# Deprivations of Liberty: Beyond the Paradigm

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Many deprivations of liberty under article 5 of the European Convention on Human Rights (ECHR) take the so-called “paradigm” form of detention in a prison cell,[[2]](#footnote-3) but “non-paradigm” deprivations take place in, for example, hospitals, the street, or even a person’s own home. Two developments in particular have rendered the definition of a non-paradigm deprivation of liberty particularly unclear. First, the House of Lords (UKHL) (in 2009) and the European Court of Human Rights (ECtHR) (in 2012) both held that the “kettling” (containment in a police cordon) of protestors (and bystanders) for several hours was not a deprivation of liberty in *Austin*.[[3]](#footnote-4) Secondly, in 2014, the Supreme Court (UKSC) held in *Cheshire West* that disabled people living in various residential homes and facilities were deprived of their liberty because they were (under the state’s responsibility) under continuous supervision and control and not free to leave.[[4]](#footnote-5) Irrelevant factors were: their compliance or lack of objection; the relative normality of the arrangements; and the reason or purpose for the arrangements.[[5]](#footnote-6) Applying that test to the *Austin* applicants, they were surely deprived of their liberty.

The purpose of this paper is to clarify what constitutes a non-paradigm deprivation of liberty under article 5. Central to this clarification is a re-evaluation of *Austin* in the light of other police operational discretion cases and *Cheshire West*. Some clarity as to the article 5 compatibility of crowd control measures is particularly urgent given the increasing number of protests across the Council of Europe (and beyond) due to the likes of Brexit and President Trump.[[6]](#footnote-7) But the conclusions drawn in the protest context can be extended to deprivations of liberty more generally since, as will be argued, the concept of liberty should be the same for everyone. Clarification as to the meaning of a non-paradigm deprivation of liberty is vital in outlining the proper scope of article 5, a prerequisite to resolving other important questions, such as the protections offered by articles 5(2)-(5), and the relationship between article 5 and the tort of false imprisonment.[[7]](#footnote-8)

## The essence of article 5

### Limited exceptions

Article 5 establishes a right to liberty and security of person,[[8]](#footnote-9) subject to specific, limited exceptions. Under article 5(1), lawful detention is permitted:

(a) after conviction;

(b) for non-compliance with a court order, or for fulfilment of an obligation prescribed by law;

(c) on reasonable suspicion of a person committing an offence, or if reasonably necessary to prevent her committing an offence or fleeing after having done so;

(d) for educational supervision of a minor, or for bringing a minor before a competent legal authority;

(e) to prevent spreading infectious diseases, or for persons of unsound mind, alcoholics, drug addicts or vagrants;

(f) to prevent unauthorised entry into a country, or with a view to deportation or extradition.

The format of article 5 reflects two competing facts. First, the right to be free from arbitrary detention is a fundamental right which has existed since at least Magna Carta.[[9]](#footnote-10) Being at liberty is a pre-requisite for the enjoyment of certain other Convention rights. Without liberty, one’s ability to associate with others, receive an education, express oneself, enjoy a private and family life and so on may be removed or at least restricted, while one becomes more susceptible to other violations such as torture or inhuman or degrading treatment.[[10]](#footnote-11) Article 5 is thus one of the main lynchpins of the Convention and its lack of definition (and potential erosion) is particularly problematic. But secondly, the right to liberty must admit of certain exceptions because otherwise we would be unable to, for example, lock up prisoners after their conviction or care for people for their own safety.

The finite list of exceptions to article 5 was the central problem the *Austin* courts faced. The police contained a protest due to concerns about violence, property damage and injury. Because of the apparent impossibility of isolating the violent members of the crowd of over 3,000 people, three types of person were caught up in the police cordon: (1) protestors whose conduct was likely to lead to a breach of the peace (violent protestors); (2) protestors whose conduct was *not* likely to lead to a breach of the peace (peaceful protestors); and (3) people who were not protestors at all but who were bystanders swept up in the cordon (non-protestors). Had only the violent protestors been kettled, there would have been no difficulty, a deprivation of their liberty being justified under article 5(1)(c) on the basis that it was necessary to prevent them from committing a breach of the peace.[[11]](#footnote-12) But because the peaceful protestors and the non-protestors were not threatening such conduct, that justification could not be used.[[12]](#footnote-13) The UKHL and the ECtHR held, however, that no deprivation of liberty had occurred and thus no justification was needed.

The ECHR drafters surely wanted to maximise the protection afforded by article 5 by providing a closed list of exceptions. Take the highly-specific wording of article 5(1)(e), for example. A clause specifying that a person could be detained for her protection or the protection of others would have covered similar ground, but more expansively. Indeed, it would have removed the problem the courts faced in *Austin* since the applicants were detained for both their own safety *and* for the protection of others.[[13]](#footnote-14) But instead, specific categories were carved out. Extra-judicially, Lord Wilson has described this drafting as “unwise”, expressing a preference for more “general limits”.[[14]](#footnote-15) But one central feature of article 5 is careful limitation of the exceptions to the right. That spirit is respected in Strasbourg jurisprudence stating that the exceptions are to be construed narrowly.[[15]](#footnote-16) New exceptions should not be read into article 5; the list of exceptions provided in article 5(1) is exhaustive.[[16]](#footnote-17) In *Austin*, the ECtHR accepted that it could not make a new exception.[[17]](#footnote-18) But its approach effectively achieved just that, by allowing the applicants to be kept in a cordon as a preventative measure in the interests of public safety. Proportionality assessments, whilst necessary to determine, for example, whether a detention is arbitrary, threaten to reduce article 5 to a mere qualified right unless they are carefully applied.

### Non-arbitrariness

The underlying thrust of article 5 is to prevent arbitrary deprivations of liberty, but that does not mean that all non-arbitrary deprivations will be lawful. Arbitrariness has not been given a “global definition” by the ECtHR and indeed the meaning of arbitrariness varies between the different article 5(1) exceptions.[[18]](#footnote-19) In general, however, the following features indicate arbitrariness: bad faith or deception; a lack of close connection to the relevant purpose under article 5(1); where the deprivation takes place in an inappropriate place or under inappropriate conditions; or where the deprivation goes on for longer than necessary.[[19]](#footnote-20) As Feldman has pointed out, the UKHL in *Austin* erred in its discussion of arbitrariness.[[20]](#footnote-21) An otherwise lawful deprivation of liberty becomes unlawful if it is arbitrary, but lack of arbitrariness does not make an action lawful.

### Paradigm/non-paradigm distinction

The drafters clearly envisaged “non-paradigm” cases when, for example, drafting article 5(1)(e), under which detentions can take place in hospitals or other medical or care facilities. Fixating on the paradigm case as a comparator is therefore not necessarily appropriate, especially when the applicant has not been tried and convicted of any crime. As has been argued elsewhere, there is no bright line between paradigm and non-paradigm cases.[[21]](#footnote-22) Sometimes, such as in *Austin*, it might be *better* to be held in a cell where one is at least provided with shelter, warmth, food, water and sanitation – none of which the *Austin* applicants enjoyed when they were kept outside on a cold and wet London day for up to seven hours. The finding in *Austin* relied on the case being a non-paradigm one.[[22]](#footnote-23) In a paradigm case, a deprivation of liberty would seemingly have taken place.[[23]](#footnote-24) In paradigm cases, even a short (non-negligible) time will count as a deprivation.[[24]](#footnote-25) But it may be queried how different *Austin* was to a paradigm case. It is easy to see that a case like *Cheshire West* is non-paradigm because the appellants have a certain degree of freedom (for example to go shopping, go to a restaurant, watch television or practice a hobby) despite their continuous supervision and control. Curfews or similar restrictions may also give rise to non-paradigm deprivations of liberty. For example, *JJ* concerned a control order under the Prevention of Terrorism Act 2005 with a combination of restrictions, including an 18-hour overnight curfew. *Guzzardi* concerned a suspected Mafioso sent to live on a 2.5 km2 area of the island of Asinara for three years and subject to various other restrictions during that time.[[25]](#footnote-26) Unlike *Cheshire West*, *JJ* and *Guzzardi*, the *Austin* applicants were completely trapped for seven hours and unable to undertake any of their usual daily activities. It is difficult to see any real difference between a locked cell and a police cordon and thus the merits of the paradigm/non-paradigm distinction are questionable.

