

# Deprivation of Liberty: Has the European Court of Human Rights Recognised a ‘Public Safety’ Exception?

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## Keywords

Deprivation of liberty, kettling, civil liberties, public demonstration, public safety, arbitrary detention, European Convention of Human Rights

## Abstract

The European Court of Human Rights held in *Austin & Others v The United Kingdom* that the police confinement of a crowd of protestors for up to seven hours, or ‘kettling’, did not constitute a deprivation of liberty in violation of Article 5 of the European Convention of Human Rights. *Austin* was the first time the Court considered the application of Article 5 to the practice of kettling. The Court’s previous Article 5 jurisprudence demonstrates that when analysing whether an individual has been unlawfully deprived of his or her liberty, the Court will consider the type of measure, its duration, its effects on the individual, and the manner of implementation of the restrictive measure. In *Austin*, the Court introduced a new factor in this analysis – the context in which the measure is imposed. This article examines the Court’s deprivation of liberty jurisprudence, as well as the Article 5 exceptions to the prohibition of deprivation of liberty. Finally, the Court’s finding in *Austin* is analysed to determine whether it now recognises a ‘public safety exception’ to Article 5.

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## I. Introduction

Public protests and demonstrations are not a new phenomenon, but they have enjoyed increasing media attention in the past few years, especially with the worldwide spread of the Occupy Wall Street movement. This increased attention has brought greater awareness – and criticism – of the police tactics used for crowd control. For example, in 1999, Seattle police were criticised after they used pepper spray, tear gas and rubber bullets to disperse crowds of World Trade Organization protestors.<sup>1</sup> More recently, and rather controversially, police have utilised ‘kettling’ to control and disperse large crowds of demonstrators. Kettling is the confinement and cordoning of persons for an extended period of time, usually during a protest or assembly.<sup>2</sup> This practice is controversial because of the potential dangers involved, such as the physical effects of being squeezed tightly for extended periods of time, or other possible injuries, such as being crushed.<sup>3</sup>

From a human rights perspective, kettling is controversial because the practice involves detaining persons against their will in a confined space for long periods of time, possibly in violation of one’s right to freedom from deprivation of liberty. This right is firmly established in international law as a fundamental human right; Article 5(1) of the European Convention on Human Rights (‘Convention’) recognises that everyone has the right to liberty and security of person, and only accepts the deprivation of a person’s liberty in specific circumstances and in accordance with the law. Article 9 of the International Covenant on Civil and Political Rights (‘ICCPR’) provides that everyone has the right to liberty and security of person, and prohibits arbitrary detention. Article 7 of the American Convention on Human Rights also guarantees the right to be free from deprivation of physical liberty. Even the International Court of Justice (‘ICJ’) has recognised this right, stating, ‘to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights’.<sup>4</sup>

The European Court of Human Rights (‘Court’ or ‘ECHR’) will generally find that an Article 5 deprivation of liberty has occurred when there is the confinement of an individual combined with one or more aggravating factors that distinguish simple detention from a deprivation of liberty. The Court makes this determination by examining the facts of each case. If the Court finds a deprivation of liberty did occur, it will then decide whether that deprivation was justified by one of the permitted ‘exceptions’ found in Article 5(1)(a) – (f) of the Convention.<sup>5</sup> Permitted exceptions include detention of an individual after a lawful conviction and detention for the purpose of bringing an individual before a competent judicial authority. Until recently the Court had not analysed whether a deprivation of liberty was permissible when police action was necessary to confine persons in order to prevent serious public disorder.<sup>6</sup> However, in its March 2012 decision in *Austin & Others v The United Kingdom*,<sup>7</sup> the Court found the kettling of persons inside a police cordon for up to seven hours was not a deprivation of liberty. The majority concluded the confinement measure was necessary based on the facts of the case combined with the context in which the measure was imposed; the police had no alternative but to resort to kettling in order

1 N de Mause, ‘Pepper Spray Gets in Their Eyes’ (*FAIR*, March/April 2000) <<http://www.fair.org/index.php?page=1029>> accessed 31 July 2012.

2 Ruthann Robson, ‘ECHR OKs Police “Kettling” of Protestors’ (*IntLawGrrls*, 18 March 2012) <<http://www.intlawgrrls.com/2012/03/echr-oks-police-kettling-of-protesters.html>> accessed 31 July 2012.

3 M Townsend and S Malik, ‘Kettle tactics risk Hillsborough-style tragedy – doctor’ (*The Observer*, 10 December 2010) <<http://www.guardian.co.uk/uk/2010/dec/19/police-kettle-risk-crush-hillsborough>> accessed 31 July 2012.

4 *Case Concerning United States Diplomatic and Consular Staff in Tehran (USA v Iran)* (Judgment) [1980] ICJ Rep 42.

5 The European Convention on Human Rights, art 5(1)(a)-(f), provides for the following permissible cases of deprivation of liberty:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

6 *Austin & Others v The United Kingdom* (GC) App nos 39692/09, 40713/09 & 41008/09 (ECHR, 15 March 2012) 42. ‘[T]he Strasbourg Court had never been called upon to consider Article 5 in the context of crowd control and asked whether the *purpose* for which an individual is detained can affect whether or not there has been a deprivation of liberty.’ See also R Brander and A Pickup, ‘Arrest and Detention’ in M Colvin and J Cooper (eds), *Human Rights in the Investigation and Prosecution of Crime* (OUP 2009) 160.

7 *ibid.*

to control the crowd and maintain public order.

This was surprising given the Court's reasoning in previous cases such as *Gillan & Quinton v The United Kingdom*,<sup>8</sup> where it held that the stop and search of persons for up to 30 minutes under a UK anti-terrorism act was a deprivation of liberty. There, the applicants were required to remain where they were, and any refusal to do so would have resulted in arrest and criminal charges; it was this element of coercion that indicated an Article 5 deprivation of liberty.<sup>9</sup> Although the degree of coercion was much higher than in *Gillan & Quinton* - being detained for nearly seven hours compared to only thirty minutes<sup>10</sup> - the context in which the confinement measure was imposed is significant, and found no deprivation of liberty.<sup>11</sup> This appears to be a departure from the Court's long-established interpretation of Article 5; namely, that a deprivation of liberty is only permissible in certain situations set out in Article 5(1)(a) – (f), none of which permit the lawful detention of a person for the purpose of maintaining public order. Thus, in light of the *Austin* decision, the question arises whether the Court now recognises a new 'public safety exception' to the Article 5 prohibition of deprivation of liberty.

Section II of this article presents the facts in *Austin*, discusses its treatment by the United Kingdom courts and introduces the parties' arguments before the ECHR. Section III outlines the ECHR deprivation of liberty jurisprudence and establishes the process the Court uses to distinguish between restrictions upon movement and deprivations of liberty. Section IV discusses the principle of 'arbitrariness' and whether the confinement measure in *Austin* fits into one of the exceptions found in the Convention. Section V examines the Court's reasoning in the *Austin* judgment. Finally, section VI compares *Austin* to the Court's previous case law and demonstrates why the Court came to the wrong conclusion.

## II. *Austin & Others v The United Kingdom*

### A. *The Facts*

*Austin & Others v The United Kingdom* was the first case to address the question of whether the police practice of kettling violates Article 5.<sup>12</sup> Kettling is a police crowd control technique that appeared in the late 1990s, with the first use at a major public protest occurring in May 2001.<sup>13</sup> When kettling is used, the police create an absolute cordon in a specific area where individuals are surrounded and contained, completely prohibited from leaving the area for some duration.<sup>14</sup> The use of kettling shows no signs of stopping; three 2010 student tuition demonstrations saw the kettling of individuals in freezing weather,<sup>15</sup> and in 2009, police kettled thousands of protestors at the London G20 summit, and three 2010 student tuition demonstrations in the United Kingdom saw the kettling of individuals in freezing weather.<sup>16</sup>

When utilising kettling or other containment measures, the police typically do not distinguish between participants and non-participants, which means non-protestors, such as passers-by, may unwillingly get caught inside the kettle along with the protestors.<sup>17</sup> This was the case in *Austin*; all four applicants were held inside a kettle during a 2001 May Day demonstration in Oxford Circus.<sup>18</sup> Only one of the applicants actually attended the demonstration with the intent of protesting; the other three either worked in the area and were caught in the cordon on their lunch break, or were attempting to pass through the area to access a bookshop.<sup>19</sup>

The police erected the cordon in Oxford Circus around two in the afternoon for the purpose of containing the crowd, although an announcement from the police that the crowd was purposely being contained was not made until four in the afternoon.<sup>20</sup> The conditions immediately after the cordon was initiated allowed sufficient space for people to walk around

8 *Gillan & Quinton v The United Kingdom* App no 4158/05 (ECHR, 12 January 2010).

