OF CORDONS, RIOTS AND DEPRIVATIONS OF LIBERTY:  
A CASE NOTE ON AUSTIN v COMMISSIONER OF POLICE FOR THE METROPOLIS  

by  
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Abstract: This paper analyses the recent decision in Austin v Commissioner of Police for the Metropolis, arising out of the policing of the May Day disturbance in 2001. The House of Lords decided that detaining a group of several thousand protesters in a cordon for seven hours was not a deprivation of liberty within Article 5 of the ECHR. This case note subjects the reasoning of the House to criticism. It concludes that the Strasbourg and UK cases relied on do not sustain the conclusion that it reaches: first that proportionality and balance properly play a role within Article 5 and secondly, as result, that the motive of the police is important in deciding whether or not a deprivation of liberty has taken place. The case is therefore of crucial importance in the ongoing development of both Article 5 jurisprudence domestically and at Strasbourg and of peaceful protest law in the UK. It is also of obvious topical resonance in light of the policing of the G20 summit in London in April this year.

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In 2006, in *Laporte v Chief Constable of Gloucestershire*, the House of Lords decided that at common law the police could take preventive action to keep the peace, where they apprehended a violent disturbance by protesters, only if the breach of the peace was imminent.\(^1\) The speeches of three of their Lordships (Lord Rodger, Lord Brown, and Lord Mance) contained *obiter* views on whether or not that same power (perhaps in fact a duty?) extended to taking action against a group where it was known that not all were - or even could be - trouble makers. In *Austin v Commissioner of the Police for the Metropolis* in 2009, the House was asked to decide that very question - albeit framed under Article 5(1) of the ECHR rather than at common law - in a challenge brought by two people detained within a police cordon for about seven hours at Oxford Circus during the disorder in central London on May Day 2001.\(^2\)

This case note will subject the reasoning of the House of Lords to critical analysis.\(^3\) *Austin* breaks new ground in terms of Article 5 jurisprudence domestically and internationally. As Lord Hope pointed out, under Article 5(1) the Strasbourg Court has not had to address attempts by states to exert control over a potentially disorderly and dangerous crowd.\(^4\) What the ECtHR will make of their Lordships’ attempts to formulate a new test for deprivation of liberty cases (based on the underlying motive and intention of the detainer) will be known when *Austin* comes before it, as it inevitably will - the applicants lost their appeal.

**BACKGROUND**

About 3,000 people were held within a cordon (measuring about 2,000 sq. metres) on May Day, a day that witnessed scenes of quite violent disorder in other parts of the capital. The police had information that a mass rally against capitalism and globalisation was planned for later that afternoon at Oxford Circus, where several main shopping roads converge. There had been outbreaks of serious public disorder over the past two years at anti-capitalism demonstrations in the city. Intelligence led the police to expect a hard core of 500 to 1,000. About 6,000 officers were to be deployed on the streets of London. Deliberately, the organisers had given no advance notice and had not co-operated with the police. Just after 2 o’clock, officers began to pen people into the area - whether or not they were planning or had even shown a keenness to demonstrate - by refusing to allow anyone, save for permitting very few, to leave. This cordon was not planned in advance but was an on-the-spot response to the arrival, at the hour, of considerable numbers of people, taking the police by surprise. Ultimately, many were forced to remain until about 9 o’clock in conditions which rather speedily and obviously became fairly intolerable: cramped, without toilet facilities and with limited or no food and drink. The delay in releasing everyone was put down to the behaviour within the cordon of a sizeable minority who did not cooperate or who became actively hostile and violent towards the police. A large number outside the cordon was actively engaged in trying to regain Oxford Circus and did not accept control by the police. No one was seriously hurt though some came close. Some officers were injured.

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2 [2009] UKHL 5. Unless otherwise made clear, all paragraph references are to the House of Lords decision.

3 This paper will appear in shorter form in my chapter on preventive action by the police (chapter seven) in *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* to be published by Hart later in 2009.

4 At [23].
Austin was one of the demonstrators who continued to make speeches via a megaphone. She had taken part in such events before and, though she was not violent nor had she any intention save to protest peacefully, she was well aware that the protest was not expected by anyone to end without serious violence. Saxby was in London on business, so becoming embroiled totally innocently. Each presented themselves to an officer but was refused permission to leave. There was no suggestion that either of them was violent and neither of them threatened to become so or to breach the peace. It was accepted that Austin and Saxby acted lawfully throughout. It was found at trial as a fact that: imposing the cordon was to establish control over the crowd prior to and during a planned and controlled dispersal; it was not practicable for the police to release the crowd collectively earlier than they did; the police had no intention of holding demonstrators for longer than necessary; the object was not to hold the crowd for any reason other than to carry out a controlled release as soon as it was practical and safe to do so; about five minutes after the cordon was imposed, the police started to plan for, and put in place resources to facilitate, a commencement of controlled dispersal during which about 400 people were released, many within the hour; and at the outset the police expected (and continued for some time to expect) that the dispersal process would take about two to three hours not the nearly seven hours that it did. Austin and Saxby brought test cases claiming damages at common law for false imprisonment and under s.8 of the HRA for deprivation of liberty contrary to Article 5.