Article 5 protects liberty in the “classic sense” of physical liberty,[[26]](#footnote-27) and does not confer “a right to do [what] or to go where one pleases”.[[27]](#footnote-28) But liberty in the narrow article 5 sense cannot be entirely separated from liberty in the wider social or civil sense. Because liberty is a pre-requisite for full enjoyment of many other Convention rights, liberty is important in order to be fully able to pursue one’s “tastes and pursuits” and to combine with others in order to do so.[[28]](#footnote-29) For example, in the article 5 jurisprudence, the courts have discussed whether the applicant can pursue a social life and her hobbies;[[29]](#footnote-30) choose the foods she eats;[[30]](#footnote-31) practice her religion;[[31]](#footnote-32) or pursue a profession or education.[[32]](#footnote-33) Without physical liberty, such wider liberty may be difficult or impossible to achieve, but an ability to enjoy this wider concept of liberty to a certain extent does not necessarily mean there has been no deprivation of liberty. For example, although the applicants in *Cheshire West*, *JJ* and *Guzzardi* were able to enjoy some or all of the wider notion of liberty, it was in some senses curtailed,[[33]](#footnote-34) or at least subject to someone else’s approval.[[34]](#footnote-35) A person cannot be truly “sovereign” “[o]ver himself, over his own body and mind” if he is not physically at liberty.[[35]](#footnote-36) Again, the fixation on the paradigm case is problematic – the threshold for what constitutes a deprivation of liberty under article 5 is linked to a general notion of autonomy and is actually much lower than the almost total social isolation of incarceration.

Although we have seen that cases such as *Cheshire West*, *Guzzardi* and *JJ* constituted deprivations of liberty despite the applicants enjoying a limited right to liberty in the wider sense, the *Austin* applicants enjoyed neither the wide nor the narrow sense of liberty for the seven hours they were contained. One difference between *Austin* and those cases, however, is that *Austin* was not of an ongoing nature. Once the seven hours had passed, the applicants were completely at liberty whereas the applicants in *Cheshire West*, for example, would be deprived of their liberty for their entire lives. As we shall see, however, duration alone is not determinative of a deprivation of liberty. Although the ability to enjoy (at least partially) the wider notion of liberty is not necessarily indicative of a person *not* being deprived of her liberty, an *inability* to enjoy the wider notion of liberty for a non-negligible length of time *is* indicative of a deprivation.

## The *Cheshire West* test

As Lady Hale said in *Cheshire West*, “human rights are for everyone”,[[36]](#footnote-37) thus “what it means to be deprived of liberty must be the same for everyone”.[[37]](#footnote-38) That conclusion flows inexorably from the Convention – article 1 mandates that everyone should enjoy the rights and freedoms it provides and article 14 provides for non-discrimination in that enjoyment. When the Court of Appeal in the same case said that “[w]hat may be a deprivation of liberty for one person may not be for another”,[[38]](#footnote-39) they confused the *concept* of a deprivation of liberty with the *justification* for its imposition.[[39]](#footnote-40) By comparing a disabled person with another person of the same capacity to evoke a relative normality test, the Court of Appeal erred in a dangerous way. Given that equality is at the heart of the Convention, creating a separate rights threshold for disabled (or gay, black, Muslim etc.) people subjects them to a different standard of rights protection than non-disabled (or straight, white, Christian etc.) people. Thus the appellants in *Cheshire West* had to be compared with the ordinary person, not with people who shared their characteristics.

The dissentients in *Cheshire West* were concerned that no-one in everyday language would consider certain of the appellants to have been deprived of their liberty given their comfortable living conditions, social lives and daily activities.[[40]](#footnote-41) “Deprivation of liberty” has, however, an autonomous meaning under the Convention,[[41]](#footnote-42) and cases such as *JJ* and *Guzzardi* had already established that deprivations of liberty could take place in a residential setting with people enjoying aspects of a normal life. But laws lose their authority and alienate citizens if their meaning is so different from their everyday use as to be nonsensical.[[42]](#footnote-43) Furthermore, the Convention’s grounding in the rule of law[[43]](#footnote-44) requires accessibility. So there should be at least *some* coincidence between everyday meanings and legal meanings.

Although the *Cheshire West* appellants’ situations were far removed from the paradigm case, we have already established that such comparisons are unhelpful. Furthermore, the test the Court established (derived from Strasbourg jurisprudence) in fact aligns very closely with an everyday or common sense notion of a deprivation of liberty: to be under continuous supervision and control and not free to leave. The fact that it was in the appellants’ own best interests to detain them was not relevant, nor was their compliance, nor the relative normality of their situation.[[44]](#footnote-45) A person’s “best interests” are already taken into account in justifying a deprivation of their liberty for their own safety under article 5(1)(e). Therefore the argument in *Austin* that the applicants were detained partially for their own good (because of the violence outside the cordon) should fail post-*Cheshire West*.[[45]](#footnote-46) Furthermore, the fact that protestors have expressed no desire to leave a cordon cannot be determinative of there being no deprivation of liberty post-*Cheshire West*.[[46]](#footnote-47) The key question to ask in such cases is: *If* they asked to leave, would they be allowed to do so?[[47]](#footnote-48)

The *Austin* applicants were certainly deprived of their liberty in “common parlance”.[[48]](#footnote-49) As the UKHL put it, however, it was “not enough that what was done could be said in general or colloquial terms to have amounted to a deprivation of liberty”.[[49]](#footnote-50) But applying the *Cheshire West* test, the *Austin* applicants were evidently not free to leave and were under the constant supervision and control of the police while contained. The dissentients in *Cheshire West* worried that the majority’s definition went too far,[[50]](#footnote-51) but we should be more concerned that the judgment in *Austin* did not go far enough and is explicitly not in line with everyday language.

Applicants in cases such as *Cheshire West* or *JJ* or *Guzzardi* – all of whom had been deprived of their liberty in law – might be unlikely, at first sight, to be described as having their liberty deprived in the ordinary meaning of the expression. But this apparent problem can be resolved by departing with the fixation on the so-called paradigm case, which, as will by now be clear, is not reflective of the essence of article 5. Contrary to what the Court said, for example, in *JJ*, “ordinary parlance” does not only suggest that a deprivation of liberty takes place in a locked cell.[[51]](#footnote-52) In everyday parlance, deprivations of liberty could take place in, for example, an unlocked room (e.g. an armed guard stands at the door), or in the open air (e.g. a physical barrier is erected around a person). In all of these scenarios, the common thread is the *Cheshire West* test – a deprivation of liberty has occurred if a person is under continuous supervision and control and not free to leave. That test should therefore be our starting point for establishing whether a deprivation of liberty has occurred. Its benefit is that it does, despite the dissentients’ doubts, accord with the everyday language notion of a deprivation of liberty. Some questions remain which we need to resolve, however. In particular, how long does a deprivation of liberty have to be to be “continuous”? The test established by the ECtHR for non-paradigm deprivations of liberty provides some assistance.

## The four-part ECtHR test

The ECtHR has devised a four-part test to determine whether a non-paradigm detention constitutes a deprivation of liberty: the duration of the measure; its effects; the type (or nature) of the measure; and the manner of its implementation (or execution). The first mention of the test appears to be in *Engel*, and it was confirmed in *Guzzardi*.[[52]](#footnote-53) Although the test has been used routinely for over 40 years, there is little discussion in the case law as to the meanings of each of its parts, certain of which are unclear, and it could be applied more systematically.

### Duration

The fact that duration is only one component of the test tells us that it alone is not determinative. A person may be detained for a long time and not be deprived of her liberty, whereas a very short detention may constitute a deprivation of liberty. That said, the longer a detention lasts, the stronger the case for finding that a deprivation has taken place; a shorter period will require more proof in the other elements of the test. The *Austin* applicants were contained for over seven hours. That alone is not enough to constitute a deprivation of liberty, although, as the ECtHR pointed out, it is indicative of one.[[53]](#footnote-54) At the other end of the spectrum, the applicants in *Gillan* were only held for a maximum of 30 minutes, yet the ECtHR strongly suggested that a deprivation of liberty had occurred (despite not ruling definitively on the issue).[[54]](#footnote-55) The coercive nature of the police’s stop and search (which required no reasonable suspicion) was central to that suggestion.[[55]](#footnote-56) Although the *Gillan* applicants were not formally arrested, their treatment was sufficiently similar to arrest that the short period likely constituted a deprivation of liberty.[[56]](#footnote-57) But not all measures of such short duration will be deprivations of liberty. Brief stops with a less coercive element (sometimes described as “transitory detention[s]”[[57]](#footnote-58)) are mere restrictions of (or interferences with) liberty and not deprivations of liberty according to the four-part test, as we shall see later.

Setting a firm time below which a deprivation could never occur or above which a deprivation will always occur is impossible given the holistic nature of the four-part test. The UKHL in *Austin* therefore erred in holding that there could be “no question” of there being a deprivation if the appellants had only been held for 20 minutes.[[58]](#footnote-59) That conclusion follows neither from the ECtHR test, nor from the UKHL’s own reasoning. If the lengthy deprivation in *Austin* was lawful because it was not arbitrary (which, as we have already seen, is based on flawed reasoning), then an arbitrary detention of any “not negligible”[[59]](#footnote-60) length (even 20 minutes) would have been a deprivation of liberty.

