findings at first instance in relation to this issue be relied upon? Again, the ECtHR was silent on the issue.

The ECtHR emphasised the discretion that must be afforded to officers to respond to the circumstances on the ground and ‘the difficulties involved in policing modern societies’ (*Austin (ECtHR)* [55-6]). The police should be given significant discretion to respond to fast-moving situations of which crowd control is a paradigm. However, this judgement does not provide the clarity that is needed. There is, for example, no discussion of what, if any, the required relationship is between the crowd which has been ‘kettled’ and the risk of serious injury or damage. Must the officers imposing the cordon believe (reasonably?) that the crowd may be in danger of serious injury or is the test that the crowd poses a danger of causing serious injury or damage? Must the belief be in relation to the entire crowd or is a generalised belief sufficient? Is there a requirement of imminence? There must be a ‘real’ risk; what does this add? Will intelligence alone suffice or must there be actual violence evident? The only issue that was clearly discussed was the irrelevance of the fact that one of the applicants was participating in a public protest (*Austin (ECtHR)* [63]). By avoiding any detailed discussion of how to apply this new ‘type and manner’ test this ambiguous judgment leaves the police without any clear indication as to when Article 5 will not be engaged by public order policing, although the lack of any rigorous inquiry by the court suggests little need to err on the side of caution.

Conclusion

It is frustrating that the ECtHR felt the need to introduce these poorly considered additions to the criteria for determining the threshold between the restriction of movement and deprivation of liberty. It appears that a significant motivation in both the HL’s and the ECtHR’s judgements to exclude the measures taken by the police from the ambit of Article 5(1) was the difficulty the police would otherwise have in bringing their actions within one of the justifiable exceptions under Article 5(1).¹ The ECtHR stated that ‘Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public’ (*Austin (ECtHR)* [56]). It is easy to sympathise with this sentiment but in terms of legal analysis it is putting the cart before the horse. Moreover, the threshold test undoubtedly provides enough ‘wriggle’ room in its traditional formation to assert that the threshold from a restriction of movement to a deprivation of liberty was not crossed. The ECtHR emphasised that the objective of Article 5 is to guard against arbitrary treatment of individuals (*Austin (ECtHR)* [56]). This judgment has driven a horse and cart through the protection offered by the Article by excluding public order policing from its remit *ab initio*: this is not the way to safeguard ‘the individual from arbitrariness’; instead it offers the police across the Council of Europe member states a *carte blanche*: if the measures are for the ‘common good’ there will be little or no inquiry as to their proportionality. The ECtHR, while acknowledging that ‘the Convention is a living instrument’, underlined that the ability to interpret the Convention in light of present day needs does not enable the ECtHR to ‘whittle down an existing right or create a new “exception” or “justification” which is not expressly recognised in the Convention’ (*Austin (ECtHR)* [53]). This is exactly what *Austin* has done. Given that this is the first public order policing case to reach the ECtHR this precedent may stand for a long time. This also represents yet another missed opportunity to clarify the jurisprudence around the threshold test.

¹ On the HL’s ruling see Lennon, G. ‘Police powers: Article 5 ECHR and crowd control’, [\[2009\] 3 Web JCLI](#).

In the control order case of *Secretary of State for the Home Department v JJ*, Lord Brown stated:

‘The borderline between deprivation of liberty and restriction of liberty of movement cannot vary according to the particular interests sought to be served by the restraints imposed. The siren voices urging that it be shifted to accommodate today's need to combat terrorism (or even that it be drawn with such need in mind) must be firmly resisted. Article 5 represents a fundamental value and is absolute in its terms. Liberty is too precious a right to be discarded except in times of genuine national emergency. None is suggested here’ ([2007] UKHL 45 [107]).

Following *Austin*, it appears that a higher threshold is to be imposed in relation to the deprivation of liberty in cases of suspected terrorism than in public order policing.