THE DECISION

In January 2009, the House of Lords handed down judgment. It found, as the courts below had done, for the police though on different grounds. In the High Court, Tugendhat J dedicated over 600 paragraphs to holding first that the claim at common law for false imprisonment was defeated by the defence of necessity and second that the deprivation of liberty was justified under Article 5(1)(c). The Court of Appeal (Sir Anthony Clarke MR giving judgment) founded its decision on two bases. First, that preventing breach of the peace constituted a good defence to the common law claim for false imprisonment (subsuming the defence based on necessity). Second, that Article 5(1) was not

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* Fenwick above n. 1 763-771 contains a detailed summary of the 150 page High Court judgment.
* [2003] EWHC 480 Admin at [574]-[578] and at [312]-[356] respectively. The round-up had the conditional purpose of arresting those whom the police reasonably suspected of having committed an offence or whom they reasonably considered it necessary to arrest to prevent them committing an offence or to prevent a breach of the peace, where there was evidence on reasonable grounds that each and every member of the cordon might reasonably appear to the police as likely to do so and the measures taken were reasonable steps. Claims under Articles 10 and 11 were rejected (ibid. at [598]-[608]) and not pursued before the Court of Appeal or the House of Lords. The right to peaceful protest had not been restricted. Austin was able to continue using her megaphone within the cordon for an hour or so at which time she had planned to leave in any event to collect her baby from the childminders. Thereafter she was in fact detained but “in fact enjoyed all the opportunities which she wanted to enjoy to exercise her rights of freedom of speech and assembly. She was not prevented in any way from exercising those rights as she wished” (ibid. at [601]).
* [2007] EWCA Civ 989 at [73]. Although it was only obiter, the Master of the Rolls thought some reference was needed to ss.12-14 of the Public Order Act 1986 for two reasons (ibid. at [74]-[84]). First he was concerned lest it be thought that the Court of Appeal was reaching the same conclusion as Tugendhat J. The second was to highlight the desirability that the common law and statutory positions should be reviewed “to see whether it would be possible to make clear provisions appropriate to cover a case of this kind in the future” (ibid. at [84]). On the first, the Court of Appeal was not persuaded, as Tugendhat J had been, that the police could lawfully rely on their statutory powers even if they did not have them in mind or purport to be exercising their powers under them at the time. The Court of Appeal was of the view (ibid. at [83]) that “whatever the strict position as a matter of law, the police should consider their statutory powers in a case of this kind and decide whether or not to exercise them. If they decide to exercise them, it is at least desirable to make it clear that they are doing so, especially since (for example) sections 12(1)(5) and 14(4)-(6) contain penal sanctions for knowing failure to comply with directions given under them.” The trial judge also held (summarised ibid.
engaged on the facts either at the outset or any time thereafter.\(^8\) This second was the sole ground of appeal to the House of Lords.\(^9\)

Before we consider that second aspect, we should advert to the first. The Court of Appeal dwelt at length on the policing response to possible breaches of the peace by third parties. The matter was discussed only \textit{obiter} by the House of Lords in \textit{Laporte} but in \textit{Austin} the Court of Appeal decided that in exceptional circumstances a police cordon was lawful to contain those who were not themselves threatening an imminent breach of the peace where no other alternative strategy or action was possible to avoid it even if the claimants themselves were not about to commit a breach of the peace.\(^10\) The Master of the Rolls distilled the essence of the \textit{obiter dicta} of Lord Rodger, Lord Brown and Lord Mance as follows:\(^11\):

\begin{enumerate}[(i)]
\item where a breach of the peace is taking place, or is reasonably thought to be imminent, before the police can take any steps which interfere with or curtail in any way the lawful exercise of rights by innocent third parties they must ensure that they have taken all other possible steps to ensure that the breach, or imminent breach, is obviated and that the rights of innocent third parties are protected;

\item the taking of all other possible steps includes (where practicable), but is not limited to, ensuring that proper and advance preparations have been made to deal with such a breach, since failure to take such steps will render interference with the rights of innocent third parties unjustified or unjustifiable; but

\item where (and only where) there is a reasonable belief that there are no other means whatsoever whereby a breach or imminent breach of the peace can be obviated, the lawful exercise by third parties of their rights may be curtailed by the police;

\item this is a test of necessity which it is to be expected can only be justified in truly extreme and exceptional circumstances; and

\item the action taken must be both reasonably necessary and proportionate.\(^{12}\)
\end{enumerate}

\(^8\) at [76]) that s.12 included a power to bring a procession to an end; that s.14 included a power to direct an assembly to disperse along a particular route and to stay in a particular place so long as necessary to effect that dispersal; and that such conditions could be imposed as a result of the acts of others. Counsel for the claimants disputed all these as correct propositions of law: ibid. [78]-[81].

\(^9\) Ibid at [102]-[104].

\(^{10}\) Before the House of Lords, it was accepted by both sides that determining whether the detention was an unlawful deprivation of liberty contrary to Article 5(1) would also resolve whether it was also a lawful exercise of breach of the peace powers at common law: at [11].

\(^{11}\) \textit{Austin} CA above n.7 at [56]-[62]. Although this aspect of the Court of Appeal decision was not appealed, its precedential value – since it is not inconsistent with the House’s later holding – remains strong.

\(^{12}\) The extent to which \textit{Laporte} and \textit{Austin} correctly distil common law principles and properly reflect the new wind blowing through Strasbourg since \textit{Öllinger v Austria} (2008) 46 EHRR 38 is moot: see further Mead n.3 above.
In the instant case, based on the finding at trial that a breach of the peace was imminent and reasonably perceived by the police to be so, the Court of Appeal held that the actions were lawful at common law. No alternative strategy to deal with the imminent threat presented itself other than to contain everyone, including innocent bystanders and clearly peaceful protesters, as part of a planned policy of detention, containment and - over time - phased release. This was so, the Court decided, despite the excessive length of containment and the intolerable conditions in the area.\(^1\)