### Effects

The “effect” part of the test was also easily satisfied in *Austin*.[[60]](#footnote-61) As the first instance judge noted, there had been a “serious interference with human dignity”.[[61]](#footnote-62) The conditions were particularly uncomfortable, including an absence of toilets, water, food and shelter (when it was cold and raining). But the *Austin* courts erred in comparing the effects on the applicants to various hypotheticals of lesser “effect”, thus undermining the actual conditions endured. At first instance, for example, Tugendhat J. compared the claimants’ situation to a flight cancellation at an airport.[[62]](#footnote-63) Other comparisons drawn included the detention of rival fans at football matches to prevent violence, or of motorists when there has been a road traffic accident.[[63]](#footnote-64) As others including David Mead have pointed out, these hypotheticals, particularly the airport and motorway examples, are not appropriate, for various reasons. First and most problematically, the people in the airport and motorway situations are unable to proceed *because of* the delay or the crash respectively, not directly *because of* police action as the *Austin* applicants were.[[64]](#footnote-65) Indeed they are not even under continuous supervision and control and they are free to leave if they choose (although admittedly leaving may not be a practical option, especially for the people in cars who could only proceed on foot).[[65]](#footnote-66) Secondly, air passengers and motorists are not stigmatised in the same way the *Austin* applicants were. Non-protestor, Geoffrey Saxby, said that he found the police’s loudhailer message that the crowd was being detained to prevent a breach of the peace and property damage to be “insulting in the extreme”.[[66]](#footnote-67) Thirdly, the people in cars and in the airport would be much more comfortable than the *Austin* applicants. One would also hope that none of the hypothetical scenarios would go on for as long as seven hours such that the conditions would become as unsanitary and uncomfortable as those in *Austin*. Fourthly, those contained in police cordons may be questioned, searched and photographed as they leave, which is very different to the treatment in the motorway or airport situations.[[67]](#footnote-68) Fifthly and finally, neither air passengers, nor motorists, nor football fans gather to exercise their freedom of expression.[[68]](#footnote-69) More account should be taken of other potential Convention rights which are implicated, as will be argued below. Given all of those differences, the people in the hypothetical scenarios are far less likely to have been deprived of their liberty than the *Austin* applicants. In *Austin ECtHR* it is noted that “commonly occurring” scenarios such as the motorway or football examples cannot be considered “‘deprivations of liberty’ within the meaning of art.5(1)”.[[69]](#footnote-70) But the Court failed to consider that the facts of *Austin* were neither comparable with those situations nor “commonly occurring”.

Lord Neuberger claimed that any “sensible person” would reasonably expect to be confined in a situation such as *Austin*.[[70]](#footnote-71) That is perhaps unlikely. To be held for such a length of time in unpleasant conditions, branded a danger to the Queen’s peace, and to be confined with some of those who were being violent (albeit to be protected from other violence outside the cordon) does not sound like something most people would agree to. Although the *Austin* courts recognised that the effect of the containment was suggestive of a deprivation of liberty, they then sought to undermine that effect, seemingly worried that if they ruled this instance of containment to be a deprivation of liberty then all of their hypotheticals would also be deprivations. But this makes insufficient use of the four-part test which is designed to exclude de minimis cases as we have already seen in terms of *duration* and to which we may now add cases which are de minimis in terms of *effect*.

Furthermore, the “effect” part of the four-part test must be applied carefully so as not to set different standards of liberty between different people. The courts have not always shown such care. When courts discuss the particular effects on a person they create the possibility that certain other people would not be deprived of their liberty if the “effects” were not great enough. For example, in *Austin*, Lois Austin is described as “an anguished mother”, unable to collect her daughter from childcare.[[71]](#footnote-72) Tugendhat J. also noted that the absence of toilets “bore particularly hard on some of the women” in the crowd.[[72]](#footnote-73) In *ZH* we are told that the 16-year-old respondent was particularly harmed by being physically restrained by five to seven police officers and placed in handcuffs and leg restraints in the back of a police van for a total of 40 minutes because of his autism and learning disability.[[73]](#footnote-74) Such discussion makes it sound like mothers, women or disabled people are more easily deprived of their liberty than non-parents, men or non-disabled people. But, as we saw earlier, the concept of liberty is the same for everyone.

Personal characteristics are only of relevance in deciding whether a deprivation of liberty was *justified* (for example, because of a need to protect that person, or to protect others from her), not whether a deprivation occurred in the first place. Personal characteristics may also make a measure arbitrary. For example, in *Litwa*, the fact that the applicant was almost blind was relevant in deciding that his detention in a sobering up centre was disproportionate given the lack of danger he posed to the public.[[74]](#footnote-75) An otherwise lawful stop and search is unlawful if it is motivated only by racism, but its unlawfulness is because of the arbitrariness, not because of the personal characteristics of the applicant per se. Thus Guzzardi’s status as a Mafioso could not be taken into account in determining whether article 5 had been breached.[[75]](#footnote-76) The fact that there was a good reason to monitor Guzzardi meant that the measures were not, for that reason, arbitrary as they would have been if a person of good character had been so treated. But, as we have seen, non-arbitrariness cannot render what is otherwise unlawful lawful (whereas arbitrariness can render the otherwise lawful unlawful).

Courts should therefore be careful, when discussing the particular hardships a person encountered, to clarify that the finding of whether or not she was deprived of her liberty is not conditional on her personal characteristics. Such care is needed because just as some features may make it easier to find that a person has been deprived of her liberty, others will make it harder. For example, if an agoraphobic is subject to control order-type measures with little impact, she is just as deprived of her liberty as someone with a hectic social calendar. Liberty is objective,[[76]](#footnote-77) therefore the “effects” part of the test must be construed objectively. Different conceptions of liberty for different people threatens the very heart of the Convention – the rule of law.

We must also be careful about arguments based on people having accepted the risk of being in a certain situation.[[77]](#footnote-78) By this logic, a distinction could be made between the protestors and non-protestors in *Austin*, perhaps finding that Saxby (a non-protestor) was deprived of his liberty while Austin (a peaceful protestor) was not. It has been said that it is “obvious” that those detained did not consent to their treatment, but perhaps a brief defence is necessary.[[78]](#footnote-79) Protestors may anticipate being contained by police whereas commuters, shoppers etc., presumably do not. Regardless, should containment occur, both groups are entitled to expect that they will not, for example, be handled forcefully or that their plans will not be disrupted for too long. The duration and conditions of the *Austin* containment were more than either a protestor or a bystander should be expected to bear. It is thus pleasing that the ECtHR found that the difference in the applicants’ circumstances was irrelevant as to whether or not they had been deprived of their liberty.[[79]](#footnote-80) We should avoid focussing on acceptance of risk so as not to create liberty hierarchies and instead concentrate on what an ordinary person may be *entitled to* *expect* in a given scenario.[[80]](#footnote-81)

### Type of measure and manner of implementation

In *Austin*, the UKHL emphasised the purpose of the containment. The police’s decision was lawful because it had been taken in good faith, was proportionate to prevent serious disorder and was enforced for no longer than reasonably necessary.[[81]](#footnote-82) The ECtHR, on the other hand, concluded that purpose was irrelevant, but undermined that conclusion by interpreting the “type” and “manner of implementation” parts of the four-part test to include “the specific context and circumstances”.[[82]](#footnote-83) It was therefore held that because there was no alternative to avoid a real risk of serious injury or damage, and because the measures were kept to a minimum, there was no deprivation of liberty, despite the duration and effects of the measure.[[83]](#footnote-84) The applicants’ treatment was a mere *interference with*, or *restriction of*, their liberty rather than a *deprivation* of their liberty. The contextual argument, however, gives insufficient weight to the applicants’ article 10 and 11 rights. If context worked to the police’s advantage, it ought to have been taken into account in the applicants’ favour too.[[84]](#footnote-85) Indeed in the breach of the peace case of *Laporte*, Lord Brown noted that the protest scenario made it all the more important that the police should take all possible steps to “advance rather than thwart”, the appellants’ rights.[[85]](#footnote-86)

The UKSC was quite clear in *Cheshire West* that the benevolent purpose of the deprivation was irrelevant. Indeed, the Court was able to cite *Austin ECtHR* as authority.[[86]](#footnote-87) As the UKSC held, benevolence of purpose can potentially *justify* a deprivation of liberty, but it does not prevent a deprivation of liberty from occurring in the first place.[[87]](#footnote-88) We cannot say that purpose is irrelevant because, without a good purpose, an otherwise lawful measure will be arbitrary and thus unlawful. But good motivations cannot breathe life into otherwise unlawful conduct. Purpose is therefore only relevant insofar as an *absence* of good purpose will render an action unlawful, but the *presence* of good purpose does not necessarily mean that an action is lawful.

