'Kettling' and Article 5(1) ECHR: *Austin and Others v UK* (2012)

Last week, the Court's Grand Chamber delivered the eagerly anticipated judgment in the case of *Austin and Others v UK*. The 14-3 majority ruling held that police tactics used during the 2001 May Day protests in London, relying on common law powers to prevent a breach of the peace and confining both demonstrators and passersby behind a police cordon for approximately seven hours, did not violate Article 5 ECHR. This post suggests that the Court's reasoning betrays the internal integrity of Article 5 and takes insufficient account of the expressive purpose which partially defined the May Day events.

Article 5 entails what appears to be a simple two-stage test – (1) is there an interference constituting a '*deprivation* of liberty' (the threshold question)? If this threshold is met, and Article 5 thus engaged – (2), is the deprivation justified under one of the six categories in subparagraphs (a)-(f), and 'in accordance with a procedure prescribed by law'? The two limbs of this test were answered differently in the lengthy judgments of the High Court, Court of Appeal and House of Lords (see the related commentaries by David Mead, Helen Fenwick, David Feldman, and Genevieve Lennon).

The Grand Chamber hints (as did Lord Neuberger in the House of Lords) that the application of this test is complicated because the 'kettling' of demonstrators is a 'non-paradigm' interference with individual liberty – the cordoning of protesters falls short of arrest and confinement in a prison cell. Thus, while the Court *has* previously found violations of Article 5 in protest cases (see, for example, *Steel and Others v UK* (1998) and most recently, *Schwabe and MG v Germany* (2011)), these cases involved more typical detention scenarios. *Schwabe*, for example, concerned the arrest and detention of two demonstrators for five and a half days in anticipation of the G8 summit protests in Rostock, June 2007. The Court made it clear that such preventive detention, where there is no evidence of an intention to commit specific and imminent unlawful acts, constitutes a violation of Article 5(1) notwithstanding the sizable challenges of guaranteeing security at the G8 summit. Parallels can also be drawn between the 'kettling' in *Austin* and the police measures used in the UK case of *R (on the application of Laporte) v Chief Constable of Gloucestershire* (2006) where anti-war demonstrators were detained on a coach for several hours after police prevented them from reaching the site of their intended protest. However, the celebrated House of Lords judgment in *Laporte* does not decide the Article 5 question given their Lordships' conclusion that the invocation of common law powers to prevent a *non-imminent* breach of the peace could not be regarded as 'prescribed by law' under Article 11(2). The same is true of the Strasbourg Court's judgment in *Gillan and Quinton v UK* (2010) concerning the police use of stop and search powers. Here, the Court considered it unnecessary to determine the Article 5 issue since it found a violation of Article 8 of the Convention (see further the joint dissenting opinion in *Austin* at para.13).

The *Austin* judgment is the Strasbourg Court's first foray into the specific practice of 'kettling'. In applying the initial limb of the Article 5 test, the Court has to decide what factors are admissible when determining whether a 'deprivation of liberty' has occurred. The Court in *Austin* repeated the long-established test (from *Engel and others v the Netherlands* (1976) and *Guzzardi v Italy* (1980)) that:

> ‘In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.’ (para.57)

Significantly though, to this list of criteria, the Court in *Austin* added ‘context’. The Court stated:

> ‘… the requirement to take account of the “type” and “manner of implementation” of the measure in question enables [the Court] to have regard to the specific context and circumstances surrounding types of restriction.’ (para.59)

It is suggested here that several inter-related problems arise from making an assessment of ‘context’ relevant to this threshold question of Article 5. The first is that such reasoning clearly allows public interest considerations in by the backdoor. Revealingly, the Court goes on to explain that ‘the context … is an important factor … since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty *in the interests of the common good*’ (para.59). This is seemingly at odds with the Court’s avowal in the preceding paragraph that ‘an underlying public interest motive … has no bearing on the question whether that person has been deprived of his liberty’ (para.58). More on these so-called ‘analogous’ and ‘commonly occurring situations’ later.

One might also note here that the *way* in which ‘context’ is viewed will often determine (and so be indistinguishable from) the purported ‘purpose’ of the police intervention (the factor that so occupied Lord Hope in the House of Lords, see paras.22 and 34 of that judgment).

In this light, it is worth closely examining what particular circumstances are given weight by the Strasbourg Court at this stage in the reasoning. Despite first suggesting that ‘the coercive nature of the containment … its duration, and its effect on the applicants, in terms of physical discomfort and inability to leave … point towards a deprivation of liberty’ (para.64), the Court then highlights the size of the crowd, the ‘volatile and dangerous conditions’, and the purported lack of any alternative policing measure capable of averting serious injury or damage, to support the trial judge’s conclusion that ‘kettling’ was indeed ‘the least intrusive and most effective means to be applied’ (para.66). Arguably, the question of duration is negated by the Court’s assertion that it was ‘unable to identify *a moment* when the measure changed from what was, at most, a restriction on freedom of movement, to a deprivation of liberty.’ While there are obvious limits to the degree of specificity or prescription we ought to expect from a judgment of the Court on questions of timing (*cf.* the dissenting opinion in *Nurettin Aldemir and Others v Turkey* (2007)), and this is not to suggest that duration of itself should be dispositive, the Court should not be so easily released from its responsibility to assess *when* a mere restriction becomes a deprivation (see similarly the joint dissenting opinion at para.12).