9 *ibid.*

10 *ibid.*

11 *Austin* (n 6) 65.

12 *Austin* (n 6) 52.

13 P Lewis, 'A History of Police Kettling' (The Guardian, 14 April 2011) <<http://www.guardian.co.uk/uk/2011/apr/14/history-police-kettling>> accessed 4 December 2012.

14 'OSCE/ODIHR – Venice Commission Guidelines on Freedom of Peaceful Assembly' (4 June 2010) 160 <[http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)020-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)020-e.pdf)> accessed 4 December 2012.

15 Lewis (n 13).

16 *ibid.*

17 OSCE/ODIHR Guidelines (n 14) 160.

18 Brander (n 6) 159; *Austin* (n 6) 10.

19 *Austin* (n 6) 10-14.

20 *ibid.* 22.

and there was no crushing, but as the afternoon progressed, the conditions grew uncomfortable.<sup>21</sup> The weather was cold and wet, and there was no access to food or water, toilet facilities, or even shelter.<sup>22</sup> Five full minutes after the cordon was put into place, the police attempted to begin a controlled release of the crowd; however, the crowd began to turn violent, and this attempt was suspended.<sup>23</sup> Three subsequent releases were planned or attempted, but halted due to crowd behaviour.<sup>24</sup> Finally, at eight o'clock that evening, collective release of the crowd recommenced, with all of the applicants released by approximately nine-thirty that night.<sup>25</sup>

The applicants commenced domestic proceedings in the High Court, seeking damages for false imprisonment and breach of the right to liberty under Article 5.<sup>26</sup> The High Court judge concluded that regarding the false imprisonment claim, police action was necessary and that the defence of necessity could be asserted.<sup>27</sup> In analysing the Article 5 claim, Judge Tugendhat found there *was* a deprivation of liberty. He reasoned however, that although the police never intended to bring everyone contained at Oxford Circus before a competent judicial authority, the police purpose was to contain the crowd in order to arrest and bring before a judge both persons the police reasonably believed had committed an offense and persons whose arrest was necessary for preventing the commission of an offense.<sup>28</sup> The judge found these purposes fit into the exceptions under Article 5(1)(c) and dismissed the applicants' claims.<sup>29</sup> He did, however, grant the applicants leave to appeal.

The Court of Appeal, however, found the detention was *not* a deprivation of liberty.<sup>30</sup> It likened the applicants' situation to a crowd at a football game<sup>31</sup> or a clogged motorway,<sup>32</sup> both situations that may call for police confinement of individuals to a specified area for a longer time than originally intended.<sup>33</sup> The Court of Appeal found: the police had no choice but to impose the cordon at Oxford Circus; the police intended a controlled release in order to avoid violence; and the public safety and crime prevention purposes meant the kettle could not be labelled an arbitrary deprivation of liberty.<sup>34</sup> Furthermore, the continued detention was lawful because the police attempted to release the crowd three times, but had to abandon release as there was considerable violence inside the kettle, as well as a large number of protestors in the area outside who posed a threat to both the police and the individuals inside the cordon.<sup>35</sup> The applicants were again granted leave to appeal.

The House of Lords agreed with the Court of Appeal that there had not been a deprivation of liberty. The House of Lords stated that the facts of each case determine whether there has been a deprivation of liberty. Like the Court of Appeal, Lord Hope also referenced football matches and crowded highways as examples of situations where measures of crowd control might be required to protect the public interest.<sup>36</sup> Lord Hope reasoned that the purpose of the measure in question was relevant for balancing what the restriction sought to achieve against the individual's interests.<sup>37</sup> He further reasoned that although Article 5 did not permit public safety interests as an exception to the prohibition of deprivation of liberty, Article 2 indicated otherwise, as people's lives could be put at risk by mob violence in the absence of police crowd control measures.<sup>38</sup> In his view, when fundamental rights compete against one another, a balance must be struck, so long as the steps are taken in good faith and proportionate to the circumstances prompting the restrictive measures.<sup>39</sup>

Lord Neuberger went further, opining that '[a]ny sensible person living in a modern democracy would reasonably expect to

21 *ibid* 21.

22 *ibid*.

23 *ibid* 23.

24 *ibid* 23-24.

25 *Austin* (n 6) 11-14, 24.

26 *ibid* 15.

27 *ibid* 30.

28 *ibid* 31.

29 *ibid*.

30 *ibid* 35.

31 *ibid*. 'It is commonplace for such a crowd to be contained for what may turn out to be quite long periods, partly for the protection of individuals in the crowd and partly (in some cases) to avoid crowd violence'.

32 *ibid*. 'Other examples would be...for example where motorists are unable to leave a motorway, perhaps for many hours, because of police action following an accident.'

33 *ibid*.

34 *ibid*.

35 *ibid*.

36 *ibid* 37.

37 *ibid*.

38 *ibid*.

39 *ibid*. Crowd control measures '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.'

be confined, or at least accept that it was proper that she could be confined, within a limited space by the police, in some circumstances.<sup>40</sup> In his view, there might be situations, including demonstrations, when the police are expected to ensure that members of the public be confined for their own protection and for the prevention of violence to persons or property.<sup>41</sup> So long as the police action is proportionate and reasonable, limited to a reasonable minimum time of confinement and necessary for the relevant purpose, Article 5 would not be triggered.<sup>42</sup> Lord Neuberger did note that the nearly seven hour confinement in *Austin* was concerning, but was not enough to convert a lawful situation into one which violated Article 5.<sup>43</sup> Lord Walker agreed with Lords Hope and Neuberger, but noted the purpose of the measure imposed was relevant only in the consideration of whether that measure might be justified under Article 5(1)(a) – (f).<sup>44</sup>

The applicants filed a complaint with the ECHR, and *Austin* was allocated to the Fourth Section of the Court before jurisdiction was relinquished to the Grand Chamber.<sup>45</sup> Article 30 permits a Chamber to relinquish jurisdiction to the Grand Chamber in cases which raise a serious legal question that could affect interpretation of the Convention, or if the resolution of an issue might depart from a previous Court judgment.<sup>46</sup> Relinquishment is rare, as it generally occurs less than twelve times per year.<sup>47</sup>

### B. *The Parties' Arguments*

The United Kingdom Government ('the government') submitted that the question of whether there had been a deprivation of liberty should be analysed based on the specific facts of the case.<sup>48</sup> Factors to be considered when finding a deprivation of liberty include the length of time of the confinement (though a significant duration by itself is not sufficient to find a deprivation of liberty), and, contrary to the applicants' argument, the purpose of the measure imposed.<sup>49</sup> The government argued there was no deprivation of the applicants' liberty, but if there had been, the deprivation of liberty was justified by the exception found in Article 5(1)(b), as its purpose was to assist a constable in dealing with a breach of the peace.<sup>50</sup> The government further argued that in the alternative, the deprivation was justified by the exception found in Article 5(1)(c), as confinement of the applicants was necessary in order to prevent the perceived breach of the peace.<sup>51</sup>

The applicants argued a deprivation of liberty is established by examining whether the individual was confined to a limited place for a significant amount of time and whether that individual consented to the confinement.<sup>52</sup> According to the applicants, 'the greater the extent of the confinement and the greater the degree of coercion by the authorities, the shorter the duration required before a deprivation of liberty would be found.'<sup>53</sup> The applicants submitted a measure's purpose is irrelevant in determining whether there was a deprivation of liberty; purpose is only relevant in concluding the deprivation of liberty is justified by one of the exceptions found in Article 5(1)(a) – (f).<sup>54</sup> These exceptions are narrowly interpreted and do not permit measures to be imposed for a public interest purpose.<sup>55</sup> Furthermore, the applicants argued the government's reasoning was flawed and that the Court could not balance competing public interest considerations so as to limit the

40 *ibid.*

41 *ibid.*

42 *ibid.*

43 *ibid.*

44 *ibid.* 37.