As Feldman has observed, “[f]undamental rights and pragmatism often … pull in opposite directions”.[[88]](#footnote-89) *Austin* was explicitly decided on the basis of pragmatism,[[89]](#footnote-90) whereas *Cheshire West* threw the relevant authorities into chaos, with a tenfold increase in the number of patients in need of assessment.[[90]](#footnote-91) Although courts may of course be mindful of practicalities, most problems have a solution – the Law Commission of England and Wales, for example, published a proposal to deal with impact of *Cheshire West*,[[91]](#footnote-92) which the Government has broadly accepted.[[92]](#footnote-93) The *Cheshire West* Court was keen to introduce a clear test because those practising in the area “need, and are entitled to, as much in the way of clear guidance as it is possible for the courts to give”[[93]](#footnote-94) – the same can be said about the need to provide similar clarity for the police.

Cases dealing with police operational discretion admittedly pose a dilemma. Unlike *Cheshire West*, operational policing involves making decisions quickly and it is necessary to “avoid the wisdom of hindsight”.[[94]](#footnote-95) Difficult decisions must be made in the heat of the moment and the court must consider only whether the *police’s* decision was reasonable and not substitute its own verdict of what *it* thinks would have been reasonable.[[95]](#footnote-96) But even if we accept that the police genuinely had no alternative, that alone does not make their actions article 5 compliant. Instead of providing a judgment to clarify how the police might act in subsequent scenarios, the *Austin* courts showed “the worst strains of excessive judicial deference”.[[96]](#footnote-97) The police tread a fine line and make difficult decisions in emergency situations. If they stray onto the wrong side of that line, the court may express sympathy for the decision reached,[[97]](#footnote-98) but should exercise a checking function to encourage more careful deliberation in future. Making a decision in the heat of the moment may explain why a course of action was taken, but it does not necessarily justify it. The courts are right to give “a high degree of respect” to police decisions,[[98]](#footnote-99) but they are not sacrosanct.[[99]](#footnote-100)

We may instinctively want the police to err on the side of caution to avoid the potential harmful outcome of scenarios like *Austin*. But although it is true that “[f]or the police to do nothing can be as dangerous as to do the wrong thing”,[[100]](#footnote-101) the opposite may also hold true: sometimes the police doing the wrong thing may be as dangerous as doing nothing. As Tugendhat J. admitted, when the police use “strong tactics” “[o]therwise peaceful people can become annoyed”.[[101]](#footnote-102) In *Austin*, the crowd was not wholly peaceful – some objects had been thrown[[102]](#footnote-103) – but the worst of the violence started *after* the cordon had been put in place. The police have accepted in other cases that containment “can actually escalate what is already going on”.[[103]](#footnote-104) Psychological research too has shown that when the police treat crowds as homogenous, non-violent members can “reconceptulize themselves” as violent, which “empower[s] crowd members to resist the police” thus “setting up a cycle of tension and escalating conflict”.[[104]](#footnote-105) Innocent bystanders should be “regarded as potential allies of the police”.[[105]](#footnote-106) That potential benefit is squandered if they are treated harshly and their goodwill is lost. Best guidance for crowd control suggests that the police must do more to differentiate between (a) protestors and non-protestors, and (b) peaceful and non-peaceful protestors.[[106]](#footnote-107) Kettling, therefore, “must only be used exceptionally” because of the inability to make both of those distinctions and its propensity to thus “exacerbate tensions”.[[107]](#footnote-108) In sum, the type and manner of implementation of the measure in *Austin* tend to support a deprivation of liberty having taken place, rather than the courts’ conclusion to the contrary.

### Conclusions on the four-part test: Austin’s legacy

In *Austin*, the government suggested that if the police’s actions were ruled unlawful, more draconian crowd control tactics such as tear gas or rubber bullets would be needed in future.[[108]](#footnote-109) But such statements are scaremongering. Finding a deprivation of liberty in *Austin* would not have ruled kettling unlawful as a tactic, just as decisions that rule that an arrest was unlawful do not suggest that the police can no longer arrest people. They simply rule that *this* arrest, or *this* cordon was unlawful. *Austin* did not give the green light for the police to kettle all protestors in all circumstances.[[109]](#footnote-110) Given the circumstances of *Austin* (including particularly the duration and conditions of the confinement) it would have been better to hold that *this* cordon was unlawful, but that other instances could be envisaged where it would be lawful according to the four-part test if, for example, it were for a shorter period of time.

Instead, *Austin* has been linked to the police taking a more robust approach at the London G20 protests in 2009 with tragic consequences,[[110]](#footnote-111) and has been “perceived by the police to sanction a much wider use” of kettling.[[111]](#footnote-112) In *Austin*, even the police admitted that kettling was “fairly draconian” and so should “always be as quick and transitory as possible”.[[112]](#footnote-113) But subsequent cases have found kettling to be lawful in even less compelling circumstances than in *Austin*. For example, in *Moos* (2012), a peaceful protest was kettled so that a violent protest, which had earlier been kettled, could be released without risking the violence re-erupting. That case went beyond *Austin* in sanctioning kettling even where the imminence of the breach of the peace was questionable. The Court should have held, as it did in the case of *ZH* (2013), that the police “behaved as if they were faced with an emergency when there was no emergency”.[[113]](#footnote-114) If the courts in *Austin* had applied the four-part test more methodically, they might have recognised that police operational discretion would only have been structured for the better, not to choke off certain options.

The *Austin* courts have been accused of reasoning backwards from the lack of relevant justification in article 5(1).[[114]](#footnote-115) It would be possible to add a new “public interest” or “security” exception to article 5(1) to deal with such scenarios,[[115]](#footnote-116) despite a clear intention to the contrary in the travaux préparatoires.[[116]](#footnote-117) But such a drastic measure is neither necessary nor desirable. Although the police have a duty to keep the peace, the State also has a positive obligation to protect liberty.[[117]](#footnote-118) A better (and more practical) solution can be found in proper application of the four-part test. If the courts had applied that test properly, they could have found that a deprivation of liberty had occurred in *Austin*, without necessarily rendering future measures deprivations too.

## Deprivations and restrictions; liberty and movement

In order to define “deprivation of liberty”, we must consider not only what “liberty” means, but also what it means to be “deprived” of one’s liberty, as opposed to liberty being merely restricted. Article 5 must also be carefully distinguished from freedom of movement as guaranteed by article 2 of protocol 4 (A2P4).[[118]](#footnote-119) The ECtHR has held that the difference between the two provisions is one of “degree or intensity” and not “nature or substance”.[[119]](#footnote-120) But rather than being viewed as two points on a spectrum (similar to figure 1 below), article 5 and A2P4 are better seen as overlapping but independent rights (as in figure 2 below).

A2P4 is relevant in a banishment case like *Guzzardi*,[[120]](#footnote-121) but is of questionable relevance in cases such as *Austin*. The difference between article 5 and A2P4 is the difference between a *deprivation of liberty* and a *restriction of movement*. A distinction may also be drawn between a *deprivation* of liberty and a *restriction* of liberty. That is to say that an action, when judged against the four-part test above, may not constitute a *deprivation* of liberty (because, for example, it is of a very short duration and has minimal effect), but may well be a *restriction* because a person was not *completely* at liberty during that time. Indeed, when discussing the difference between article 5 and A2P4, the courts sometimes use such language. For example, in *Austin*, the ECtHR said that the “difference between *deprivation of* and *restriction upon* liberty is one of degree or intensity, and not of nature or substance”.[[121]](#footnote-122) That difference reflects the four-part test establishing deprivations of liberty under article 5, which is different from article 5’s relationship with restrictions of *movement* under A2P4. But the courts are not always careful to articulate clearly the two different distinctions which can be illustrated as follows:

**Restriction of/interference with liberty At liberty**

(Lawful)

**Deprivation of liberty**

(Unlawful, subject to limited exceptions)