The House of Lords on the only issue before it aligned itself with the Court of Appeal: it was not persuaded that Article 5(1) was engaged. As Lord Hope put it, measures of crowd control undertaken in the interests of the community will fall outside Article 5 so long as they are not arbitrary: they must be resorted to in good faith, that they must be proportionate and that they are enforced for no longer than is reasonably necessary.\(^2\) In other words, being held for seven hours in a police cordon without food or water, without shelter or suitable clothing on a wet, windy day and unable to leave even though, of most members individually, there was no suspicion that they themselves had done anything wrong was not in fact a deprivation of liberty, a conclusion described by Lord Neuberger as “on the face of it, surprising”.\(^3\)

**REASONING**

The House of Lords made clear, as the Court of Appeal had below, that there was a distinction between on the one hand restricting movement under the 4th Protocol (which the UK has not ratified)\(^4\) and on the other depriving someone of their liberty under Article 5(1). This latter is “in the first rank of fundamental rights”\(^5\), subject only to the exhaustive list of six permitted situations in Article 5(1)(a)-(f).\(^6\) The existence of the former qualified right goes some way towards indicating the limits of the latter absolute right, putting the ambit of the latter in proper perspective.\(^7\) The divide is not just a function of duration - if it were, it would clearly have been one on the facts.\(^8\) It is, as we learn from *Guzzardi*, a matter of judgement on the facts. The analysis starts with a consideration of the concrete situation of the individual in question and then account is taken of other factors, such as the type, nature, effects and manner of implementation (as well as duration), to see if the threshold has been crossed. The classification is not one of nature or substance but of degree and intensity; it is not enough that what occurred was in lay or general terms a deprivation of liberty - outside perhaps of the paradigm case of “close confinement in a prison cell.”\(^9\)

\(^{\text{1}}\) Query the application of Article 3, a matter not raised in the case. Though not torture might it be argued it is degrading or inhuman treatment to contain people thus?

\(^{\text{2}}\) At [37] though the qualification of the interests of the community is to be found at [34].

\(^{\text{3}}\) At [51].

\(^{\text{4}}\) The UK is one of only five member states not to have ratified the Protocol; two have not signed it (Greece and Switzerland) and three more are only signatories: the UK, Spain and Turkey; source [http://conventions.coe.int/Treaty/CommAtt/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG access 20 March 2009].

\(^{\text{5}}\) *McKay v UK* (2006) 44 EHRR 827 at [30].

\(^{\text{6}}\) Lord Hope at [15]-[16]. Lord Scott at [39], Lord Walker at [41], Lord Carswell at [48] (simply agreeing with Lord Hope) and Lord Neuberger at [53]-[60] offer little or nothing more on how we might identify a deprivation of liberty outside the paradigm of incarceration.

\(^{\text{7}}\) Lord Hope at [15].


\(^{\text{9}}\) Lord Hope at [18] c.f. Lord Walker’s construction at [41] of that paradigm as “close personal confinement, against one’s will and to one’s discomfort” not something noticeably different to the situation that befell Ms Austin.
Account must be taken of a whole range of factors, including the specific situation of the individual and the context in which the restriction of liberty occurs... And it is helpful to have regard to how the case in hand compares with the core or paradigm case, which cannot be the subject of argument. ...On the other hand ... article 5(1) may apply to deprivations of liberty of even a very short duration.22

On that question, the House was clear: the May Day cordon was not a deprivation of liberty.

What is novel about the case is not its application of the standard Guzzardi or Engel test to a new scenario: of the four who offered reasoned speeches (Lord Carswell simply agreeing with Lord Hope) only Lord Neuberger actually attempted to subject the facts, as found at trial, to any type of factorial analysis.23 Its novelty rests on the fact that all four considered that what was truly determinative of the issue (though perhaps only in non-paradigm cases?) is the purpose or motive behind and the intentions of those who implemented the cordon.24 According to Lord Scott, the underlying aim, preventing damage to property and injury to persons, was something that “rank[ed] very high in the circumstances to be taken into account.”25 Lord Neuberger drew support from one aspect of the Grand Chamber decision in Saadi for the idea that the detainer’s state of mind might play a role.26 The ECtHR there held that detention could be arbitrary and thus contrary to Article 5(1) if “there has been an element of bad faith or deception.”27 So, if the cordon had been continued (presumably set up in the first place?) so as to punish or teach demonstrators a lesson, in Lord Neuberger’s view very different considerations would have arisen: there would be a strong argument that this would be a detention within Article 5.28 Lord Hope took a slightly differently route to the same ultimate conclusion that the underlying aim was key. In his reading of certain Strasbourg cases, what pervades the whole ECHR – not just those articles obviously subject such as the qualified rights in Articles 8 to 11 – is the notion of balance and proportionality.29 Without a binding Strasbourg view on the matter,30 and bearing in mind the adjuration in McKay that the “key purpose [of Article 5] is to prevent arbitrary or unjustified deprivations of liberty”31, he felt it was open to assert a more textured and contextualised approach to Article 5, in which motive and purpose were key factors.

I would hold therefore that there is room, even in the case of fundamental rights as to whose application no restriction or limitation is permitted by the Convention, for a pragmatic approach to be taken which takes full account of