45 *ibid.* 4.

46 See L Zwaak, 'The Procedure Before the European Court of Human Rights' in P van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006) 108. Judgments of a Chamber may be referred to the Grand Chamber; judgments by the Grand Chamber are final. A party may object to relinquishment in order to preserve its right of rehearing by the Grand Chamber if they are not satisfied with the Chamber's judgment. See R Lawson, 'The European Convention on Human Rights' in C Krause and M Scheinin (eds), *International Protection of Human Rights: A Textbook* (Abo Akademi University 2009) 421.

47 Lawson (n 46) 421. In 2012, the Grand Chamber delivered judgments in 12 relinquishment cases and 14 judgments in rehearing cases. See European Court of Human Rights, Annual Report 2012, 59. By contrast, in 2011, the Grand Chamber only delivered judgments in six relinquishment cases, compared with 13 judgments on the merits, and seven in rehearing cases. See European Court of Human Rights, Annual Report 2011, 65. This was more on par with 2010, when the Grand Chamber delivered judgments in five relinquishment cases, 18 judgments on the merits, and 13 rehearing cases. See European Court of Human Rights, Annual Report 2010, 65.

48 *Austin* (n 6) 41.

49 *ibid.*

50 *ibid.* 44.

51 *ibid.*

52 *Austin* (n 6) 45.

53 *ibid.*

54 *ibid.* 46.

55 *ibid.*

Convention protections.<sup>56</sup> Based on the facts, the applicants argued that the deprivation of liberty did not occur the moment the cordon was imposed but rather, that the length and nature of their confinement, its coercive enforcement by the police, and the effect of the confinement upon them elevated the restriction of their movement to a deprivation of liberty.<sup>57</sup> Finally, the applicants argued the deprivation of liberty was not justified by any of the exceptions found in Article 5(1)(a) – (f).<sup>58</sup>

The disagreement among the parties (and within the House of Lords) revolved around the question of whether the purpose of the measure imposed should be considered as a factor in the Court's determination of whether there has been a deprivation of liberty. The Court's jurisprudence regarding restriction upon movement and deprivation of liberty is discussed in the following section.

### III. Deprivation of Liberty versus Restriction Upon Movement

#### A. *Deprivation or Mere Restriction?*

Because the detention of an individual is a major interference with personal liberty, it will always be subject to close scrutiny.<sup>59</sup> Although a deprivation of liberty can occur in different ways other than detention in a cell,<sup>60</sup> Article 5 of the Convention is concerned with a person's physical liberty to move from place to place.<sup>61</sup> More specifically, Article 5 protects exclusively against the *deprivation* of liberty, and not other restrictions of a person's physical liberty.<sup>62</sup> Thus, the Court distinguishes between the restriction of movement, which is protected by Article 2 of Protocol 4 to the Convention, and the deprivation of liberty found in Article 5.<sup>63</sup> This distinction between deprivation of liberty and other restrictions is not readily apparent; it is based on degree or intensity, as opposed to nature or substance.<sup>64</sup> When making this distinction, a wide range of factors should be considered, including the type and duration of the deprivation of liberty, and the effects and manner of implementation of the measure being scrutinised.<sup>65</sup>

One of the leading ECHR cases demonstrating the difference between deprivation of liberty and restriction upon movement – *Engel & Others v The Netherlands*<sup>66</sup> – is cited by the *Austin* Court as establishing the proper test to be used in a deprivation of liberty analysis. In *Engel*, the Court distinguished between 'light arrest' and 'aggravated arrest', which it found did not violate Article 5, and 'strict arrest', which did.<sup>67</sup> The applicants were all soldiers serving in the Dutch armed forces and were all, at some point or another, disciplined for various military offenses.<sup>68</sup> Soldiers punished with light arrest had to remain in their dwellings during off-duty hours (inclusive of both on- and off-barracks residents).<sup>69</sup> The next level of punishment, aggravated arrest, meant the soldier had to remain in a specific, but unlocked, location.<sup>70</sup> Strict arrest, which fell short of committal to a disciplinary unit, covered both on- and off-duty hours; officers remained at home, while non-commissioned officers were locked in a cell.<sup>71</sup> The Court found there was no deprivation of liberty when light arrest or aggravated arrest was imposed.<sup>72</sup> Strict arrest, however, was different because non-commissioned officers and ordinary servicemen were locked in a cell for 24 hours a day.<sup>73</sup> Servicemen subjected to light arrest could still receive visitors, use the telephone and move freely about the barracks outside duty hours (though servicemen subjected to aggravated arrest could also receive visitors but could not move freely about the barracks). However, servicemen under strict arrest were entirely excluded from the performance of

56 *ibid* 47.

57 *ibid*.

58 *ibid* 49.

59 *Engel & Others v The Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72, & 5370/72 (ECHR, 8 June 1976) 45.

60 *Guzzardi v Italy* App no 7367/76 (ECHR, 6 November 1980) 95. 'Deprivation of liberty may, however, take numerous other forms.'

61 N Allen, 'Restricting Movement or Depriving Liberty?' (2009) Spring 2009 J Mental Health L 19, 28. 'The right to liberty refers to the individual liberty in its classic sense, the physical liberty of the person.' E Bleichrodt, 'Right to Liberty and Security of Person (Article 5)' in P van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006) 458.

62 Bleichrodt (n 61) 458.

63 Brander (n 6) 158; see Lawson (n 46) 400.

64 Bleichrodt (n 61) 457; see also Brander (n 6) 158. 'The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance.' *Gillan & Quinton* (n 8) 56.

65 Brander (n 6) 158.

66 *Engel* (n 59).

67 Bleichrodt (n 61) 458.

68 *Engel* (n 59) 12.

69 *ibid* 18.

70 *ibid* 19.

71 *ibid* 20.

72 *ibid* 61.

73 *ibid* 62.

their normal duties.<sup>74</sup> Thus, the applicants who were subjected to strict arrest were deprived of their liberty under Article 5.

In *Guzzardi v Italy*, also referenced in *Austin*, the Court built upon the distinctions from *Engel* and looked at the totality of the circumstances to find Mr Guzzardi's confinement to the island of Asinara was, in fact, a deprivation of his liberty.<sup>75</sup> Mr Guzzardi was placed under 'special supervision' on the island after he was classified as a dangerous individual.<sup>76</sup> The Court noted that although the area Mr Guzzardi could move around in was much larger than a cell and not contained by a physical barrier, it was limited to a tiny fraction of an island that was difficult to access,<sup>77</sup> and he could not visit the area where the island's population resided.<sup>78</sup> Moreover, Mr Guzzardi was housed in a dilapidated building, lacked the opportunity for social contacts, could not leave his dwelling after ten o'clock at night, or before seven o'clock in the morning, and was required to report to the authorities twice per day.<sup>79</sup> The Court, in finding a violation of Article 5, reasoned that a deprivation of liberty would not stand on one single factor; rather, it was the combination of all the factors in the case that gave rise to the violation.<sup>80</sup>

The Court still follows this approach over thirty years later. In *Austin*, it recalled the difference between restriction of movement and deprivation of liberty is one of 'degree or intensity, and not one of nature or substance',<sup>81</sup> and set this analysis as the starting point for a determination of whether there has been a deprivation of liberty. Thus, when determining whether an applicant has been deprived of his or her liberty, the Court is not as concerned with the nature of the location of detention.<sup>82</sup> Rather, various criteria will be considered, including the degree of coercion used, the area of confinement and the level of police coercion used to enact the confinement.<sup>83</sup> Additionally, the Court will consider the frequency and intrusiveness of the supervision during the confinement, and the extent to which contact with the outside world is permitted.<sup>84</sup> Generally, the smaller the area of confinement, the greater the likelihood that there was a deprivation of liberty.<sup>85</sup>