**Figure 1: Article 5 Deprivation of liberty spectrum (applying the four-part ECtHR test)**

**Figure 2: Relationship between article 5 (right to liberty) and A2P4 (freedom of movement)**

The spirit of A2P4 is to allow people to move freely within and between countries and to set up a residence of their choosing, not to inquire as to whether someone can quite literally walk down a public street or move around within a cordon.[[122]](#footnote-123) The jurisprudence on A2P4 supports that fact, with cases on applicants being forced to remain in a certain city,[[123]](#footnote-124) or country,[[124]](#footnote-125) or having their passports seized.[[125]](#footnote-126) By contrast, cases which have been held not to engage A2P4 have included security controls at an airport.[[126]](#footnote-127) A brief stop of that nature would likely not infringe article 5 either, but such cases should be decided on the deprivation of liberty spectrum.[[127]](#footnote-128) Because the right to liberty is not a right to simply move around as one wishes, to be stopped momentarily to have our bags searched is not prima facie a deprivation of liberty. One is under supervision and control and not free to leave, but for a “negligible” time.[[128]](#footnote-129) We are merely “kept waiting” – our liberty is restricted, but we are not deprived of it.[[129]](#footnote-130) If, however, that stop is arbitrary (for example, motivated by racism, or it continues for longer than necessary),[[130]](#footnote-131) it may become a deprivation of liberty. But assuming it is not arbitrary, is brief and the effects on the ordinary person would be minimal, it is a mere restriction of liberty not engaging article 5. The four-part test allows us to see where on the article 5 deprivation of liberty spectrum a measure falls.[[131]](#footnote-132) That conclusion accords with the ordinary language test – we would not ordinarily think that we have been deprived of our liberty if we are kept waiting for five minutes, or even an hour in a busy airport. But we might say we had been so deprived if we are, for example, told to come to a separate room for a more thorough search and unable to leave. In *Gahramanov*,[[132]](#footnote-133) the ECtHR declared inadmissible a complaint regarding several hours’ detention in an airport.[[133]](#footnote-134) In the Court’s view, there was no deprivation of liberty, despite the length of time and the fact that he was not free to leave the examination room because the search took place for no longer than was necessary. Again, the Court misapplied the arbitrariness test. Allowing non-arbitrariness to make lawful all potential deprivations of liberty risks hollowing out article 5’s protections since the State can always attempt to argue that the deprivation lasted no longer than necessary. Applying the four-part test, *Gahmramanov* is a borderline case. We may expect to have our bag searched and to be delayed for a short time, but to be held up for several hours due to an administrative mistake (his name wrongly appeared on a list of people to be stopped) is less likely to be something the average person would be entitled to expect. By contrast, five hours’ detention in an airport room with an armed guard on the door constituted a breach of article 5 in *Kasparov*. *Gahramanov* was distinguished because the detention was longer than necessary and was “not the normal situation that anyone travelling through an airport can be expected to endure”.[[134]](#footnote-135)

Article 5 and A2P4, although overlapping, are different in substance and not merely different points of the same spectrum. Just as article 5 should be given a meaning which accords with everyday language, so too must A2P4. “Freedom of movement” in everyday speech connotes changing one’s place of residence or travel more broadly than the mere use of public roads.[[135]](#footnote-136) Someone deprived of her liberty may also lack freedom of movement, just as various other Convention rights may be affected, but the relationship is not as the ECtHR has sometimes suggested. If the Court finds a breach of article 5, it considers it unnecessary to reach a conclusion on A2P4.[[136]](#footnote-137) Because, however, the rights are overlapping rather than interchangeable, there is no reason that a breach of article 5 could not also give rise to a separate breach of A2P4, just as a breach of article 5 can lead to a breach of other Convention rights.[[137]](#footnote-138) A breach of article 5 can concern a distinct part of the applicant’s case (e.g. detention in an airport) from an A2P4 breach (e.g. the prevention of onward travel). It would equally be possible for a person to suffer a breach of A2P4 without a breach of article 5 (if they are not otherwise under continuous supervision and control e.g. *Riener*), or a breach of article 5 without a breach of A2P4 (e.g. *ZH*). A2P4 should be considered in addition to, not instead of, article 5 not only because of its different nature, but also because of the more limited protection it affords, given its qualified nature.[[138]](#footnote-139)

## A merging of tests

The UKHL in *Austin*, finding no direct Strasbourg authority on crowd control,[[139]](#footnote-140) looked to cases on medical detention.[[140]](#footnote-141) It logically follows that *Cheshire West* could therefore be referred to, in addition to *Austin*, in future kettling cases. Given the assistance that the ECtHR found from the domestic courts in *Austin*, explicitly referring to the importance of subsidiarity,[[141]](#footnote-142) perhaps *Cheshire West* could have influence at Strasbourg too, particularly because of the heavy reliance on Strasbourg authority in that case.[[142]](#footnote-143) Thus we can see the symbiotic relationship between the courts – the domestic courts learn from Strasbourg, but Strasbourg too learns from the domestic courts.

With that in mind, the *Cheshire West* and ECtHR tests can be combined and elaborated on to clarify what constitutes a non-paradigm deprivation of liberty as follows:

1. *What was the type of measure?* Logically, consideration of the type of measure imposed should be the first question the Court looks at, although at present it does not consider the parts of the test in any particular order. Furthermore, the Court has never explained what it is looking for when applying this stage of the test. Incorporation of the *Cheshire West* test would clarify matters: was the applicant under continuous supervision and control and not free to leave? If not, there is no deprivation of liberty. If yes, a presumption arises that a deprivation has occurred, subject to the application of parts (2)–(4) of the test. Continuity can be established even if, as in *JJ* and *Guzzardi*, there are periods of the day when a person is free to go about her business, because there is always an overriding supervision (the phrase “almost constant” supervision is inaccurate and should be avoided.)[[143]](#footnote-144) Reframing the test in this manner would discourage drawing comparisons with the so-called paradigm case of deprivation in a cell.
2. *What was the manner of implementation of the measure?* The second part of the test is, at present, in danger of being indistinct from either part (1)[[144]](#footnote-145) or part (4) of the test.[[145]](#footnote-146) One solution would therefore be to get rid of it entirely. We need not be wedded to the four-part test, although it is tempting to see if it can be salvaged in order to make a realistic suggestion to improve the Court’s jurisprudence that does not depart radically from current practice. In order to maintain the four-part test, therefore, but to allow “manner of implementation” to play a distinctive role, it could focus on arbitrariness. The Court could therefore ask whether: the measure was implemented in bad faith or through deceit; there was a lack of close connection to the relevant purpose under article 5(1); the deprivation took place in an inappropriate place or under inappropriate conditions; or the deprivation continued for longer than necessary. If the answer to any of those questions is “yes” the measure will constitute a deprivation of liberty. If, however, all those questions are answered in the negative, parts (3) and (4) of the test must be applied – non-arbitrariness does not rebut the part (1) presumption.
3. *What was the duration of the measure?* As well as the time that passed, was the measure a one-off (as in *Austin*) or is it ongoing (as in *Cheshire West*)? As we have seen, there is no set length of time above which a deprivation will always take place and no set length of time below which a deprivation will never take place, unless it is “negligible”.[[146]](#footnote-147) Duration cannot be considered in isolation from part (4) of the test. A short and/or one-off period is not necessarily indicative of no deprivation,[[147]](#footnote-148) but the longer the period the harder it will be to rebut the presumption in (1).
4. *What was the effect of the measure?* As we have seen, this test must be applied objectively. The Court should therefore ask what the measure was like in terms of what the ordinary person is entitled to expect in terms, for example, of shelter, comfort, coercion, impact on other rights such as expression, assembly or association, education, respect for private and family life and so on. Minimal effect is not necessarily indicative of no deprivation, especially if the duration was long, but the greater the effect the harder it will be to displace the presumption in (1).

The test set out here can apply to all non-paradigm measures impacting on liberty. For example, control orders (now Terrorism Prevention and Investigation Measures) or banishment;[[148]](#footnote-149) the various categories covered by article 5(1)(e); and those awaiting deportation or extradition decisions under article 5(1)(f) who are not free to leave if the choice to go back to their country of origin is not a real one (e.g. because they cannot do so safely).[[149]](#footnote-150) The four-part test must be applied in the order given, but also looked at holistically. Parts (3) and (4) of the test especially must be considered together. The *Cheshire West* test provides a starting point which should be taken as presumptive, not merely indicative, of a deprivation of liberty. That alone will usually suffice and the “duration” and “effects” tests should be seen as introducing a de minimis threshold for stops which are mere restrictions of liberty, for example, a routine identity check or bag search. The *Cheshire West* test thus provides a logical starting point – the “continuous” part of that test connotes that a merely transitory detention will not be a deprivation of liberty, just as Strasbourg jurisprudence confirms that a deprivation of liberty must be for a “not negligible” length of time.[[150]](#footnote-151) For example, the test could be applied in a kettling scenario as follows:

*1)* *Were the protestors under continuous supervision and control and not free to leave the cordon?* One might imagine that the answer will be “yes”, but it is possible that, for example, a protestor was indeed free to leave and chose not to. The key test is whether, if a person asked to leave, she would be allowed to do so.

*2)* *Was the kettling arbitrary?* Again, we can imagine that in most scenarios, the answer will be “no”; that the police acted in good faith to stop a violent outbreak. As noted above, lack of arbitrariness does not render the measure lawful. It would be possible, however, that the measure went on for longer than was necessary, for example, or was not even necessary in the first place. Indeed *Austin ECtHR* is clear that had the cordon remained in place for longer than was necessary, the case “might” have been brought within article 5.[[151]](#footnote-152) The Court considers that this would have changed the “type of the measure”. Surely the more logical placement of such a consideration is the “manner” of the implementation, the “type” of measure remaining constant. Such separation is not unduly formalistic, but rather lends structure to aim for clearer and more consistent jurisprudence.

*3)* *What was the duration of the kettling?* There will be no fixed time below which kettling would not constitute a deprivation, except that a very transitory period of time will not constitute “continuous” supervision and control. The longer the cordon continues, the easier it will be to constitute a deprivation, especially if the effects are great.