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22 Lord Hope at [22], references to supporting cases omitted.
23 At [57].
24 Lord Neuberger at [63].
25 See also the Court of Appeal decision n.7 at [98]-[99] and [103]-[104].
26 At [39].
27 At [54].
28 Saadi above n.20 at [69].
29 Lord Neuberger at [63]. He was the only one troubled by the length of detention but added (at [62]) it was “hard to contend that the mere fact that the period of constraint was unusually long can, of itself, convert a situation which would otherwise not be within the ambit of article 5 into one which is.” He referred to Novotka v Slovakia (App 47244/99) ECHR 4 November 2003 in which detention in prison was not outside Article 5 because it was only for a short time.
31 At [27]. See too Lord Neuberger at [55]. The Court of Appeal was greatly influenced by the infusion of proportionality into Article 5: see n.7 at [93]-[94] and [106].
32 Thus there is no role for s.2 of the HRA to play strictu sensu and so no “mirror principle” and nothing to depart from.
33 Above n.17. This it must be said does not answer whether Article 5(1) is engaged – the Court was referring to Article 5 as a whole.
all the circumstances. But the importance that must be attached in the context of article 5 to measures taken in the interests of public safety is indicated by article 2 of the Convention, as the lives of persons affected by mob violence may be at risk if measures of crowd control cannot be adopted by the police. This is a situation where a search for a fair balance is necessary if these competing fundamental rights are to be reconciled with each other. The ambit that is given to article 5 as to measures of crowd control must, of course, take account of the rights of the individual as well as the interests of the community. So any steps that are taken must be resorted to in good faith and must be proportionate to the situation which has made the measures necessary. This is essential to preserve the fundamental principle that anything that is done which affects a person’s right to liberty must not be arbitrary. If these requirements are met however it will be proper to conclude that measures of crowd control that are undertaken in the interests of the community will not infringe the article 5 rights of individual members of the crowd whose freedom of movement is restricted by them.\(^34\)

Lord Walker in turn provided a strange analysis. The first few paragraphs of his speech, in which he referred to Lord Hope’s “very guarded” conclusion on the matter, indicated his preference for caution. As he demonstrated, the factors set out in Engel, Guzzardi and HM do not list “purpose” as a relevant circumstance. This is something more generally relevant to determining whether a deprivation of liberty is protected under Article 5(1)(a)-(f).\(^35\) But, without further reasoning or explanation, he nonetheless felt able to conclude that it was essential to pose this simple question:

what were the police doing at Oxford Circus on 1 May 2001? What were they about? The answer is, as Lord Hope has explained in his full summary of the judge’s unchallenged findings, that they were engaged in an unusually difficult exercise in crowd control, in order to avoid personal injuries and damage to property. ... The aim of the police was to disperse the crowd, and the fact that the achievement of that aim took much longer than they expected was due to circumstances beyond their control.\(^36\)

Lord Hope in that passage above highlighted one further factor in Austin, one that did not feature before either of the courts below: without the power to control order in a potentially inflammatory situation, the police risked violating their duty to preserve and protect life under Article 2.\(^37\) This is really no more, albeit couched in Convention terms, than developing and heightening the uncontentious principle that the police are under a general duty to keep the peace and to prevent serious public disorder, a consideration which also supported the outcome in favour of the police.

\(^34\) At [34]. When he uses the word “infringe” Lord Hope must be taken as meaning “engage”: see [37] where he adds a further fourth qualification (to the lack of arbitrariness and the need for both good faith and proportionality) that crowd control measures should not be enforced any longer than necessary. This must be implicit in their proportionality. See also Lord Neuberger at [60]: “In a case such as the instant one it seems to me unrealistic to contend that article 5 can come into play at all, provided, and it is a very important proviso, that the actions of the police are proportionate and reasonable, and any confinement is restricted to a reasonable minimum, as to discomfort and as to time, as is necessary for the relevant purpose, namely the prevention of serious public disorder and violence.”

\(^35\) At [43]-[44]. He also doubted the continued relevance of some other key Article5 cases such as Nielsen v Denmark (1988) 11 EHRR 173 and X v Germany (1981) 24 DR 158.

\(^36\) At [47]. It is hard to know what “further remarks” of his Lord Hope earlier said (at [38]) he endorsed.

\(^37\) Lord Hope at [34] and Lord Neuberger at [58].
certainly before the Court of Appeal and which is implicit throughout the speeches in the House. Both the House of Lords and the Court of Appeal used the analogy of football fans detained outside a stadium to avoid crowd violence or motorists on motorways detained after a crash blocks the road. In their view, no one would consider these to be deprivations of liberty.

ANALYSIS AND COMMENT

Contrary to the view taken by the Master of the Rolls in the Court of Appeal, it would be very surprising indeed if Strasbourg analysed the matter with similar principles in mind to those that held sway before both the Court of Appeal and the House of Lords. As we have just seen, the House of Lords’ decision was premised on two assertions of law. First, proportionality could and should play a role in deprivations of liberty cases leading to, second, the idea that motive and purpose were significant in determining whether or not Article 5(1) was even engaged. Neither of these is unassailably correct.

The Strasbourg “fair balance” test

On the issue of balance, the House of Lords (and Court of Appeal) erred in considering proportionality not in its hitherto rightful place – in assessing the legality of limitations on qualified rights in Articles 8 to 11 – but as integral to the assessment of whether an Article is engaged at all on the facts. Lord Hope relied on several eclectic cases to make this point: Soering v UK, N v UK and O’Halloran v UK though without the wariness, urged by Lord Bingham in Gillan, about transposing Strasbourg judgments as factual precedents. None of these cases is an Article 5 case but that is not the main point. Halloran concerned the extent of the privilege against self-incrimination, something already read in to the broad fair trial guarantee contained in Article 6(1). Austin did not involve the scope and extent of sub-rights, implied rights or even adjectival rights; it concerned the meaning of express words clear on the face of Article 5: what does “deprivation of liberty” mean? In any event, Halloran – unlike the other two – merely asserts that “what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case.” No applicant under Article 5 could sensibly deny that is the position – it is after all what Guzzardi and Engel (to name but two) set out in terms. Even if it means that proportionality is implicit in Article 6, on no possible reading can it be taken to mean that it is part and parcel of ECHR jurisprudence generally or of Article 5 specifically, let alone that purpose and motive are key. Soering does in this way assist. In what has become a well-known passage the Court abracadabrised

