

March 2012

Austin and Others v. the United Kingdom [GC] - 39692/09, 40713/09 and 41008/09

Judgment 15.3.2012 [GC]

Article 5

Article 5-1

Deprivation of liberty

Containment of peaceful demonstrators within a police cordon for over seven hours: *Article 5 not applicable; no violation*

Facts – On 1 May 2001 a large demonstration against capitalism and globalisation took place in London. The organisers gave no notice to the police of their intentions and publicity material they distributed beforehand included incitement to looting, violence and multiple protests all over London. The intelligence available to the police indicated that, in addition to peaceful demonstrators, between 500 and 1,000 violent and confrontational individuals were likely to attend. In the early afternoon a large crowd made its way to Oxford Circus, so that by the time of the events in question some 3,000 people were within the Circus and several thousand more were gathered in the streets outside. In order to prevent injury to people and property, the police decided that it was necessary to contain the crowd by forming a cordon blocking all exit routes from the area. Because of violence and the risk of violence from individuals inside and outside the cordon, and because of a policy of searching and establishing the identity of those within the cordon suspected of causing trouble, many peaceful demonstrators and passers-by, including the applicants, were not released for several hours.

Following these events, the first applicant brought a test case in the High Court for damages for false imprisonment and a breach of her Convention rights. Her claim was dismissed and that decision was upheld on appeal. In a unanimous ruling*, the House of Lords found that there had been no deprivation of liberty within the meaning of Article 5 of the Convention since the intention of the police had been to protect both demonstrators and property from violence, and the containment had continued only as long as had been necessary to meet that aim. In its view, the purpose of the confinement or restriction of movement and the intentions of those responsible for imposing it were relevant to the question of whether there had been deprivation of liberty, and measures of crowd control that were proportionate and undertaken in good faith in the interests of the community did not infringe the Article 5 rights of individual members of the crowd whose freedom of movement was restricted.

Law – Article 5 § 1: This was the first case in which the Court had considered the application of Article 5 § 1 in respect of the “kettling” or containment of a group of people by the police on public-order grounds. The following general principles were of particular relevance in this context:

(a) The police had to be afforded a degree of discretion in taking operational decisions. Article 5 could not be interpreted in a way that made it impracticable

for them to fulfil their duties of maintaining order and protecting the public, provided they complied with the underlying principle of Article 5, which was to protect the individual from arbitrariness.

(b) Article 5 § 1 was not concerned with mere restrictions on liberty of movement, which were governed by Article 2 of Protocol No. 4 (which Protocol the United Kingdom had not ratified). In order to determine whether someone had been "deprived of his liberty" within the meaning of Article 5 § 1, the starting point had to be his or her concrete situation and account had to be taken of a whole range of criteria such as the type, duration, effects and the manner of implementation of the measure in question. The difference between deprivation of liberty and restriction upon liberty was one of degree or intensity, not of nature or substance.

(c) The purpose behind the measure in question was not a factor to be taken into account when deciding whether there had been a deprivation of liberty (although it might be relevant to the subsequent inquiry whether the deprivation of liberty was justified under one of the subparagraphs of Article 5 § 1).

(d) Conversely, the context in which the measure in question was imposed was an important factor. Members of the public were often called on to endure temporary restrictions on freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match. Such commonly occurring restrictions could not properly be described as "deprivations of liberty" within the meaning of Article 5 § 1, 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.

Turning to the facts of the applicants' case, the Court noted that following a three-week trial and consideration of a substantial body of evidence, the trial judge had found that the police had expected a "hard core" of 500 to 1,000 violent demonstrators to form at Oxford Circus at around 4 p.m. and that there was a real risk of serious injury, even death, and damage to property if the crowds were not effectively controlled. They were taken by surprise when over 1,500 people gathered there two hours earlier and decided that an absolute cordon had to be imposed if they were to prevent violence and the risk of injury and damage. From 2.20 p.m., when a full cordon was in place, no-one in the crowd was free to leave the area without permission. There was space within the cordon for people to walk about and no crushing, but conditions were uncomfortable, with no shelter, food, water or toilet facilities. Although the police tried throughout the afternoon and evening to start releasing people, their attempts were repeatedly suspended because of the violent and uncooperative behaviour of a significant minority both within and outside the cordon and full dispersal was not completed until 9.30 p.m. Approximately 400 individuals who could clearly be identified as not being involved in the demonstration or who had been seriously affected by being confined were, however, permitted to leave beforehand.

On the basis of these findings, the Court considered that the coercive nature of the containment within the cordon, its duration; and its effect on the applicants, in terms of physical discomfort and inability to leave Oxford Circus, pointed towards a deprivation of liberty. However, the Court also had to take into account the "type" and "manner of implementation" of the measure in question as the context in which the measure was imposed was significant.

The cordon had been imposed to isolate and contain a large crowd in dangerous and volatile conditions. It was a measure of containment that had been preferred over more robust methods which might have given rise to a greater risk of injury. The Court had no reason to depart from the judge's conclusion that in the circumstances an absolute cordon had been the least intrusive and most effective means of averting a real risk of serious injury or damage. In this context, the Court did not consider that the putting in place of the cordon had amounted to a "deprivation of liberty". Indeed, the applicants had not contended that, when it was first imposed, those within the cordon had been immediately deprived of their liberty and the Court was unable to identify a moment thereafter when the containment could be considered to have changed from what had been, at most, a restriction on freedom of movement, to a deprivation of liberty. It was striking that some five minutes after an absolute cordon had been imposed, the police had been planning to commence a controlled release. They made frequent attempts thereafter and kept the situation under close review throughout. Accordingly, on the specific and exceptional facts of the instant case, there had been no deprivation of liberty within the meaning of Article 5 § 1. In conclusion, since Article 5 is inapplicable, there has been no violation of that provision in this case.

The Court underlined, however, that measures of crowd control should not be used by national authorities directly or indirectly to stifle or discourage protest, given the fundamental importance of freedom of expression and assembly in all democratic societies. Had 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.

Conclusion: no violation (fourteen votes to three).

* *Austin (FC) & another v. Commissioner of Police of the Metropolis* [2009] UKHL 5.

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