*4)* *What was the effect of the kettling?* One could imagine, for example, that a scenario like *Austin* might have greater “effect” on a person than if containment took place, for example, in a shopping centre where the participants were at least not exposed to the elements. This part of the test cannot, however, be decided in isolation from the duration. We know from cases such as *Guzzardi* that deprivations of liberty can take place in comfortable conditions. Although that case was about an ongoing, rather than one-off, containment, even a one-off containment may have sufficient “effect” if it is more than the average person should be expected to endure.

The Joint Committee on Human Rights (JCHR) has recently recommended that Parliament should provide a statutory definition of “deprivation of liberty” in the case of those who lack mental capacity.[[152]](#footnote-153) Such definition is thought to be required because of concerns that the *Cheshire West* test is over-inclusive, echoing the sentiments of the dissentients in that case. The task of legislative drafting would not be simple, and the JCHR does not provide much of a steer. Application of the revised four-part test could provide some nuance without the need for parliamentary intervention:

*1) Is the individual under continuous supervision and control and not free to leave?* The answer will be “yes” even where excursions from the home occur if they are subject to controls such as asking permission and/or being accompanied. But if the individual is free to leave at any time, of her own free will and without supervision or other restrictions, she is not deprived of her liberty. Furthermore, there is the possibility of finding that someone is not deprived of their liberty on the basis that their lack of freedom to leave is because of their condition, not because of their continuous supervision and control.[[153]](#footnote-154) The dangers of limiting article 5’s protections are, however, discussed below.

*2) Is the measure arbitrary?* Here we can consider, for example, if the individual’s condition is such that the measure may become unnecessary, but also whether she is subjected to the minimum supervision required – anything more will be arbitrary. Once again, however, absence of arbitrariness does not make a measure lawful.

*3) What is the duration of the measure?* In most cases, the duration will be long-term and in many cases for life. But this alone does not constitute a deprivation of liberty if she is not under continuous supervision and control and if she is free to leave.

*4) What is the effect on the individual?* The effect on the individual may well be minimal. She may be very happy in her living conditions and may have a large amount of freedom. A deprivation of liberty can still be established with minimal effect if the other conditions are satisfied. Many of the objections in the JCHR’s report from parents or caregivers of affected individuals objected to the language of “deprivation” or “control” or “gilded cages”, suggesting that such terms are inappropriate when individuals are not physically restrained, placed in locked rooms or medicated.[[154]](#footnote-155) Indeed one parent of arential treatment.part of the test must be applied objectively to avoid creating differential treatment.of a disabled person noted the “irony” that the supervision constituting a deprivation of liberty in fact gave her daughter more freedom to live a full life.[[155]](#footnote-156) Such sentiments evoke sympathy.[[156]](#footnote-157) It may be that article 5’s protections can be viewed as paternalistic in not considering disabled peoples’ visible contentment, short of consent. But the autonomous definition, and wide scope, of article 5’s protections do not require such features such as restraint, locked doors or medication to be present. The balance between “safeguarding and disproportionate intrusion” is certainly important.[[157]](#footnote-158) But, it is submitted, it is better to be over- rather than under-inclusive. Over-inclusion is preferable not only because of such individuals’ “extreme vulnerability” by virtue of their conditions, but because of their vulnerability in entrusting the state with their care.[[158]](#footnote-159) Better that individuals in loving family environments have to endure terminology which may be considered distasteful than individuals in more institutional settings lose valuable protections.[[159]](#footnote-160) As Lady Hale noted in *Cheshire West*, we should not consider the deprivation of liberty label as “stigmatising” of individuals or their carers, but quite the contrary – as recognition of disabled people’s “equal dignity and status as human beings like the rest of us”.[[160]](#footnote-161) Although the effect on the disabled person may be negligible, the effect on a non-disabled person would be much greater – few of us would tolerate having to ask permission or being accompanied on every trip outside our home. Although the courts must assess the “concrete situation” of a person,[[161]](#footnote-162) as has been argued above, this part of the test must be applied objectively to avoid giving differential protection.

Reasonable judges may differ as to their conclusions at each stage of the four-part test. But application of the test in the way set out here would go a long way to improving the consistency and transparency of article 5 judgments, whilst retaining enough flexibility for the test to be applied to very different scenarios in very different Member States.

## Conclusions

It is now a decade since Feldman lamented that the test for what constitutes a deprivation of liberty under article 5 needed to be “clearer, more rational and less relativistic”.[[162]](#footnote-163) Since then, the situation for non-paradigm cases has worsened rather than improved, with the conflicting tests used in *Austin* and *Cheshire West*. The analysis here has demonstrated that the *Cheshire West* test accords better with the essence of article 5, the everyday notion of what it means to be deprived of one’s liberty and the ethos of the Convention as a whole. By concentrating too much on good purpose and pragmatism, the *Austin* courts went against all of those more important principles. Police operational discretion is important. But so too is the judicial role in monitoring the police and other authorities, rather than emboldening them. The message *Austin* sent is especially worrying given that certain Council of Europe Member States are known to have police forces which deal particularly robustly with protests.[[163]](#footnote-164) Clarification of what constitutes a deprivation of liberty is, however, needed beyond the crowd control context and the test proposed here can apply to non-paradigm cases more generally.

The relationship between the domestic courts and the ECtHR works in both directions. The UKHL led the ECtHR *in Austin*. Strasbourg did not seem keen to strain a frosty relationship further by meddling in operational policing. Relations are certainly no better today. But Strasbourg could now make use of the UKSC’s distillation of ECtHR jurisprudence whilst adhering more to the spirit of article 5 by incorporating the *Cheshire West* test into their four-part test and by applying it to deprivations of liberty of different natures. The four-part test, applied more methodically and with more elaboration than at present, could clarify, rationalise and harmonise this messy area of law.