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* The Court of Appeal considered that a deprivation of liberty was also made out because police appeared to have no alternative and planned orderly release and because, absent the cordon, the claimants “would have found themselves in an increasingly disorderly situation, which most people would have regarded as less preferable”: above n.7 at [103]-[104].
* Lord Hope at [23] and Lord Neuberger at [58]. He added to this mix the example of a deranged or drunk gunman on the loose in a building. What is more worrying is the self-serving reasoning he employs at [64]: the unlikelihood of the cordon being protected by Articles 5(1)(b) and (c) supported a conclusion that the cordon was outwith Article 5(1) in the first place.
* Above n.7 at [93](iv).
* On several occasions as well, the House elided questions about Article 5 as a whole – including the six listed limitations in Articles 5(1)(a)-(f) – and especially whether it had been violated with the issue of whether Article 5 was engaged i.e. had there been a deprivation of liberty in fact?
* Above n.30 at [89]
* Above n.30 at [44].
* Above n.30 at [53].
* R (Gillan) v Commissioner of Police for the Metropolis [2006] UKHL 12 at [23].
that “inherent in the whole Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.” Two points are worth making about this one sentence revelation. The first is this. Soering stands in splendid isolation in this regard, made without drawing on any previous relevant case-law. The second point is this. Article 3 is one of two truly absolute rights which permit of no qualifications, limitations, or even derogations. In the case itself, what was being balanced was the punishment against the crime not communal interests against individual rights."

Let us take these in turn. Previous and subsequent cases that utilise the same phrase fall into one of two main camps. Either they concern the lawfulness of deprivations of property under the First Protocol or are cases in which the Court is being asked to impose positive obligations on states parties. In fact, in the passage cited from 

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N v UK, an expulsion case like Soering, this is evident: “Article 3 does not place an obligation on the contracting state to alleviate such disparities through the provision of free unlimited healthcare to all aliens without a right to stay...”

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What is often thought to be the original statement was made in Sporrong and Lönnroth v Sweden and it is worth quoting the paragraph in its entirety.

The fact that the permits fell within the ambit neither of the second sentence of the first paragraph nor of the second paragraph does not mean that the interference with the said right violated the rule contained in the first sentence of the first paragraph. For the purposes of the latter provision, the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1. (My own underlining added)

The context was assessing whether expropriation permits (which had expired but for which no compensation was ever paid) represented an unlawful interference with the claimants' property as to be a deprivation or de facto expropriation of property within Article 1 of the First Protocol. We can see that in context, the relevance of balance is to the proportionality of interferences or limitations or restrictions on rights not on whether the right is actually engaged, the question for the House in Austin. The only Article 5 case that even features the concept used in Soering is Brogan v UK but there the issue was not the deprivation of liberty but whether someone arrested was brought “promptly” before a judge, clearly a matter open to a more circumstantial analysis.

On the second point above, as Article 3 is absolute, there is some justifiable logic to utilising proportionality as one factor in assessing the extent of that absolute right in modern day conditions.

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* See Soering above n.30 at [104].
* There is a third, those “standard” cases where balance is involved in qualified rights. As one example of hundreds, Klass v FRG (1978) 2 EHRR 214 at [39]
* Above n.30. Other cases would include Cossey v UK (1990) 13 EHRR 622 at [37], Recs v UK (1986) 9 EHRR 56 at [37]. The fact that positive obligations are at issue also explains the limited relevance of the Article 2 point made by Lord Hope at [34]. If it is alleged of the police that there were in breach of Article 2 should they have failed to set up a cordon, that is the imposition of a positive obligation, the police themselves not having killed anyone. In such situations, it is trite Strasbourg law (see e.g. Stjerna v Finland (1994) 24 EHRR 194) that the decision whether to do so involves balancing various individual and collective interests.
The same does not pertain to Article 5(1) which can lawfully be limited under Article 5(1)(a)-(f) and of course by Article 15 too. Indeed, Article 5 read as a whole in any event complies with the adjuration to find a fair balance: the balancing mechanism comes into play in assessing the “lawfulness” of the permitted exceptions, a term held to impose duties of non-arbitrariness and proportionality. There is no necessary reason why, by reference to Soering, proportionality should bear on the question of what a “deprivation of liberty” means. That is a normative question requiring free-standing justification and analysis.

In none of the leading non-paradigmatic (that is non-incarceration) Article 5 cases at Strasbourg level has such an approach been adopted or even contemplated. In none of the works on the ECHR is there any discussion of the European Court taking an approach premised on balance to “deprivation of liberty”. In fact in Storck v Germany, the Court held that there is a loss of liberty for non-consensual “confinement in a particular restricted space for a not negligible length of time.” Further, it is instructive that in their analysis of proportionality as applied by the ECtHR, Richard Clayton and Hugh Tomlinson do not list Article 5 as one of the six areas where proportionality exerts an influence. The only situation where it seems to play a role is in assessing the lawfulness of any deprivations of liberty under Article 5(1)(a)-(f). Then the Court should ask whether or not “less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require a person be detained”. This requires an assessment of alternatives with the onus on the state to satisfy both that they had been considered and properly rejected. It is clearly different to the broad brush approach of balance espoused by the House and acts as a limiter on state action not as an enabler, as it does under Austin, when it plays a role assessing whether or not Article 5 has been engaged.

Domestic support?

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See e.g. Steel v UK (1999) 28 EHRR 603.
See Guzzardi v Italy (1981) 3 EHRR 333 [92]-[95], Amuur v France (1993) 22 EHRR 533 [37]-[49], HIL v UK (2005) 40 EHRR 32 [89]-[94] and Engel v Netherlands (1979-80) 1 EHRR 617 [56]-[59].