#### 1. Confinement Plus One or More Aggravating Factors

*Guzzardi* illustrates the trickiness involved in crossing the threshold from restriction upon movement to deprivation of liberty.<sup>86</sup> When reviewing other Article 5 cases, it becomes clear the Court requires two elements to make that distinction: the confinement of an individual to a particular place for more than a negligible period of time, and 'something more', an additional aggravating factor or factors distinguishing simple detention from a deprivation of liberty.<sup>87</sup> In his dissent in *Guzzardi*, Judge Matscher implied this 'something more' is "the general context of the case" . . . that [reached] the level and intensity that would cause it necessarily to be classified as a deprivation of liberty'.<sup>88</sup> An example of this is found in *Gillan & Quinton*, where the Court noted that when analysing whether there has been a deprivation of liberty, as opposed to a restriction thereof, the starting point is the applicant's concrete situation. Then a whole range of criteria must be considered such as the type and duration of confinement, and the effects of that confinement.<sup>89</sup> In that case, the two applicants were stopped and searched by London police officers for articles which could be used in connection with terrorism in the vicinity of an arms fair under section 44 of the UK Terrorism Act 2000.<sup>90</sup> The first applicant was searched and detained for approximately 20 minutes.<sup>91</sup> The second applicant was stopped and searched for five minutes, but stated it felt like thirty minutes.<sup>92</sup> In its analysis of whether the confinement violated Article 5, the Court recalled that the difference

74 *ibid* 18-21.

75 *Guzzardi* (n 60) 95.

76 *ibid* 12.

77 *ibid* 95.

78 *ibid* 95.

79 *ibid* 95.

80 *Guzzardi* (n 60) 95. In his dissent, Judge Zekia noted the ECHR has to 'find whether the restrictions in question had the cumulative effect of depriving the person subject thereto of his liberty.' *Guzzardi v Italy* (Dissenting Opinion of Judge Zekia) App no 7367/76 (ECHR, 6 November 1980).

81 See *Austin* (n 6) 57.

82 Interights, *Interights Manual for Lawyers – Right to Liberty and Security Under the ECHR* (Article 5) (Interights 2007) 5.

83 *ibid* 3.

84 *ibid*.

85 *ibid*.

86 The *Guzzardi* judges voted 11-7 for finding of a deprivation of liberty.

87 Allen (n 61) 28.

88 *Guzzardi v Italy*, (Partly Dissenting Opinion of Judge Matscher) App no 7367/76 (ECHR, 6 November 1980) 3.

89 *Gillan & Quinton* (n 8) 56.

90 *ibid* 8.

91 *ibid*.

92 *ibid* 9.

between deprivation of and restriction upon liberty is one of degree or intensity, and not one of nature or substance.<sup>93</sup> The applicants were both detained for a time period of less than 30 minutes, during which they were entirely denied the freedom of movement. They were required to remain where they were and submit to the search, or risk arrest and detention at a police station, and possible criminal charges.<sup>94</sup> An analysis of the facts using the two elements defined above yields the clear result that there was a deprivation of liberty; the applicants were confined to the spot where the police stopped them (the confinement), and the threat of criminal charges should they refuse to remain and submit to the search was the coercion that tipped the scales toward a deprivation of liberty (an aggravating factor).<sup>95</sup> The Court found it was this level of coercion that crossed the threshold to a deprivation of liberty.<sup>96</sup>

## 2. Consent to Deprivation

In some cases, the Court has considered detention without one's valid consent as the aggravating factor that crosses the threshold to a deprivation of liberty, such as in cases where the applicant was placed in a mental health hospital against his or her will. In *Storck v Germany*,<sup>97</sup> the Court found there was an Article 5 deprivation of liberty when Ms Storck was held against her will in a psychiatric institution.<sup>98</sup> Her father placed her in the institution without her consent; while at the institution, she was placed in a locked ward and was unable to contact others.<sup>99</sup> The Court noted Ms Storck was under the constant supervision and control of the clinic personnel, and she was not free to leave the clinic for the duration of her 20-month stay.<sup>100</sup> Furthermore, she was brought back by the police after escaping and was unable to maintain regular social contact with the outside world.<sup>101</sup> In determining that she was objectively deprived of her liberty, the Court reasoned that an Article 5(1) deprivation of liberty is not limited to a person's confinement to a certain restricted place for more than a negligible length of time. A person is deprived of his or her liberty if, in addition to that objective element, an additional subjective element is present; namely, that he or she has not validly consented to the confinement.<sup>102</sup> The Court drove this point home by noting that the right to liberty is so important that submitting oneself to detention does not void the protection against deprivation of liberty.<sup>103</sup> Although Ms Storck went to the clinic with her father and had the capacity to consent to admission to the hospital, she did not do so and therefore, was deprived of her liberty.<sup>104</sup>

Three years after *Storck*, the Court recognised the lack of valid consent to detention as an additional subjective element in the determination of whether an individual has been deprived of his or her liberty.<sup>105</sup> In *Shtukaturov v Russia*,<sup>106</sup> the applicant, who suffered from a mental disorder, was declared legally incapable, and his mother was appointed his guardian and authorised to act on his behalf in all matters.<sup>107</sup> His mother then placed him in a mental hospital against his will; he was prevented from meeting with his lawyer or his friends, was prohibited from having any contact with the outside world, and was not allowed to write letters or use the telephone.<sup>108</sup> The denial of access to the applicant's lawyer continued even after the ECHR informed the Government of Russia of interim measures directing the organisation of a meeting between the applicant and his lawyer.<sup>109</sup> The applicant claimed he had been deprived of his Article 5 right to liberty as he never consented to his detention in the hospital;<sup>110</sup> the Government of Russia argued his placement in the hospital was lawful and at the request of his official guardian.<sup>111</sup> The Court found that although the applicant lacked the legal capacity to consent to the

93 *ibid* 56. [Article 5] is concerned with the *deprivation* of liberty and not with mere *restrictions* on freedom of movement. This distinction is not always easy to identify, since the difference is "merely one of degree or intensity, and not one of nature or substance." B Emmerson and others, *Human Rights and Criminal Justice* (Sweet & Maxwell 2007) 238.

94 *Gillan & Quinton* (n 8) 57.

95 *ibid*.

96 *ibid*. However, the Court did not answer the question of whether there was a violation of Article 5 of the Convention because it found there was a violation of Article 8, which prohibits the deprivation of the right to respect for private life.

97 *Storck v Germany* App no 61603/00 (ECHR, 16 June 2005).

98 *ibid* 78.

99 *ibid* 14-15, 69.

100 *ibid* 73.

101 *ibid*.

102 *ibid* 74.

103 *ibid* 75.

104 *ibid*.

105 *Shtukaturov v Russia* App no 44009/05 (ECHR, 27 June 2008) 106.

106 *ibid*.

107 *ibid* 16-18.

108 *ibid* 21-25.

109 *ibid* 33.

110 *ibid* 101.

111 *ibid* 98.

confinement, it did not mean he was unable to understand the situation.<sup>112</sup> In the Court's view, the subjective element – the applicant's perception that he was being deprived of his liberty – was met. The Court rejected the Government of Russia's argument that the applicant agreed to his continued stay in the hospital and found the applicant had been deprived of his liberty.<sup>113</sup>

Applying these elements to the facts in *Austin*, it seems the Court would find a deprivation of liberty had occurred. Meeting the first element, the *Austin* applicants were confined, without valid consent, to a particular place for more than a negligible period of time; they were confined to an area in Oxford Circus for six to seven hours in a crowd of roughly 2,000 people in cold and wet weather with no shelter and without access to food, water or shelter. They could not leave the kettle for fear of risking arrest or imprisonment. Thus, the duration and conditions of the *Austin* applicants' detention far exceeded that of the applicants in *Gillan & Quinton*, leading to the logical conclusion that the Court would find a deprivation of liberty.

Once the Court has examined the facts and found there has been a deprivation of liberty – which generally consists of confinement without valid consent, plus one or more aggravating factors – the next step is to determine whether that deprivation of liberty is justified under one of the exceptions found in Article 5, which is discussed in the next section.