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2. As explained in *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45; [2008] 1 A.C. 385 at [36]–[46]. [↑](#footnote-ref-3)
3. *Austin and another v Commissioner of Police of the Metropolis* [2009] UKHL 5; [2009] 1 A.C. 564; *Austin v United Kingdom* (2012) 55 E.H.R.R. 14 (*Austin UKHL* and *Austin ECtHR* respectively). [↑](#footnote-ref-4)
4. *P v Cheshire West and Chester Council; P and Q v Surrey County Council* [2014] UKSC 19; [2014] A.C. 896. [↑](#footnote-ref-5)
5. *Cheshire West* at [50]. [↑](#footnote-ref-6)
6. See also fn.162. [↑](#footnote-ref-7)
7. See most recently *R. (on the application of Jollah) v Secretary of State for the Home Department* [2018] EWCA Civ 1260. [↑](#footnote-ref-8)
8. On the meaning of “security of person” see R. Powell, “The Right to Security of Person in European Court of Human Rights Jurisprudence” (2007) 6 E.H.R.R. 649. On art.5 generally see B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th edn (Oxford: Oxford University Press, 2017), ch.11; D.J. Harris, M. O’Boyle, E.P. Bates and C.M. Buckley, *Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights*, 4th edn (Oxford: Oxford University Press, 2018), ch.8. [↑](#footnote-ref-9)
9. Magna Carta 1215, cl.39. [↑](#footnote-ref-10)
10. M. Macovei, *The Right to Liberty and Security of the Person: A Guide to the Implementation of Article 5 of the European Convention on Human Rights* (Strasbourg: Council of Europe, 2004), p.6. [↑](#footnote-ref-11)
11. Although breach of the peace is not a crime in English law, it is categorised as such for the ECHR’s purposes: *Steel v United Kingdom* (1999) 28 E.H.R.R. 603. [↑](#footnote-ref-12)
12. Cf. *Austin and Saxby v Commissioner of Police of the Metropolis* [2005] EWHC 480; [2005] H.R.L.R. 20 (*Austin EWHC*). [↑](#footnote-ref-13)
13. *Austin ECtHR* at [28]. [↑](#footnote-ref-14)
14. Lord Wilson, “Our Human Rights: A Joint Effort?” (The Howard J. Trienens Lecture) (2018), p.8. [↑](#footnote-ref-15)
15. *A v United Kingdom* (2009) 49 E.H.R.R. 29 at [171]. [↑](#footnote-ref-16)
16. *Al-Jedda v United Kingdom* (2011) 53 E.H.R.R. 23 at [99]. [↑](#footnote-ref-17)
17. *Austin ECtHR* at [53]. [↑](#footnote-ref-18)
18. *Saadi v United Kingdom* (2008) 47 E.H.R.R. 17 at [68]. [↑](#footnote-ref-19)
19. *Saadi* at [74]. [↑](#footnote-ref-20)
20. D. Feldman, “Containment, Deprivation of Liberty and Breach of the Peace” (2009) 68 C.L.J. 243, 243–244. [↑](#footnote-ref-21)
21. M. Hamilton, “‘Kettling’ and Article 5(1) ECHR: *Austin and others v UK* (2012)” ECHR Blog (2012). [↑](#footnote-ref-22)
22. Hamilton, “‘Kettling’ and Article 5(1) ECHR”. [↑](#footnote-ref-23)
23. *Austin UKHL* at [18]. [↑](#footnote-ref-24)
24. R. Stone, “Deprivation of Liberty: The Scope of Article 5 of the European Convention on Human Rights” (2012) 1 E.H.R.L.R. 46, 52, 56; *Storck v Germany* (2006) 43 E.H.R.R. 6 at [74]. [↑](#footnote-ref-25)
25. *Guzzardi v Italy* (1981) 3 E.H.R.R. 333. [↑](#footnote-ref-26)
26. *Engel and others v Netherlands* (1979–80) 1 E.H.R.R. 647 at [58]. See also *Guzzardi* at [92]; *JJ* at [36], [57]. [↑](#footnote-ref-27)
27. *Cheshire West* at [46]. [↑](#footnote-ref-28)
28. J.S. Mill, *On Liberty* (Harmondsworth: Penguin, 1984), p.71. [↑](#footnote-ref-29)
29. *Cheshire West* at [14], [17]; *Guzzardi* at [49]; *JJ* at [45]. [↑](#footnote-ref-30)
30. *JJ* at [37], [45]. [↑](#footnote-ref-31)
31. *JJ* at [20]. [↑](#footnote-ref-32)
32. *Guzzardi* at [38]; *JJ* at [20]; *Cheshire West* at [14]. [↑](#footnote-ref-33)
33. For example, JJ could only attend the mosque in his local area approved by the Home Office: *JJ* at [20]. [↑](#footnote-ref-34)
34. For example, P could have outings from “Z house” whenever he chose, so long as he was accompanied by a carer: *Cheshire West* at [17]. [↑](#footnote-ref-35)
35. Mill, *On Liberty*, p.69. [↑](#footnote-ref-36)
36. *Cheshire West* at [1]. [↑](#footnote-ref-37)
37. *Cheshire West* at [46]. [↑](#footnote-ref-38)
38. *P and Q v Surrey County Council* [2011] EWCA Civ 190; [2012] Fam. 170 at [40]. [↑](#footnote-ref-39)
39. *Cheshire West* at [34]. [↑](#footnote-ref-40)
40. *Cheshire West* at [93], [99], [108]. [↑](#footnote-ref-41)
41. *JJ* at [13]; *Cheshire West* at [99]. [↑](#footnote-ref-42)
42. H. Fenwick, “Marginalising Human Rights: Breach of the Peace, ‘Kettling’, the Human Rights Act and Public Protest” [2009] P.L. 737, 749. [↑](#footnote-ref-43)
43. ECHR preamble. [↑](#footnote-ref-44)
44. *Cheshire West* at [50]. [↑](#footnote-ref-45)
45. *Austin ECtHR* at [28]. [↑](#footnote-ref-46)
46. Cf. *R. (on the application of Moos and McClure) v Commissioner of Police of the Metropolis* [2012] EWCA Civ 12 at [97]. The applicants in *Austin* had asked to leave: *Austin ECtHR* at [11]–[13]. [↑](#footnote-ref-47)
47. Admittedly a difficulty of proof occurs where an applicant has not asked to leave (if, for example, her route to a police officer is blocked by the crowd) because the police may well say that she would have been allowed to leave had she asked – certain people were permitted to leave in *Austin ECtHR* at [25]. [↑](#footnote-ref-48)
48. Fenwick, “Marginalising Human Rights” 748. [↑](#footnote-ref-49)
49. *Austin UKHL* at [18]. [↑](#footnote-ref-50)
50. The dissentients’ doubts concerned not only going “too far” in terms of ordinary language, but also going beyond clear and constant Strasbourg jurisprudence, especially since the Mental Capacity Act 2005, s.64(5) states that “deprivation of liberty” is to have the same meaning as art.5, thus giving a “more closely tied” link than under the Human Rights Act 1998, s.2(1): *Cheshire West* at [91]. [↑](#footnote-ref-51)
51. *JJ* at [12]. [↑](#footnote-ref-52)
52. *Engel* at [59]; *Guzzardi* at [92]. [↑](#footnote-ref-53)
53. *Austin ECtHR* at [64]. [↑](#footnote-ref-54)
54. *Gillan and Quinton v United Kingdom* (2010) 50 E.H.R.R. 45 at [57]. [↑](#footnote-ref-55)
55. *Gillan* at [57]. [↑](#footnote-ref-56)
56. Stone, “Deprivation of Liberty” 54. [↑](#footnote-ref-57)
57. *Austin EWHC* at [28]. [↑](#footnote-ref-58)
58. *Austin UKHL* at [24]. [↑](#footnote-ref-59)
59. *Storck* at [74]. [↑](#footnote-ref-60)
60. *Austin ECtHR* at [64]. [↑](#footnote-ref-61)
61. *Austin EWHC* at [7]. Tugendhat J. found that there had been a deprivation of liberty, albeit one which could be justified. [↑](#footnote-ref-62)
62. *Austin EWHC* at [594]. [↑](#footnote-ref-63)
63. e.g. *Austin UKHL* at [23]. [↑](#footnote-ref-64)
64. See also *R. (on the application of Ferreira) v HM Senior Coroner for Inner South London* [2017] EWCA Civ 31; [2018] Q.B. 487, where there was no deprivation of liberty because the patient could not leave the hospital *because of* her medical condition, rather than *because of* the actions of the hospital. [↑](#footnote-ref-65)
65. D. Mead, “The Right to Protest Contained by Strasbourg: An Analysis of *Austin v UK* and the Constitutional Pluralist Issues it Throws Up”, *UK Constitutional Law Association Blog* (2012); N. Oreb, “Case Comment: The Legality of ‘Kettling’ after *Austin*” (2013) 76 M.L.R. 735, 741. [↑](#footnote-ref-66)
66. *Austin EWHC* at [490]. [↑](#footnote-ref-67)
67. *Austin EWHC* at [442]. [↑](#footnote-ref-68)
68. Hamilton, “‘Kettling’ and Article 5(1) ECHR”. [↑](#footnote-ref-69)
69. *Austin ECtHR* at [59]. [↑](#footnote-ref-70)
70. *Austin UKHL* at [58]. [↑](#footnote-ref-71)
71. *Austin EWHC* at [436]. [↑](#footnote-ref-72)
72. *Austin EWHC* at [7]. [↑](#footnote-ref-73)
73. *ZH v Commissioner of Police of the Metropolis* [2013] EWCA Civ 69; [2013] 1 W.L.R. 3021 at [21]. [↑](#footnote-ref-74)
74. *Litwa v Poland* (2001) 33 E.H.R.R. 53. [↑](#footnote-ref-75)
75. Cf. *Guzzardi*, dissenting opinion of Sir Gerald Fitzmaurice at [11]. [↑](#footnote-ref-76)
76. *Cheshire West* at [76]. [↑](#footnote-ref-77)
77. G. Lennon, “The Purpose of the Right to Liberty under the ECHR, Article 5” (2012) 3 Web J.C.L.I. [↑](#footnote-ref-78)
78. Fenwick, “Marginalising Human Rights” 750. [↑](#footnote-ref-79)
79. *Austin ECtHR* at [63]. [↑](#footnote-ref-80)
80. *ZH* at [87]; *Kasparov v Russia* (2018) 66 E.H.R.R. 21 at [46]. [↑](#footnote-ref-81)
81. *Austin UKHL* at [34]. [↑](#footnote-ref-82)
82. *Austin ECtHR* at [58]–[59]. [↑](#footnote-ref-83)
83. *Austin ECtHR* at [59], [65]–[68]. [↑](#footnote-ref-84)