That view is borne out by consideration of the relevant chapter in P Van Dijk, F von Hoof, A van Rijn and L Zwaak (eds) The Theory and Practice of the European Convention on Human Rights 6th ed (Intersentia Antwerp, 2006), of Harris, O’Boyle and Warbrick The Law of the European Convention on Human Rights (OUP Oxford 2009) pp.123-129, of Clayton and Tomlinson The Law of Human Rights (OUP Oxford) 10 EHRR 80 – 10.89 and of J Murdoch Article 5 of the European Convention on Human Rights – The Protection of Liberty and the Security of the Person Human Rights Files No. 12 (revised) (Council of Europe Publishing Strasbourg 2002). In none of these is there any discussion of the Court at Strasbourg taking an approach premised on “balance” either to “deprivation of liberty” or to the various permitted restrictions under Article 5(1)(a)-(f). The closest that we come is the assertion by Clayton and Tomlinson (at 10.93) that the application of the prohibition on arbitrariness in Article 5(1) – see for an example Loukanov v Bulgaria (1997) 24 EHRR 12 at [41] – is similar to assessing whether the limitations on Articles 8-11 are necessary in a democratic society. This in turn is taken from J Murdoch “Safeguarding the liberty of the person: recent Strasbourg jurisprudence” (1993) 42 ICLQ 494, 499. Closer inspection of this and of the case-law reveals that arbitrariness – presumed in the word “lawful” in each of Article 5(1)(a)-(f) – means that the law should not be misused for improper purposes, or be driven by bad faith or be an abuse of power outside the purposes of Article 5: Bosanova v France (1987) 9 EHRR 297.

(2005) 43 EHRR 96 at [74] though as the authors of O’Boyle, Harris and Warbrick point out (ibid124) maybe the Court had in mind the paradigm of physical, institutional confinement by the state.

Clayton and Tomlinson above n.53 paras 6.42 – 6.53.

Witold Litwa v Poland (2001) 33 EHRR 1267 at [78], van Dijk and van Hoof above n.53 470 indicate that in their view Article 5(1)(b) does include a balance between the importance in a democratic society of securing immediate fulfilment of an obligation and the importance of the right to liberty.
As well as there being (at best) limited support at Strasbourg for the approach taken by the House, there is little or none domestically. In none of the control order cases (JJ, MB or EE) did the House of Lords approach the question as one of balance. It certainly did not in JJ where the single issue was the engagement of Article 5. Neither did the House in Gillan. These two were, before Austin, the leading domestic cases on Article 5. These recent pronouncements on the scope of Article 5 have all considered as the test for a deprivation of liberty that set out in, for example, HL v UK: that "in order to determine whether there has been a deprivation of liberty, the starting-point must be the concrete situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question." It is instructive that Lord Hoffman is the only member of the House of Lords in JJ also cited in the speeches in Austin, one of two dissentient voices, and then from those two or three passages that discuss the paradigm, not something of concern in Austin itself. However in JJ - but not relied on in Austin - Lord Hoffman also describes the case where X is “placed under actual physical constraint for any length of time [as], for that period, a deprivation of liberty”.

How different is that to what happened to Austin and Saxby? More tellingly, Baroness Hale in JJ says that being deprived of physical liberty means

being forced or obliged to be at a particular place where one does not choose to be [citing X v Austria in support]. But even that is not always enough, because merely being required to live at a particular address or to keep within a particular geographical area does not, without more, amount to a deprivation of liberty. There must be a greater degree of control over one’s physical liberty than that.

In Gillan, Lord Bingham distinguished the claimants’ case, where they were kept waiting during a stop and search, thus:"

I would accept that when a person is stopped and searched [under ss. 44-45 of the Terrorism Act 2000] the procedure has the features on which the appellants rely [viz. (at [22]) the police have the power to require compliance with the procedure; a member of the public will not feel that his compliance is voluntary; officers have power to detain, which he may or may not exercise; reasonable force may be used to enforce compliance; and non-compliance is criminally punishable.] Thus a member of the public has no effective choice

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*b Above n.46 at [21]-[26] Lord Bingham, [38] Lord Hope, [58] Lord Scott, [70] Lord Walker and [71] Lord Brown.
*c (2004) 40 EHRR 761 [89].
*d The relevant passages in JJ are [35]-[37], referred to by Lord Hope in Austin at [16], [20] and [29] and by Lord Neuberger at [3] and [32].
*e JJ/above n.57 at [42]. His dissent, like Lord Carswell’s, was premised on rejecting the approach of the majority, favouring as it did a comparison with the detainee’s normal life and an assessment of the measures in question on someone in the position of the particular detainee.
*f In X v Austria (1979) 18 DR 154, 156; the commission expressed the view that to detain someone forcibly, even for a short time for the purpose of taking blood for a test, was a deprivation of his liberty. It was this case - and X and Y v Sweden (1976) 7 DR 123 that prompted Clayton and Tomlinson to conclude that “very short periods of detention are deprivations of liberty where there has been close confinement or arrest by the police”: Human Rights above n.53 para 10.88. While this might be too wide a proposition to distil from those two cases alone, if such a view were correct, it would surely assist those in situations similar to Austin’s?
*g JJ/above n.57 at [57].
*h Gillan above n.46 at [25].
but to submit, for as long as the procedure takes. On the other hand, the
procedure will ordinarily be relatively brief. The person stopped will not be
arrested, handcuffed, confined or removed to any different place. I do not
think, in the absence of special circumstances, such a person should be
regarded as being detained in the sense of confined or kept in custody, but
more properly of being detained in the sense of kept from proceeding or kept
waiting. There is no deprivation of liberty.

