



**Blackstone**  
CHAMBERS

Presented by Blackstone Chambers in association with Liberty  
“Focus on Public Law and Human Rights”  
18<sup>th</sup> November 2005

**RECENT CASES ON ARTICLE 5 OF THE EUROPEAN  
CONVENTION: LIBERTY AND SECURITY**

**DAVID PANNICK QC**

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW  
Tel: +44(0)20-7583 1770 Fax: +44(0)20-7822 7350 Email: [clerks@blackstonechambers.com](mailto:clerks@blackstonechambers.com)  
[www.blackstonechambers.com](http://www.blackstonechambers.com)



Article 5 guarantees the right to personal freedom, and to protection from arbitrary detention.

Article 5(1) provides that everyone has "the right to liberty and security of person". It says that "No-one shall be deprived of his liberty" save in the circumstances specified in Article 5(1)(a)-(f) "and in accordance with a procedure prescribed by law".

Two of those circumstances are:

- "(b) *the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
- (c) *the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".*

As Lord Bingham of Cornhill observed in **A v Secretary of State**<sup>1</sup> (in relation to the detention of terrorist suspects), English law has a long, libertarian tradition, given effect in the remedy of habeas corpus, and upheld in a series of landmark decisions down the centuries.

In applying Article 5, the European Court has emphasised the significance of personal liberty. In **Kurt v Turkey**<sup>2</sup>, the Court referred to "*the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities*". The Court said that the permitted limitations on the right "*must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom*".

I want to discuss three cases which raise difficult questions about the application of Article 5 in the context of the policing of mass demonstrations.

In **R (Gillan) v Commissioner of Police of the Metropolis**<sup>3</sup>, the Claimants were a student on his way to a demonstration against an arms fair, and a journalist filming the protests. They were stopped and searched by police who were randomly checking people to look for weapons associated with terrorism.

In **R (Laporte) v Chief Constable of Gloucestershire Constabulary**<sup>4</sup>, the police stopped, boarded and searched four coaches on their way to the Fairford Air Base. The police refused to allow the passengers to continue to the airbase because of a concern that they were likely to cause a breach of the peace. The coaches were escorted back to London. The journey took about two and a half hours.

---

<sup>1</sup> [2005] 2 AC 68, paragraph 36.

<sup>2</sup> (1998) 27 EHRR 373, paragraph 122.

<sup>3</sup> [2004] 3 WLR 1144.

<sup>4</sup> [2005] QB (Court of Appeal) and [2004] 2 All ER 874 (Divisional Court).

In **Austin and Saxby v Commissioner of Police of the Metropolis**<sup>5</sup>, the Claimants objected to police tactics in controlling the May Day protests in central London in 2001. When a large number of demonstrators marched into Oxford Circus, the police decided that the only means of preserving public order was to contain them there until it was safe to release them. About 2000 people were so contained, in very cramped conditions, most of them unable to leave for 7 hours.

The relevant principles to be derived from these cases are as follows:

- 1 The Court of Appeal recognised in **Laporte**<sup>6</sup> that it is a unfortunate fact that there are those who seek to shelter behind others seeking to exercise their right peacefully to protest. Using what would otherwise be a peaceful protest as a shield, some individuals seek to create public disorder, cause personal injury and damage property.
- 2 In seeking to control demonstrations to prevent violence and disorder, there is a difficult dividing line between "*detention*", which must satisfy the criteria of Article 5, and restrictions on freedom of movement. See also **Raimondo v Italy**<sup>7</sup>.
- 3 The question whether there is detention within the scope of Article 5 is important because Article 5 permits detention only if specified criteria are satisfied.

Article 5(1) provides that no-one shall be deprived of liberty save in one of a limited number of defined circumstances. The only possibly relevant provisions in Article 5 in the context of policing demonstrations are Articles 5(1)(b) and (c).