84. Hamilton, “‘Kettling’ and Article 5(1) ECHR”. [↑](#footnote-ref-85)
85. *R. (on the application of Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55; [2007] 2 A.C. 105 at [129]. [↑](#footnote-ref-86)
86. *Cheshire West* at [28] citing *Austin ECtHR* at [58]. [↑](#footnote-ref-87)
87. e.g. *Cheshire West* at [82]–[83]. See too the dissentients in *Austin ECtHR* at [4]. [↑](#footnote-ref-88)
88. Feldman, “Containment, Deprivation of Liberty and Breach of the Peace” 244. [↑](#footnote-ref-89)
89. *Austin UKHL* at [34]. See also *R. (on the application of Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9, [2017] A.C. 256 at [30]. [↑](#footnote-ref-90)
90. There were 13,700 Deprivation of Liberty Safeguards applications the year before *Cheshire West* (2013–14) and 137,540 the following year: Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372 (2017)) para.2.22. [↑](#footnote-ref-91)
91. Law Commission, *Mental Capacity and Deprivation of Liberty*. [↑](#footnote-ref-92)
92. “Final Government Response to the Law Commission’s Review of Deprivation of Liberty Safeguards and Mental Capacity” HCWS542 (March 14, 2018). [↑](#footnote-ref-93)
93. *Cheshire West* at [60]. [↑](#footnote-ref-94)
94. *R. (on the application* of *Castle) v Commissioner of Police of the Metropolis* [2011] EWHC 2317 (Admin), [2012] 1 All E.R. 953 at [70]. See also *Laporte* at [55], [90], [106]. [↑](#footnote-ref-95)
95. *Moos* at [68]–[76]. [↑](#footnote-ref-96)
96. Fenwick, “Marginalising Human Rights” 756. [↑](#footnote-ref-97)
97. e.g. *R. (on the application of Moos and McClure) v Commissioner of Police of the Metropolis* [2011] EWHC 957 (Admin); [2011] H.R.L.R. 24 at [57]; *ZH* at [90]. [↑](#footnote-ref-98)
98. *Austin EWHC* at [166]. [↑](#footnote-ref-99)
99. *ZH* at [90]. [↑](#footnote-ref-100)
100. *Austin EWHC* at [16]. [↑](#footnote-ref-101)
101. *Austin EWHC* at [313]. [↑](#footnote-ref-102)
102. *Austin EWHC* at [506]. [↑](#footnote-ref-103)
103. *Moos* at [95]. [↑](#footnote-ref-104)
104. C. Stott and S. Reicher, “Crowd Action as Intergroup Process: Introducing the Police Perspective” (1998) 28 *European Journal of Social Psychology* 509, 512. [↑](#footnote-ref-105)
105. *Laporte* at [83]. [↑](#footnote-ref-106)
106. Organization for Security and Co-operation in Europe, *Guidelines on Freedom of Peaceful Assembly*, 2nd edn (Warsaw: OSCE/ODIHR, 2010) (OSCE Guidelines), paras 158–159. [↑](#footnote-ref-107)
107. OSCE Guidelines, para.160. [↑](#footnote-ref-108)
108. *Austin ECtHR* at [42]. [↑](#footnote-ref-109)
109. *Austin ECtHR* at [68]. [↑](#footnote-ref-110)
110. Feldman, “Containment, Deprivation of Liberty and Breach of the Peace” 245; Fenwick, “Marginalising Human Rights” 753, 763. [↑](#footnote-ref-111)
111. D. Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Oxford: Hart Publishing, 2010), p.355. [↑](#footnote-ref-112)
112. *Austin EWHC* at [346]. [↑](#footnote-ref-113)
113. *ZH* at [90]. [↑](#footnote-ref-114)
114. Stone, “Deprivation of Liberty” 56. See especially *Austin UKHL* at [64]. [↑](#footnote-ref-115)
115. D. Feldman, “Deprivation of Liberty in Anti-terrorism Law” (2008) 67 C.L.J. 4, 8. [↑](#footnote-ref-116)
116. Council of Europe, European Commission on Human Rights, “Preparatory Work on Article 5 of the European Convention on Human Rights” (1956), pp.10, 13. [↑](#footnote-ref-117)
117. *Storck* at [102]. [↑](#footnote-ref-118)
118. Which has been ratified by all Council of Europe members except Greece, Switzerland, Turkey and the United Kingdom. [↑](#footnote-ref-119)
119. *Rantsev v Cyprus and Russia* (2010) 51 E.H.R.R. 1 at [314], citing *Guzzardi* at [93]. [↑](#footnote-ref-120)
120. Although Italy had not ratified protocol 4 at the time of that case. [↑](#footnote-ref-121)
121. *Austin ECtHR* at [57] (emphasis added). See too *Guzzardi* at [93]. [↑](#footnote-ref-122)
122. Cf. *Austin UKHL* at [16], [57]. [↑](#footnote-ref-123)
123. *Rosengren v Romania*,Application No 70786/01, Judgment of April 24, 2008. [↑](#footnote-ref-124)
124. *Riener v Bulgaria* (2007) 45 E.H.R.R. 32. [↑](#footnote-ref-125)
125. *Baumann v France* (2002) 34 E.H.R.R. 44. [↑](#footnote-ref-126)
126. *Phull v France*, Application No 35753/03, Decision of January 11, 2005. [↑](#footnote-ref-127)
127. Figure 1. [↑](#footnote-ref-128)
128. *Storck* at [74]. [↑](#footnote-ref-129)
129. *R. (on the application of Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12; [2006] 2 A.C. 307 at [25]. [↑](#footnote-ref-130)
130. *Amuur v France* (1996) 22 E.H.R.R. 533 at [43]. [↑](#footnote-ref-131)
131. Figure 1. [↑](#footnote-ref-132)
132. *Gahramanov v Azerbaijan*, Application No 26291/06, Decision of October 15, 2013. [↑](#footnote-ref-133)
133. The applicant claimed he was detained for four hours, the authorities claimed it was two: *Gahramanov* at [43]. [↑](#footnote-ref-134)
134. *Kasparov* at [46]. [↑](#footnote-ref-135)
135. Mead, *The New Law of Peaceful Protest*, p.201. Mead leaves open the possibility that A2P4 may cover the use of public roads, but seems sceptical. See too OSCE Guidelines, p.142 fn.136. Cf. *Olivieira v Netherlands* (2003) 37 E.H.R.R. 32, where a ban on entering into part of the city centre engaged but did not breach A2P4. [↑](#footnote-ref-136)
136. e.g. *Kasparov* at [75]. A HUDOC database search reveals that Strasbourg has never found a violation of both art.5 and A2P4 in the same case. [↑](#footnote-ref-137)
137. e.g. an art.5 breach that prevents an applicant from attending a protest can also breach art.11: *Kasparov* at [69]. [↑](#footnote-ref-138)
138. Given the link to autonomy noted above, potential overlap also exists between arts 5 and 8. The key test of continuous supervision and control and lack of freedom to leave should be borne in mind when trying to ascertain whether art.5 can apply. Given the limited exceptions to art.5, that test should be applied before relying (additionally or exclusively) on art.8. [↑](#footnote-ref-139)
139. *Austin UKHL* at [23]. [↑](#footnote-ref-140)
140. e.g. *Nielsen v Denmark* (1989) 11 E.H.R.R. 175; *HM v Switzerland* (2004) 38 E.H.R.R. 17. [↑](#footnote-ref-141)
141. *Austin ECtHR* at [61]; M. Amos, “The Value of the European Court of Human Rights to the United Kingdom” (2017) 28 E.J.I.L. 763, 779. [↑](#footnote-ref-142)
142. *Cheshire West* at [19]–[32]. [↑](#footnote-ref-143)
143. Cf. *Guzzardi* at [95]. [↑](#footnote-ref-144)
144. e.g. *Austin ECtHR* at [59], [65]. [↑](#footnote-ref-145)
145. e.g. *Guzzardi* at [88]–[94]. [↑](#footnote-ref-146)
146. *Storck* at [74]. [↑](#footnote-ref-147)
147. e.g. *ZH*. [↑](#footnote-ref-148)
148. e.g. *JJ*; *Guzzardi*. [↑](#footnote-ref-149)
149. *Amuur*. [↑](#footnote-ref-150)
150. *Storck* at [74]. [↑](#footnote-ref-151)
151. *Austin ECtHR* at [68]. [↑](#footnote-ref-152)
152. JCHR, “The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards” (HC 890, HL 161, 2018), para.45. [↑](#footnote-ref-153)
153. *R. (on the application of Ferreira) v HM Senior Coroner for Inner South London* [2017] EWCA Civ 31; [2018] Q.B. 487. [↑](#footnote-ref-154)
154. JCHR report, paras 38, 44 and 47. See also *Cheshire West* at [46]. [↑](#footnote-ref-155)
155. JCHR report, para.47. [↑](#footnote-ref-156)
156. *Cheshire West* at [46]. [↑](#footnote-ref-157)
157. JCHR report, para.49. [↑](#footnote-ref-158)
158. *Cheshire West* at [57]. [↑](#footnote-ref-159)
159. *Cheshire West* at [56]. [↑](#footnote-ref-160)
160. *Cheshire West* at [57]. [↑](#footnote-ref-161)
161. *Guzzardi* at [92]. See also *Cheshire West* at [51]. [↑](#footnote-ref-162)
162. Feldman, “Deprivation of Liberty in Anti-terrorism Law” 8. [↑](#footnote-ref-163)
163. e.g. Turkey: A. Kucukgocmen, “Turkish Court Releases 14 Students Bring Tried for Opposing Afrin Operation” *Reuters*,June 6, 2018, <https://uk.reuters.com/article/uk-turkey-security-students/turkish-court-releases-14-students-being-tried-for-opposing-afrin-operation-cnnturk-idUKKCN1J22C8>; and Russia: M. Tsvetkova and D. Pinchuk, “Russia’s Navalny Detained as Protestors Point to Poll Fraud Threat”, *Reuters*, January 28, 2018, <https://uk.reuters.com/article/uk-russia-election-navalny-office/russias-navalny-detained-as-protesters-point-to-poll-fraud-threat-idUKKBN1FH04V>, [Both accessed July 4, 2018]. [↑](#footnote-ref-164)