It is a matter of conjecture why in *Austin* the House decided to view the facts through the prism of
balance, something without much (any?) support in domestic or Strasbourg case law, rather than to
conduct its analysis within parameters twice framed and chosen by the House over the previous
eighteen months.

Cases on motive and purpose

The premise that circumstance and balance was integral to Article 5 jurisprudence allowed the
House to decide that motive and purpose too should play a role in determining whether a
deprivation of liberty had taken place. First, in normative terms such a conclusion is not a necessary
consequence of that premise, even if we choose to accept it. Second, several cases were cited in
support but on closer inspection the matter is far from clear. In support it is true that in J Baroness
Hale posited that “restrictions designed, at least in part, for the benefit of the person concerned are
less likely to be considered a deprivation of liberty than are restrictions designed for the protection
of society”. In *Austin*, the motives were mixed: alongside protecting those in the cordon from
attack there was also clearly an element of public protection. We should not underestimate that in
her words it was only “less likely”, certainly not determinative. There is little conceptual analysis of
why this should be so. Considering detention as not being a deprivation of liberty if its purpose is to
benefit the detainee is flawed at a deeper and more philosophical level: it smacks of benevolent
authoritarianism which most would consider to be inimical to a system of human rights premised on
individuality, on autonomy and on dignity. It is now well established that Article 5 is too precious to
be restricted by consent: in *de Wilde, Oonoms and Versyp v Belgium* the ECtHR reached that
conclusion (as it also did later in *HL v UK*).

The right to liberty is too important in a ‘democratic society’ within the
meaning of the Convention for a person to lose the benefit of the protection
of the Convention for the single reason that he gives himself up to be taken
into detention. Detention might violate Article 5 even although the person
concerned might have agreed to it. 

Many cases on which the House relied in *Austin* do not offer unmitigated support for the
position eventually taken. In *X v FRG*, it was not a deprivation of liberty to keep two children at a

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66 Above n.52 at [90].
67 Above n.52 at [90].
police HQ for questioning for information rather by arrest. The persuasive character of the case was doubted by Lord Walker in Austin itself. He felt unease about the disingenuous reasoning, given the intimidating nature of a police station for anyone let alone a child. Not only that but it would mean that assisting police with their enquiries did not even raise an issue under Article 5, something surely of concern in the domestic sphere? In Guenat v Switzerland, someone was taken back to the police station for three hours, though never locked up, out of humanitarian concern caused by his strange behaviour. This is obviously different to Austin: there a whole group was detained, and even if for humanitarian reasons, for reasons not related to any one person’s individual behaviour. Nielsen v Denmark can clearly be distinguished: the underlying reason there for the committal to a psychiatric ward was that the mother had requested it. Despite the situation being very close to the paradigm, there was no deprivation of liberty for that reason. Not only in Austin was there no consent – even if implied on behalf of those too scared to leave and seeking sanctuary, it cannot account for Austin herself who asked to leave – it is also questionable today for its reliance, again as Lord Walker intimated, on out-moded ideas of parental rights. It is doubtful that HM is “of value … to illustrate issues of principle”. Although there is some appreciation of the relevance of the applicant’s own interests (in both health and hygiene terms) being served by being placed in a foster home, it is largely a case that “depends entirely on [its] own facts”. It is one matter to state that detaining X in her own best interest (aside from the autonomy aspect) is not a deprivation of liberty and quite another to say that detaining 3,000 people not all of whom needed any protection (some being intent on causing violence themselves) is equally not a deprivation. That is not to gainsay the result in Austin – it is merely to note that the cases on which it rests do not make it out. It is a normative position needing a reasoned justification for the jurisprudential leap being made. The last case, Saadi, was thought by Lord Neuberger to provide that doctrinal support. The Grand Chamber held that short-term detention pending fast-track asylum/immigration assessment was not unlawful under Article 5(1)(f). Lord Walker latched onto one aspect of the judgment that to him made it clear that “the state of mind of the person responsible for the alleged detention can be a relevant factor in deciding whether Article 5 has been infringed.” However, closer reading of the relevant passage shows that this does not go to whether or not Article 5 is engaged at all – the issue in Austin – but to whether the deprivation was lawful, that is whether it was arbitrary, the point we considered above. It is no help in the instant case. In all these cases, the House again seems to have fallen foul of Lord Bingham’s transposition trap.

Of football crowds and motorway pile-ups

The comparisons that the House of Lords drew with football crowds and motorway crashes are difficult ones to counter. There is something unsettling about insisting that the 3,000 caught up at Oxford Street were deprived of their liberty but at the same time denying that status to away fans or
delayed car drivers. The gut feeling one has is that being kept behind after a game - for one’s own and others’ safety - and being held up on a motorway by the police after an accident would not fall into the same category.\textsuperscript{39} Let us though consider the situation from a different perspective, by viewing each of those in the cordon as individuals rather than as an innominate pack. If only one person were held in those same conditions for seven hours, are we really saying that would not be a deprivation of liberty? If we are, then what distinguishes that case from arresting someone at Oxford Circus and then almost immediately releasing them once it has been confirmed by radio that, say, an alibi checks out?\textsuperscript{39} That would very clearly be a deprivation of liberty albeit very temporary and one capable of justification under Article 5(1)(e).\textsuperscript{40} It cannot be the duration that dictates that conclusion - since the cordon was in place for seven hours - so what is it about the cordon that does not give it the flavour of a deprivation? Austin could not move from the spot she was in - or could only do so in a cramped space - and could not hope to break out of the cordon without being arrested - we must assume (or else how else was it maintained?) - for obstruction or to prevent a breach of the peace. In lay terms, she was deprived of her liberty or, as Jim Murdoch put it, she “lost control over [her] liberty”\textsuperscript{41}. If Article 5(1) has as its underlying purpose the protection of citizens from being arbitrarily detained (the word used throughout Article 5(1)(a)-(f)) by the state, what better example of it in action than \textit{Austin}? A group of several thousand all detained – that is not free to go even if they asked to leave (bar a few hundred) – all selected en masse and indiscriminately without any regard for personal factors, such as the threat they each posed, with the only reason for their original and continuing detention being that they happened to be at place \textit{X} at a time when it was decided to impose a police cordon.