Other arguments raised elsewhere in the Court’s judgment also highlight the potential

for an expansive – and police oriented – view of 'contextual' factors. The Court noted the state's positive obligations to protect the rights under Articles 2 and 3 ECHR (paras.56), as well as 'the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources' (para.55 – a phrasing common in other Strasbourg judgments concerning police positive obligations). Could questions of police resources therefore be regarded as germane (as a contextual matter) to the question of whether a deprivation of liberty has occurred?

Moreover, the Court also states that it does not wish to constrain the operational discretion of the police, especially because they 'have access to information and intelligence not available to the general public' (para. 56). Surely, though, to correlate the degree of deference due in operational decisions with the intelligence exclusively possessed by the police could potentially justify more intrusive forms of police intelligence gathering – just at the time when the role of undercover policing and infiltration of protest groups in the UK has deservedly come under the spotlight (see also *R v Barkshire and others* (2011)). It is important in this regard to recall an earlier judgment of the House of Lords – *Tweed v Parades Commission for Northern Ireland* (2006) – which held that disclosure of police reports (or at least an accurate summary of the information contained therein) might be necessary in order for a court to properly assess the proportionality of restrictions on freedom of assembly. Surely the same argument also applies in relation to judicial scrutiny of police contingency planning as relevant to the inquiry under Article 5(1). On this question, Keir Starmer QC – who originally acted on behalf of the claimants in the *Austin* case was critical of 'the "lack of an audit trail" showing the consideration of alternative plans being considered during the [police] planning and training" for May Day 2001.'

To return to the so-called 'analogous' or 'commonly occurring situations' with which the facts of *Austin* were compared, the Court argued that mere restrictions on liberty could not be regarded as deprivations of the same so long as they were 'rendered unavoidable as a result of circumstances beyond the control of the authorities', were 'necessary to avert a real risk of serious injury or damage', and were 'kept to the minimum required for that purpose' (para.59). In making this argument, the Court had in mind the examples cited previously by the Court of Appeal and House of Lords – namely, measures taken to separate rival football crowds and measures hemming in motorists in the aftermath of a traffic accident. First of all, as David Mead argues in another blog posting on the Strasbourg judgment in *Austin*, these cases are not really analogous at all. Why so? It is suggested here that what really differentiates *Austin* from these so-called analogous cases is the fact that neither football crowds nor delayed motorists involve gatherings assembled primarily for an expressive purpose on matters of public interest. In *Austin* – even though some of those caught behind the police cordon were not themselves demonstrators (a factor that was evaluated differently by the majority (at para.63), and the dissenting Judges (at para.11)) – the context, if at all relevant to the threshold question in Article 5(1), was surely partially defined by the need also to ensure the practical and effective protection of the rights of speech and assembly. This 'contextual' factor could have been given greater weight (even though no separate complaint under Articles 10 or 11 was being considered in *Austin*). Such an approach would not only be consistent with reading the Convention as a whole and promoting internal consistency between its provisions (para.54), but would have been more compelling than the rather dubious argument

about the implied consent of those detained (an argument with which Lord Neuberger flirted in the House of Lords judgment at para.61) or the assertion that such circumstances are 'unavoidable' and 'beyond the control of the authorities' (since this is a dangerously elastic concept, devoid of practical application). Such an approach, emphasizing the contextual importance of freedom of speech and assembly, might also have given greater bite to the Court's rather limp concession that '[i]t cannot be excluded that the use of containment and crowd control techniques could, in particular circumstances, give rise to an unjustified deprivation of liberty in breach of Article 5(1)' (para.60).

In a similar vein (relating to the internal consistency of the Convention), the Court did stress (at para.55) 'the importance and purport of the distinct provisions of Article 5 and of Article 2 of Protocol No. 4', and also reflected on the fact that 'Article 5 should not, in principle, be interpreted in such a way as to incorporate the requirements of Protocol No. 4 in respect of States which have not ratified it' (the UK being one of only four Council of Europe member states not yet to have ratified Protocol 4). The Court, however, did not return to this point even though the spectrum between deprivations under Article 5 and mere restrictions under Article 2 of Protocol 4 offers a straightforward and arguably more persuasive way of evading the clutches of Article 5 whilst also unambiguously casting 'kettling' as a strategy ordinarily requiring justification under Article 2(3) of Protocol 4 (in countries where that Protocol has been ratified).