#### IV. The Deprivation of Liberty Must Not be 'Arbitrary'

##### A. Arbitrariness

Article 5's protection applies to the *arbitrary* deprivation of liberty,<sup>114</sup> so there are instances when the deprivation of liberty may be permissible, such as those listed in Article 5(1)(a) through 5(1)(f) of the Convention, including the confinement of suspected and convicted criminals, illegal immigrants and persons of unsound mind.<sup>115</sup> The Court has noted that the list in the Convention is exhaustive.<sup>116</sup> Thus, the Court cannot create a new exception.<sup>117</sup> Likewise, the ICCPR protects against arbitrary deprivation of liberty; Article 9(1) prohibits the arbitrary deprivation of liberty and requires that the grounds and procedures used to deprive a person of his or her liberty must have a legal basis.<sup>118</sup> The Human Rights Committee ('Committee') has also noted that the detention must not be arbitrary and that the reasons for, and procedures relating to the detention, must be established by law.<sup>119</sup>

When analysing whether the deprivation of liberty is arbitrary, the important question to be answered is whether the disputed detention was lawful; meaning, the detention must comport with a procedure prescribed by law.<sup>120</sup> This is because lawfulness implies the absence of any arbitrariness.<sup>121</sup> The Court has observed that whether the deprivation of liberty is carried out according to national law is inconsequential; rather, it must be necessary under the circumstances.<sup>122</sup> Finally, due to its serious character, the detention of an individual is only justified when other less severe measures have been considered, but rejected, due to their lack of protection for the individual or public interest.<sup>123</sup>

Although the Court has not recognised a universal definition regarding specific conduct on the part of the authorities that

112 *ibid* 107.

113 *ibid* 109.

114 '[T]he essence of the right to liberty is to safeguard individuals from *arbitrary* detention by requiring liberty deprivations to be made in accordance with a procedure prescribed by law.' Allen (n 61) 20. 'Protection from arbitrary arrest and detention is a foundational principle of . . . the European Convention on Human Rights.' Brander (n 6) 157. 'Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty'. *A & Others v The United Kingdom* (GC) App no 3455/05 (ECHR, 19 February 2009) 162. The right to liberty in Article 5 'is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion.' *Guzzardi* (n 60) 92.

115 Allen (n 61) 20. Similarly, Article 9(1) of the ICCPR 'is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.' Human Rights Committee, General Comment 8, 30 June 1982 [1].

116 *Engel* (n 59) 58; see also *A & Others* (n 114) 163. This list is exhaustive and must be interpreted narrowly. Bleichrodt (n 61) 463.

117 *Austin* (n 6) 53.

118 R Hanski and M Scheinin, *Leading Cases of the Human Rights Committee* (Institute for Human Rights 2007) 122.

119 General Comment 8 (n 115) para 4.

120 *Bozano v France* App no 9990/82 (ECHR, 18 December 1986) 54. The ECHR went on to note, 'any measure depriving the individual of his liberty must be compatible with the purpose of Article 5...namely to protect the individual from arbitrariness'. See also Bleichrodt (n 61) 463.

121 *ibid* 59. The Court has noted that, 'a necessary element of the "lawfulness" of the detention within the meaning of Article 5 § 1 (e) is the absence of arbitrariness.' *Witold Litwa v Poland* App no 26629/95 (ECHR, 4 April 2000) 78. The requirement that the measure not be arbitrary 'can be regarded as the guiding principle for the interpretation of Article 5.' Bleichrodt (n 61) 465.

122 *Witold Litwa* (n 122) 78.

123 *ibid*. '[I]t must also be examined whether less severe measures than the deprivation of liberty could have sufficed.' Bleichrodt (n 61) 465.

would constitute arbitrariness, criteria have emerged from its case law.<sup>124</sup> One such standard is that detention is arbitrary when there has been bad faith or deception by the authorities.<sup>125</sup> Regarding the permissible deprivations listed in Article 5(1) of the ECHR, the Court has noted that both the detention order and its execution must conform to the intent of the restrictions found in the article.<sup>126</sup> Additionally, there must be some connection between the grounds of the permitted deprivation and the conditions of the detention.<sup>127</sup> Finally, there must be an assessment of whether the detention was necessary to achieve the purpose of the measure; that is, whether the detention of an individual is so serious that it should only be resorted to after other less severe measures have been rejected.<sup>128</sup> Therefore, in Article 5 cases, the Court will first determine whether there has been a deprivation of liberty and then analyse whether the situation fits into a category listed in Article 5(1).<sup>129</sup>

The ECHR examined the question of whether the deprivation of liberty was arbitrary in *Saadi v The United Kingdom*; there, Mr Saadi was held for seven days in a detention centre designed specifically to hold asylum applicants.<sup>130</sup> The Grand Chamber believed it was clear that Mr Saadi was deprived of his liberty during the time he was held at the detention centre based on the degree of his confinement.<sup>131</sup> Once a deprivation of liberty has been established, the Court must then determine whether that deprivation was ‘lawful’. The Court ultimately held there was no violation of Article 5 because the deprivation of Mr Saadi’s liberty was not arbitrary; the authorities acted in good faith by detaining him.<sup>132</sup> Furthermore, the detention centre where he was held was specifically designated for asylum seekers, and it had facilities for recreation and religious observance, and provided medical care and legal assistance.<sup>133</sup> Thus, holding Mr Saadi for seven days for the purpose of processing his asylum claim did not violate Article 5(1)(f) of the Convention.<sup>134</sup>

Similarly, the Committee has noted that arbitrariness must be interpreted broadly.<sup>135</sup> This means that continued detention must be necessary under all the circumstances, such as to prevent flight, the interference with evidence or further commission of crime.<sup>136</sup> In *Aage Spakmo v Norway*, the Committee found Mr Spakmo’s detention for eight hours constituted a deprivation of liberty under Article 9 of the ICCPR.<sup>137</sup> Mr Spakmo, the applicant, was commissioned to carry out repairs on an apartment building, but was arrested after he continued the work despite an injunction to halt the repairs.<sup>138</sup> The Committee noted that although the arrest itself was reasonable and necessary, Norway failed to show why, in order to prevent Mr Spakmo from carrying out the work, it was necessary to detain him for eight hours.<sup>139</sup> The Committee reiterated that lawful arrests under Article 9(1) must be reasonable and necessary in their entirety.<sup>140</sup> In *Spakmo*, because of the unreasonable length of detention after the reasonable arrest, there was a violation of Article 9(1) of the ICCPR.<sup>141</sup>

### B. *The Detention Must be for the Purpose of Bringing the Detainee Before a Legal Authority*

One of the government’s arguments in *Austin* was that the purpose for imposing the kettle was justified by Article 5 to prevent a breach of the peace.<sup>142</sup> The ECHR has noted Article 5(1)(c) is clear in its requirement that individuals who are detained for the purpose of preventing the commission of a criminal offense may only be detained for the purpose of being brought before a competent legal authority.<sup>143</sup> In the *Lawless* case, the Court determined Mr Lawless’s detention was not

124 *Saadi v The United Kingdom* (GC) App no 13229/03 (ECHR, 29 January 2008) 68.

125 *ibid* 69. The Court’s position regarding Article 5(1)(a) and (f) is ‘in the absence of bad faith or improper purpose, the national authorities have greater scope to determine the need for, and length of, detention.’ Brander (n 6) 167.

126 *Saadi* (n 124) 69.

127 *ibid*.

128 *ibid*; see Brander (n 6) 167.

129 *Guzzardi* (n 60) 96. ‘It is well established in the Court’s case-law under the sub-paragraphs of Article 5 §1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f), be “lawful”.’ *Saadi* (n 124) 67.

130 *Saadi* (n 124) 12-15.

131 *ibid* 42.

132 *ibid* 77.

133 *ibid* 78.

134 *ibid* 80.

135 *Womah Mukong v Cameroon*, UN Doc CCPR/C/51/D/458/1991 (HR Comm, 26 February 1991) 9.8.

136 *ibid*.