CONCLUSION

There is a sound policy reason for rejecting the leap made by the House. One conclusion to be drawn from \textit{Austin} is that much of Article 5(1) will become increasingly redundant. A concentration on the purpose of the deprivation is likely to mean that states need not justify detentions and arrests by reference to Article 5(1)(a)-(f) since they would be defined out by earlier considerations of state of mind.\textsuperscript{42} If the House of Lords line were followed in a case like \textit{Saadi} in future – or countless others – there would be no need to consider Article 5(1)(f) at all if some sort of ill-defined public welfare benevolence is first established. Of course, that is not what actually occurred in \textit{Saadi} at Strasbourg.

\textsuperscript{39} The fact that certainly for football fans less so for motorway drivers there is some sense, as there was not in \textit{Austin}, of that being a known risk of going to an away game or setting out on a trip cannot really make any difference.

\textsuperscript{40} There is no discussion in \textit{Austin} of whether any - or all - those in the cordoned area were ever actually arrested and (if so) whether that were lawful. As is clear from cases such as \textit{R v Inwood[1973]} 1 WLR 647 and \textit{R v Brosch[1988]} Crim LR 743, no specific words are needed for an arrest in fact to take place, provided it is made clear by words or action (\textit{Dawes v DPP[1994]} RTR 209 - fitting of a device trapping suspected car thief in car) that a suspect is no longer free to go. If that were the case at the cordon, then s.28 PACE should have been complied with - that is they should each have been told of the fact and ground of arrest - even if it were obvious (s.28(2) & s.28(4)). If s.28 has not been complied with, any force used would be an unlawful assault or mere physical detention false imprisonment, and this would be aside from any issue about whether or not necessity /breach of the peace could serve as a defence.

\textsuperscript{41} For the engaging of Article 5 by arrest, see as one example \textit{Cumming v Chief Constable of Northumbria[2003]} EWCA 1844 at [43]-[44] Latham LJ. In \textit{Al-Fayed v Commissioner of Police for the Metropolis[2004]} EWCA Civ 1579 at [82] Auld LJ was prepared to accept the relevance of Article 5 to a case where someone was arrested, for the purposes of interviewing them at the police station, and where they had consented to being interviewed in any event: he talked of “...cases such as these, where the subject’s loss of liberty is known to be for a relatively short period for the purpose of an interview to which he was, in any event, prepared to submit, and which may or may not lead to him being charged...”

\textsuperscript{42} Murdoch above n.35 499.

\textsuperscript{43} Similar concerns abound in other areas of rights-analysis, free speech being a key one: is advertising free speech? Is pornography? Is symbolic flag burning? I am grateful to my colleague Daithí Mac Sithigh for this insight.
(nor before the House of Lords domestically) which tends to indicate that domestic law is out of kilter. This is the most worrying aspect of the decision. It would shift the focus of inquiry away from the effect on the individual and onto state motives at too early a stage. The better and more defensible analysis of the situation, one it is submitted that would be adopted by the Strasbourg Court, would be to consider enforced detention in a police cordon for seven hours as a deprivation of liberty and then to assess whether it can be excused or justified by Article 5(1)(a)-(f). With the greatest of respect to Lord Neuberger, the fact that that might not be likely is not a good reason for holding the police’s actions as outwith the protection of the ECHR in the first place: mass round ups ostensibly for “public protection”, even if never having come before the ECtHR before, must have been in the minds of the framers given the history of the inter-war period.

The Court’s decision and approach in Austin also edges us closer to a position of “illegal gathering”, a concept hitherto unknown in English law but all too familiar elsewhere. That is the real worry and the dangerous marker it heralds. The historic position taken in English law is to allow the targeting of individuals either by turning them away or permitting them to be arrested but to confer immunity on the group itself as a separate entity. What we see in Austin is effectively collective guilt by association – and the larger the potentially guilty group (that is the larger the numbers of those threatening or becoming violent), the more defensible it is for the police to exercise indiscriminate control. They do not need to make specific allegations of the likeliness of trouble against any one person provided they can identify a cohort they cannot isolate and deal with separately. It was little wonder that counsel for the claimants submitted there was no case to answer at the original trial: that English law had never recognised a power to arrest or even detain individuals who were neither threatening the peace themselves nor by their unreasonable actions provoking others to violence. The view taken by the courts at all three stages takes us nearer to a power of collective round-up of protesters on suspicion about a handful. As Helen Fenwick commented about the original decision, such a “finding is completely opposed to the spirit of Art 5 (and Arts 10 and 11)”. In that light, it simply beggars belief to see the case – as Tugendhat J did at first instance in his concluding words – as being “about the right to liberty and public order and not about freedom of speech or freedom of assembly.”

* [2002] UKHL 41.
* It also removes any judicial control and oversight that references to the role of competent courts, competent legal authorities and lawful orders within Articles 5(1)(a)-(d) implies.
* Without wishing to develop this any further, the High Court was satisfied that Article 5(1)(e) was made out. We might also argue under Article 5(1)(b), that the obligation prescribed by law is for us all to keep the peace. As we saw above these deprivations must be “lawful” and it is here that discussion about duration and excessive numbers caught would be made.
* At [64].
* Fenwick Civil Liberties above n.1 769
* Austin High Court judgment above n.6 at [608]