The Court's concession that 'kettling' *might*, on different facts, give rise to an unjustified deprivation of liberty also requires us to consider the second limb of the test in Article 5(1). If a 'kettling' case arose in which Article 5 was actually engaged, it would be virtually impossible for the authorities to argue that it was justified under any of the existing subparagraphs (a)-(f) – particularly since the Court has repeatedly stressed that these exceptions are exhaustive (see, for example, *Austin*, para.60, and *Schwabe*, para.69). It is important to remember that unlike the limiting clauses in Article 11 or Article 2 of Protocol 4, there is no 'exception' under Article 5(1) for security measures or public order considerations. On this basis, no other purposes (however well-intentioned) or extraneous factors (such as public order) can justify what has already been decided, under the first limb of the test, to be a deprivation of liberty. Arguably, the admission of 'contextual' factors as elaborated by the Court in *Austin* serves to introduce a *de facto* exception to Article 5(1). Here, it is noteworthy that such a provision was actually dropped during the drafting of the Convention in 1950. A proposed draft of Article 5 read as follows:

> 'No person shall be deprived of his liberty … save by legal procedure in the case of: (a) the lawful detention of a person after a conviction *or as a security measure involving deprivation of liberty.*'

Had this latter provision remained in the final text of the Convention, even 'kettling' of demonstrators which constituted a deprivation of liberty would likely have been capable of justification. Since it did not remain, however, the judgment in *Austin* strains the integrity of Article 5 itself.

So where does all of this leave the practice of 'kettling'? While sometimes spun as being the lesser of two (or more) evils (– the Strasbourg Court for example noted that 'more robust methods' would have increased the risk of injury (para.66)), 'kettling' in practice has received widespread criticism. The UK's Joint Committee on Human Rights concluded that: 'it would be a disproportionate and unlawful response to cordon a group of people and operate a blanket ban on individuals leaving the contained area, as this fails to consider whether individual circumstances require a different response' (para.28 of the JCHR report). Similarly, in the wake of the policing of the G20 protests in 2009, the UK's Home Affairs Committee was scathing of police commanders who were unwilling to allow protesters to leave a containment area to access medicine (paras.44-46 of the HAC report).

The OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly also emphasize (at para.160) that: 'Strategies of crowd control that rely on containment … must only be used exceptionally: Such strategies tend to be indiscriminate, in that they do not distinguish between participants and non-participants, or between peaceful and non-peaceful participants.' This imperative of avoiding blanket treatment of protesters draws on the Strasbourg Court's admissibility decision in *Ziliberberg v Moldova* (2004). Here, the Court noted that 'an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.'

There has also long been a question-mark over the impact and prudence of 'kettling' as a public order management strategy. In the aftermath of the violent G20 protests in Toronto in June 2010, for example, the *Toronto Police Service After-Action Review* (June 2011) concluded that:

> 'Crowd behaviour is often influenced by the type and manner of police deployment. Displays of real or implied force can lead to negative crowd reactions that may escalate a situation. … The use of a containment technique or box, referred to by some as a "kettle," has operational merit for containing and preventing the spread of disorder. However, persons not involved in the event must have both a route of egress from and the opportunity to leave the affected area. Containment tactics should be modified to include specific direction as to when they are to be used. When used, a controlled egress point should be established and appropriate notification provided to the crowd.' (pp.31-32)

Recognition at least of the escalatory potential of blanket containment echoes the argument made by psychologists Steve Reicher and Clifford Stott who have warned that if the police treat a crowd as presenting a uniform threat of danger, this could become a self-fulfilling prophecy:

> This common treatment has led crowd members to reconceptualize themselves as members of a common category. Moreover, the expectation of mass support engendered by such a common categorization has empowered crowd members to resist the police. This in turn has fed back into police actions (again, we infer, mediated by their perceptions and their power), hence setting up a cycle of tension and escalating conflict. (1998: 512).

In contrast, the Court in *Austin* both perpetuated the myth of crowds as undifferentiated mobs and the police role as being about 'control' rather than facilitating the enjoyment of fundamental rights.

Finally, there is good reason to be extremely careful about asserting a bright-line distinction between 'paradigm' and 'non-paradigm' Article 5 cases. The analogous (non-paradigm) cases discussed by the Court of Appeal and House of Lords in *Austin* were highlighted with a view to suggesting that certain deprivations of (or restrictions upon) liberty are intuitively beyond the scope of Article 5. This is a dangerous premise. Instead, such typologies and analogies are best avoided altogether in favour of a test which examines all cases by applying objective factors such as type, duration, effects and manner of implementation and – as crucially suggested here, in view of the likely deployment of 'kettling' strategies – whether the rights to freedom of speech or assembly are also engaged. The Court's concession that 'kettling' *might* on different facts engage Article 5 is perhaps the only silver lining around what is otherwise (in the words of the dissent, para.7) 'a bad message to police authorities'.