137 *Aage Spakmo v Norway*, UN Doc CCPR/C/67/D/631/1995 (HR Comm, 11 November 1999) 6.3.

138 *ibid* 2.1.

139 *ibid* 6.3. However, it is of note that six members of the Committee dissented, opining the eight-hour detention was neither unreasonable nor a violation of Article 9.

140 *ibid* 6.3.

141 *ibid* 7.

142 *Austin* (n 6) 44.

143 *Lawless v Ireland*, App no 332/57 (ECHR, 1 July 1961) 14.

justified under Article 5. Mr Lawless was arrested for being a suspected member of the IRA, an ‘unlawful organisation’.<sup>144</sup> Mr Lawless was told he would be released if he promised in writing to ‘respect the laws of Ireland’ and not become a member of any unlawful organisation. He was detained for a total of six months after his arrest.<sup>145</sup> The Court had to assess whether his detention complied with the Convention.<sup>146</sup> First, it noted that Article 5(1)(c) permits a deprivation of liberty only when its purpose is to bring the detained person before a competent judicial authority, to restrain him or her from committing an offense or from absconding after having actually committed an offense.<sup>147</sup> In finding the deprivation of liberty was arbitrary, the Court reiterated Article 5 is intended to protect individuals from arbitrary detention.<sup>148</sup> Thus, without the safeguards of Article 5, ‘anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention’.<sup>149</sup>

### C. *No Exception for Threat of Terrorism*

The Court has said Article 5 does not permit a balancing of interests between the individual’s right to liberty and the State’s interest in protecting the population from the threat of terrorism – the individual’s right to liberty prevails.<sup>150</sup> In finding there was a violation of Article 5 in *A & Others v The United Kingdom*, the ECHR reiterated that if a situation of detention is not justified by one of the Article 5(1)(a) – (f) exceptions, any attempt to justify it by claiming necessity to balance the State’s interests against those of the detainee will fail.<sup>151</sup> In *A & Others*, the 11 applicants were all non-UK nationals who were detained in London on suspicion of being involved in or linked to terrorist groups and who were deemed a threat to national security.<sup>152</sup> While in detention, the detainees were permitted to receive visitors, could socialise with other prisoners, make phone calls and write and receive letters.<sup>153</sup> They also had access to their legal representatives, health care, exercise, education and work.<sup>154</sup> However, the Court found their detentions did not fall within the exception found in Article 5(1)(f).<sup>155</sup> The Court rejected the government’s ‘balancing of the interests’ argument and noted that it was inconsistent ‘with the principle that paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5.’<sup>156</sup>

The foregoing cases demonstrate how narrowly the Court interprets the permitted Article 5 exceptions. The Court has repeatedly acknowledged the extensive nature of this list and has recognised its inability to create a new exception not listed in the Convention. But, what happens in situations where the measure that caused the deprivation of liberty was instituted for the purpose of maintaining public order, as was done in *Austin*?

## V. **Has the Court Recognised a New ‘Public Safety Exception’ to Article 5?**

The issue in *Austin* was whether the continued kettling of the applicants for up to seven hours was a deprivation of liberty. The government argued it was not and claimed the police kettle was imposed for the purpose of isolating and containing a large crowd in volatile and dangerous conditions. The government further argued that if the Court did consider the continuation of the kettle a deprivation of liberty, it was justified under Article 5(1)(b) and (c), as the police had a duty to deal with a breach of the peace, and confinement of the applicants was necessary to prevent a breach of the peace. The Court however, never considered the government’s alternative argument, as it did not find that the continued kettling of the applicants was a deprivation of liberty.

In the first part of the Court’s analysis, it agreed with the previous reasoning of the United Kingdom Court of Appeal and

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144 *ibid* 20.  
 145 *ibid* 21.  
 146 *ibid* 2.  
 147 *ibid* 14.  
 148 *ibid*.  
 149 *ibid*.  
 150 *A & Others* (n 114) 171.  
 151 *ibid*.  
 152 *ibid* 29-70.  
 153 *ibid* 71.  
 154 *ibid* 71.  
 155 *A & Others* (n 114) 170.  
 156 *ibid* 171.

House of Lords, finding the initial imposition of the kettle was not a deprivation of liberty.<sup>157</sup> The Court considered that police must be given discretion when making ‘operational decisions’<sup>158</sup> and reasoned that technological advances have enabled protestors to organise quickly, which can cause unforeseen challenges to arise while police officers are attempting to maintain order.<sup>159</sup> Police techniques such as kettling have emerged in response to these advances. Thus, in the Court’s view, Article 5 cannot be interpreted in a way that would restrict or prevent the police from fulfilling their mandate to maintain public order.

Continuing with its analysis, the Court recalled a deprivation of liberty question must be analysed based on the particular facts of each case, including the type and duration of the restriction, and the effects of and manner of implementation of the deprivation.<sup>160</sup> This is where the Court disagreed with the government; it referenced Lord Walker’s submission that the underlying purpose for imposing the containment measure is not a factor that should be considered when determining whether there has been a deprivation of liberty.<sup>161</sup> The Court did note, however, the ‘context in which action is taken’ is an important factor to consider.<sup>162</sup> It repeated the earlier football match/crowded motorway examples cited by the Court of Appeal and House of Lords and stated it did not consider ‘such commonly occurring restrictions on movement’ as Article 5 violations when they are: (1) unavoidable based on the circumstances; (2) necessary to prevent a real risk of serious injury; and (3) kept to a minimum.<sup>163</sup>

The Court recognised there could be situations when crowd control techniques might violate Article 5 and again, stressed that the circumstances of each case, including the police tactics used, must be examined to determine whether there has been a deprivation of liberty.<sup>164</sup> Applying this to the facts in *Austin*, the Court noted an initial analysis of the coercive nature and duration of the containment within the cordon, as well as the physical discomfort of the applicants and their complete inability to leave Oxford Circus, pointed towards a deprivation of liberty.<sup>165</sup> However, in the majority’s view, the police had no other choice but to impose the kettle as the least restrictive means to control the crowd; thus, Judge Tugendhat’s conclusion that ‘an absolute cordon was the least intrusive and most effective means to be applied’ under the circumstances was correct.<sup>166</sup>

Moving on to the applicants’ contention that the deprivation of liberty stemmed from the kettle’s duration, its coercive enforcement, and its effect on them, the majority stated it could not identify the precise moment when the confinement changed from a restriction upon the applicants’ freedom of movement to a deprivation of their liberty.<sup>167</sup> The Court viewed the three attempted releases, combined with the arrival of a new group of protestors and the volatile conditions in both crowds, as evidence that the dangerous conditions that originally prompted the cordon persisted for the entirety of the afternoon.<sup>168</sup> Thus, because the imposition of the cordon was not a deprivation of liberty, the continued kettling was not either. This finding meant the Court did not need to ascertain whether the confinement measure was justified by one of the exceptions found in Article 5(1)(a) – (f).

Finally, the Court issued a warning that this finding was not an endorsement for police or national authorities to use crowd control as a way to discourage or prevent protest.<sup>169</sup> It further advised that if the prevention of injury or damage to property had not been necessary in *Austin*, or if the type of confinement measure used by the police had been different, the Court’s analysis might produce a different result.<sup>170</sup>

#### A. *Dissent*

Three judges dissented, arguing the majority’s finding improperly implies that ‘if it is necessary to impose a coercive and

157 *Austin* (n 6) 66-68. The applicants did not allege a deprivation of liberty from the moment the kettle was imposed.

158 *ibid* 56. On this point, the Court referenced the prior case of *PF & EF v The United Kingdom* App no 28326/09 (23 November 2010).

159 *Austin* (n 6) 56.

160 *ibid* 57.

161 *ibid* 58. ‘[A]n underlying public interest motive, for example to protect the community against a perceived threat emanating from an individual, has no bearing on the question whether that person has been deprived of his liberty’.

162 *ibid* 59.

163 *ibid*.

164 *ibid* 60.

165 *ibid* 64.

166 *ibid* 66.

167 *ibid* 67.

168 *ibid*.

169 *ibid* 68.