Article 5(1)(b) allows for the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law. But in **Engel v The Netherlands (No. 1)**<sup>8</sup>, the European Court gave a narrow meaning to the phrase "*secure the fulfilment of any obligation prescribed by law*". It requires "*a specific and concrete obligation which he has until then failed to satisfy*". So the police cannot rely on Article 5(1)(b) to detain a person because of a concern that he may be about to commit an offence. That is especially so given the content of Article 5(1)(c).

Article 5(1)(c) allows for the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

The European Court has held that the phrase "*for the purpose of bringing him before the competent legal authority*" applies to all parts of Article 5(1)(c) - including "*when it is reasonably considered necessary to prevent his committing an offence*" - and not just to the phrase "*on reasonable suspicion of having committed an offence*".<sup>9</sup> This makes no sense, either

---

<sup>5</sup> [2005] EWHC 480, **The Times** 14 April 2005.

<sup>6</sup> At paragraph 36.

<sup>7</sup> (1994) 18 EHRR 237, paragraph 39.

<sup>8</sup> (1976) 1 EHRR 647, paragraph 69.

<sup>9</sup> **Lawless v Ireland (No. 3)** (1961) 1 EHRR 15, 27, paragraph 14; and **Brogan v United Kingdom** (1988) 11 EHRR 117, paragraph 52.

grammatically or as a matter of purpose, especially as the detention must be proportionate on the facts and especially as the detainee is in any event protected by Article 5(3) which provides that everyone arrested or detained in accordance with Article 5(1)(c) "*shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial*". Indeed, the Court has accepted that Article 5(3) is not breached if the individual is not in fact brought before a court, but is promptly released. In **Brogan v United Kingdom**<sup>10</sup>, the European Court stated :

*"No violation of Article 5(3) can arise if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible".*

This undermines the finding that detention can only be justified under Article 5(1)(c) if there was an intention to bring a person before a court. In the context of Article 5(3), "*promptly*" can cover a period of hours, as the Court held in **Fox, Campbell and Hartley v United Kingdom**<sup>11</sup>.

In **Laporte** in the Divisional Court, May LJ said that "*on the face of it*", detention of the people on the coach while they were escorted back to London could not be justified under Article 5(1)(c) "*because it was not effected for the purpose of bringing the persons detained before a magistrate*".<sup>12</sup> He noted that this would mean that Article 5 is more narrow in scope than the common law power to detain to prevent a breach of the peace.

This was not a matter addressed by the Court of Appeal in **Laporte** because it concluded that in any event the decision to escort the coaches back to London was disproportionate and not justifiable at common law. The Court of Appeal noted that this point would need to be confronted in the May Day case, which at that time was pending in the High Court<sup>13</sup>.

In **Austin and Saxby**, Mr Justice Tugendhat held that the detention in Oxford Circus was within Article 5(1)(c) because the purpose was to arrest and bring before a judge all those who the police reasonably suspected of having committed an offence, or who they reasonably considered it necessary to arrest to prevent them committing an offence. In the circumstances prevailing on May Day 2001, it was impracticable to differentiate between the members of, and reasonably necessary to contain all of, a group in order to prevent a breach of the peace. So the detention of everyone was lawful under Article 5(1)(c) so long as the police acted in a proportionate manner, which the judge was satisfied was the case. This approach to Article 5(1)(c) will be challenged in the Court of Appeal.

These cases - **Gillan, Laporte** and **Austin and Saxby** - illustrate the difficult legal problems which arise in applying the Article 5 protections to the policing of demonstrations where there is good reason for police concern that there will be violence and disorder, the only

---

<sup>10</sup> (1988) 11 EHRR 117, paragraph 58.

<sup>11</sup> (1990) 13 EHRR 157, paragraphs 41-42.

<sup>12</sup> Paragraph 46.

<sup>13</sup> Paragraph 56.

effective method of preventing such violence and disorder is to impose controls on all those present, but the restrictions are severe and prolonged (as during the Oxford Street containment) and it certainly cannot be said that all those so restricted are personally involved in violent activity.