170 *ibid* 68.

restrictive measure for a legitimate public-interest purpose, the measure does not amount to a deprivation of liberty.<sup>171</sup> Judges Tulkens, Spielmann and Garlicki focused their dissent on two main points. The first point was the Court has consistently held that the specific intention of a confinement measure must not be considered when determining whether there has been a deprivation of liberty.<sup>172</sup> They noted the specific aim is only relevant once a deprivation of liberty has been found.<sup>173</sup> This reasoning is the second step in the process of determining whether the deprivation of liberty was justified under one of the exceptions listed in Article 5(1)(a) – (f), and the majority should not have relied upon this reasoning to support its finding that there was no deprivation of liberty.<sup>174</sup> In the dissent's view, Article 5 is crafted in a way that inherently balances the public interest and the individual's right to liberty – the legitimate purposes for which a confinement measure may be imposed are limited to those purposes listed in Article 5(1)(a) – (f).<sup>175</sup>

The dissent's second main argument concerned the wording of Article 5 itself. In the dissent's view, it is impermissible to make distinctions between measures taken on public order grounds and measures imposed for any other public interest.<sup>176</sup> Making this distinction could open the door for police or national authorities to detain individuals for a variety of reasons outside the scope of those listed in Article 5(1)(a) – (f), so long as it could be shown that the confinement was necessary.<sup>177</sup> This was the analysis used in *A & Others*, where the Court reiterated that the exceptions listed in the Convention are exhaustive and interpreted narrowly. It is not possible to create a new exception simply for the purpose of balancing State interests against those of the detainees.<sup>178</sup> If detention is not justified by one of the exceptions, it is incompatible with the aims of Article 5.<sup>179</sup>

The dissent criticised the majority for noting that certain crowd control techniques could lead to an unjustified deprivation of liberty, but only requiring that Article 5 be interpreted in a way that accounts for both context and the police duty to maintain public order.<sup>180</sup> The dissent's concern was that this position is dangerous as it 'leaves the way open for *carte blanche* and sends out a bad message to police authorities.'<sup>181</sup> In fact, even the majority must have recognised this danger as it took pains to emphasise in its own judgment that this was not the intended result. Furthermore, regarding the police duty to protect the public interest, the dissent recognised that in *Austin*, the facts did not establish there was a clear and present danger to any individuals present in Oxford Square.<sup>182</sup> The dissent then pointed to the Court's previous jurisprudence establishing that positive obligations under Article 2 and 3 must comply with Article 5, including a recent decision where the Court found Article 5(1) contained the only situations when an individual could be deprived of his or her liberty in the name of protecting the public interest.<sup>183</sup>

The dissent did not believe the confinement measure employed in *Austin* was the least intrusive means the police could have applied.<sup>184</sup> The police officers took control of the situation by keeping everyone inside the cordon, including individuals who were not present for the purposes of demonstrating. The result was that anyone who happened to be present in Oxford Circus at 2 o'clock in the afternoon was, in the dissent's opinion, treated like an object and forced to remain for the duration of the day.<sup>185</sup> This was evidence that the police could have applied less intrusive means to contain the crowd. Individuals who intentionally participate in a demonstration should expect that their freedom of movement may be restricted if the conditions deteriorate to the point where police action is needed. However, passers-by with no intention of participating in a demonstration should not be subjected to measures aimed at controlling a hostile crowd.

The dissent felt the majority was incorrect in concluding that because it could not identify the exact moment when the cordon

171 *Austin & Others v The United Kingdom* (Joint Dissenting Opinion of Judges Tulkens, Spielmann and Garlicki) App nos 39692/09, 40713/09 & 41008/09 (ECHR, 15 March 2012) 3.

172 *ibid* 4.

173 *ibid*.

174 *ibid*. 'In each case, Article 5 §1 must be interpreted in a manner which takes into account the specific context in which the techniques are deployed, as well as the responsibilities of the police to fulfill their duties of maintaining order and protecting the public.' *Austin* (n 6) 60.

175 *Austin* Joint Dissenting Opinion (n 171) 4.

176 *ibid* 5.

177 *ibid*.

178 *ibid* 6.

179 *ibid*.

180 *Austin* (n 6) 60; *Austin* Joint Dissenting Opinion (n 171) 7.

181 *Austin* Joint Dissenting Opinion (n 171) 7.

182 *ibid*.

183 *ibid*.

184 *ibid* 10.

185 *ibid*.

changed from a restriction upon freedom of movement to a deprivation of liberty, there was no deprivation of liberty.<sup>186</sup> The dissent questioned – and rightfully so – whether this meant there was no deprivation of liberty before the crowd was released, or whether the confinement did in fact become a deprivation of liberty, but the precise moment this occurred could not be determined.<sup>187</sup> If it was the latter, the *Austin* majority should not sweepingly conclude there was no deprivation of liberty; in situations that are unclear, the presumption is for individual rights to prevail.<sup>188</sup>

Finally, the dissent criticised the majority for not referencing the 2010 judgment of *Gillan & Quinton*. There, the Court found a deprivation of liberty based on a coercive restriction of the applicants' freedom of movement.<sup>189</sup> The dissent distinguished the degree of coercion in that case as being *lower* than the degree of coercion in *Austin*. The *Gillan & Quinton* applicants were detained for less than thirty minutes, whereas the *Austin* applicants were detained for up to seven hours. Furthermore, the *Austin* applicants' freedom of movement was reduced to a small area with approximately 2,000 other individuals. Both the *Gillan & Quinton* and *Austin* applicants were subject to arrest or even a prison sentence if they refused to comply with police instructions. Yet, Article 5 was interpreted more broadly in *Gillan & Quinton* than in *Austin*.<sup>190</sup> Thus, the dissent was persuaded there had indeed been a violation of Article 5 in *Austin*.<sup>191</sup>

Ultimately, in the *Austin* holding, although the Court gave deference to the action taken by the police to maintain public order, it did not recognise a new 'public safety exception' to Article 5. The majority permitted the reasoning that the kettle was imposed for the purpose of maintaining public order to influence its deprivation analysis, instead of reserving it for the question of whether any permitted exceptions applied. This appears to be a deviation from its previous holdings in Article 5 cases.

## VI. Does *Austin* Stray From the European Court of Human Rights' Previous Jurisprudence?

### A. Confinement Plus an Aggravating Factor

An analysis of the Court's Article 5 jurisprudence suggests *Austin* should have had a different result. Even the majority recognised this when it noted an analysis of the facts based on the *Engel* criteria pointed towards a deprivation of liberty. When considering that a deprivation of liberty consists of a confinement (without valid consent) plus one or more aggravating factors, it is clear the majority in *Austin* erred. The conditions inside the police cordon in *Austin* were such that they added the required 'something more' to move the applicants' confinement from a restriction of movement to a deprivation of liberty. The applicants were confined to a small space with roughly 2,000 other people, and all were completely deprived of access to food, water, toilet facilities and shelter from the cold and wet weather for several hours. Comparing these facts to *Guzzardi*, where the Court found it was the cumulative effect of the conditions of Mr Guzzardi's confinement that changed his confinement from a restriction upon movement to a deprivation of liberty,<sup>192</sup> the *Austin* result should have been the same. Mr Guzzardi was not bound by a physical barrier and could move about inside the area of his confinement; in *Austin*, the applicants were restricted to the area bound by a police barricade, and as time passed, they had difficulty moving about in that confined space. The cumulative effect of the conditions on the *Austin* applicants clearly crossed the threshold from a restriction upon movement to a deprivation of liberty.

Furthermore, compare the *Austin* facts to *Gillan & Quinton*, where the applicants were only detained for a time period of less than thirty minutes. There, the coercive nature of that detention arose from the fact that the applicants were forced to remain and consent to the search, or else risk criminal charges. In *Austin*, the applicants were confined for nearly seven hours, much longer than the applicants in *Gillan & Quinton*, and they were also subjected to police coercion by being forced to stay in place or risk arrest and imprisonment. Surely the degree of intensity of the confinement in *Austin* was enough to cross the threshold from a restriction upon the applicants' movement.

Where the *Austin* majority made its biggest error was by including the context in which the action was taken as a factor in its deprivation of liberty analysis. It seems the Court has conflated the ideas of 'context' and 'purpose'. As the Court's previous

186 *ibid* 12.

187 *ibid*.

188 *ibid*.

189 *ibid* 13.

190 *ibid*.

191 *ibid* 14.

192 *Guzzardi* (n 60) 95.

cases indicate, an analysis of the *context* refers to the general facts and circumstances of the case, taken as a whole.<sup>193</sup> An analysis of the *purpose* behind the continued detention of the applicants should be reserved for consideration in the second step of the Court's process – the determination of whether the confinement measure was justified by one of the exceptions in Article 5(1)(a) – (f). This confusion of terms improperly leads the Court to consider the purpose of the confinement measure, disguised as 'context', in its analysis of whether a deprivation of liberty has occurred. The dissent touched upon the possible ramifications of this; the door is now open for law enforcement officials to more frequently assert necessity to maintain public safety as justification to impose unlawful detention measures.

### B. *No Consent to Confinement*

An analysis of whether an individual has validly consented to the confinement is the 'subjective element' in the determination of whether there has been a deprivation of liberty. The majority in *Austin* did not consider it relevant that only one of the three applicants was present in Oxford Circus for the purpose of participating in the protest. Though not expressly debated, the issue of consent was implicated by the Court of Appeal and House of Lords, and again by the *Austin* majority. Their reasoning was that members of the public should foresee that they may be subjected to temporary restrictions upon their movement in certain 'contexts'. The two cited examples of these contexts were: 1) being stuck as a passenger on a crowded public highway, and 2) separating groups of supporters of the opposite team at a football game for the purpose of avoiding 'violence and mayhem'.<sup>194</sup> But, these situations cannot be compared to *Austin*. It is not disputed that active protestors should expect their freedom of movement might be restricted when the protest takes a turn for the worse; however, the passers-by will have a different expectation. As the dissent noted, individuals without intention of participating in a demonstration could reasonably expect they would not be subjected to confinement measures imposed to control a dangerous crowd of protestors. Thus, the applicants in *Austin* did not give valid consent to be detained, and like the applicant in *Shtukaturrov*, they perceived their liberty was being deprived, thereby fulfilling the subjective element.

### C. *The Confinement Was Arbitrary*

The *Austin* result is most troubling when compared to *A & Others*. Although the *Austin* Court did not arrive at the point where it analysed whether the police measure was justified by one of Article 5's exceptions, that analysis was conducted in *A & Others*. Recall in that case the Court rejected the argument that Article 5 permits the balancing of the individual's right to liberty and the State's interest in protecting its population from the threat of terrorism.<sup>195</sup> This however, is essentially the reasoning adopted by the *Austin* Court, where it noted Article 5 should not be interpreted in a way that impedes the police from fulfilling their duty to maintain public order. The *Austin* Court endorsed a police action under the guise of being necessary to prevent serious injury or damage, despite the lack of evidence of an actual, imminent threat to any individuals located inside or outside the kettle. When comparing these cases, it appears the Court allows greater leeway for the threat of personal injury or damage to property from a crowd of protestors than it does the threat to national security, which one could assume to be the greater of the two. Although the Court attempted to warn that a change in one of the factors – a different type of confinement measure, a finding that the confinement measure was not necessary or not the least restrictive means utilised – could change the outcome, this is likely to be ignored in the name of maintaining public safety.

Furthermore, the *Lawless* decision suggests that the applicants' continuous detention inside the police cordon with no intention of bringing them before a competent legal authority should have led the Court to find an Article 5 violation. The government's alternative argument, if the Court had found a deprivation of liberty, was that the kettle was maintained to prevent a breach of the peace, and was thus justified by Article 5(1)(c). This argument is incorrect as it ignores the purpose of the Article 5(1)(c) exception, which permits the detention of individuals *only* for the purpose of bringing them before a competent judicial authority. It is a Convention safeguard to prevent the arbitrary and overarching arrest and detention of individuals. The *Austin* facts did not indicate the police intended to bring any individuals detained inside the cordon before a competent judicial authority. Indeed, even the House of Lords rejected this argument based on the ECHR's reasoning in *Lawless*.<sup>196</sup>

Finally, the *Austin* decision falls outside the Human Rights Committee's approach. Recall that in *Spakmo* the Committee

193 The Court cites *Engel* (n 59) 59.

194 *Austin* (n 6) 37.

195 *A & Others* (n 114) 171.

196 *Austin* (n 6) 37 citing Lord Neuberger 64.

noted the ‘reasonable and necessary’ requirement – the arrest must be lawful, and also reasonable and necessary in *all* the circumstances.<sup>197</sup> Mr Spakmo was detained for eight hours, and although his initial arrest was lawful, the unreasonable length of detention was what caused the deprivation of liberty. In *Austin*, the applicants were only detained for six to seven hours inside the police cordon, and were entirely dependent upon the police officers’ decisions regarding when they could leave.<sup>198</sup> Because deprivations of liberty resulting from public-order considerations are no different from other types of deprivation of liberty,<sup>199</sup> there was no clear indication as to why it was reasonable and necessary to detain the applicants for such a long period of time, or why the police did not choose to use less intrusive means to do so. Furthermore, the *Austin* Court even admitted that ‘[h]ad it not remained necessary for the police to impose and maintain the cordon in order to prevent serious injury or damage, the “type” of the measure would have been different, and its coercive and restrictive nature might have been sufficient to bring it within Article 5.’<sup>200</sup> Thus, it is likely that even the Committee would have found a deprivation of liberty based on the facts in *Austin*, which makes it all the more surprising the ECHR did not.

The Court’s jurisprudence clearly demonstrates the majority in *Austin* deviated from its established standard for analysing deprivation of liberty questions. The Court first erred by not finding that the cumulative effects of the deprivation crossed the threshold from a restriction upon movement to a deprivation of liberty. The Court’s second error was by including ‘context’ as a consideration in this determination. The majority even admitted an analysis of the facts using its ‘go to’ test – the criteria established in *Engel* – would result in a finding of a deprivation of liberty. But by improperly including the context in which the action was taken in its analysis, the Court not only misconstrued the very purpose of Article 5, but also tipped the balance away from the protection of individual rights.

## VII. Conclusion

The case history of the European Court of Human Rights demonstrates there is no bright line rule with regard to determining whether or not a set of circumstances constitutes a deprivation of liberty. What the jurisprudence does show however, is that there are two steps in the process of finding an Article 5 violation. First, there must be a deprivation of liberty, as opposed to a restriction of movement, which involves finding there has been an involuntary confinement plus one or more aggravating factors. Second, the Court must determine the deprivation of liberty was arbitrary, meaning it is not justified by one of the exceptions listed in Article 5. The list of exceptions in Article 5 is exhaustive, and the Court cannot create a new one.

Regarding the question of its ruling in *Austin* and whether the Court has now recognised a ‘public safety exception’ to Article 5, the answer is no; the Court did not find the applicants’ continued kettling a deprivation of liberty, so it never analysed whether the confinement measure was justified. When following the Court’s jurisprudence, the result in *Austin* should have been different; the circumstances demonstrated a higher level of police coercion than in many of the cases where a deprivation of liberty was found. The majority improperly considered the purpose of the measure imposed in its analysis of whether there was a deprivation of liberty, instead of reserving this analysis for the second step in the process. The majority also erred by citing the context in which the measure was imposed as a significant factor to be considered when making its deprivation of liberty determination.

It seems the Court introduced the context in which the measure was imposed as a new element into its formula for determining whether a confinement rises to the level of a deprivation of liberty, whether intentionally or not. By considering ‘context’ as a factor in its overall analysis, the Court has created an alternative way for States to justify questionable police action. The dissent is right to worry *Austin* could be interpreted as giving police *carte blanche* to implement crowd control techniques that will result in unjustified deprivations of liberty in the name of maintaining public order. It remains to be seen whether the Court will continue to improperly use context as a factor in analysing future deprivation of liberty questions. ■

197 *Aage Spakmo* (n 137) 6.3.

198 *Austin* Joint Dissenting Opinion (n 171) 14.

199 *ibid* 5.

200 *Austin* (n 6) 68.