HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 5

on appeal from: [2007] EWCA Civ 989

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Austin (FC) (Appellant) & another *v* Commissioner of Police of the Metropolis (Respondent)

Appellate Committee

Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Carswell
Lord Neuberger of Abbotsbury

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Respondent:
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LORD HOPE OF CRAIGHEAD

My Lords,

1. One of the features of a vigorous and healthy democracy is that people are allowed to go out onto the streets and demonstrate. Thousands of demonstrations take place each year in London. Experience has shown that for the most part gatherings of this kind are peaceful. The police, on whom the responsibility of maintaining public order rests, seek to facilitate rather than impede their activities. Unfortunately, human nature being what it is, this is not always possible. Sometimes an event attracts people who do not share the peaceful intentions of the organisers. Sometimes it is the organisers themselves whose intentions are anything but peaceful. On those occasions it may be necessary for the police to take control of the event to ensure public safety and minimise the risk of damage to property. The event with which this case is concerned was such an occasion.

2. The ways in which the police will seek to control the event will vary from case to case. In this case their policy was one of containment. Its consequence was that a large number of people were enclosed in the place where they had gathered within a police cordon. They were prevented for many hours from leaving it. Article 5(1) of the European Convention on Human Rights provides that no one shall be deprived of his liberty save in the cases which that article specifies. The appellant was one of those within the police cordon. The question which this case raises is whether the way in which she was treated was incompatible with her Convention right to liberty. Underlying that question is an

important issue of principle. The right which is guaranteed by article 5(1) is an absolute right. But it must first be held to be applicable. To what extent, if at all, is it permissible in the determination of that issue to balance the interests of the individual against the demands of the general interest of the community? The appellant submits that it is plain that she was deprived of her right to liberty. She says that the reason why the cordon was put in place and kept there for so long is irrelevant. If she is right, she must succeed in this appeal. If she is wrong, the judge's findings are against her. They show conclusively that the sole purpose of the cordon was to maintain public order, that it was proportionate to that need and that those within the cordon were not deprived of their freedom of movement arbitrarily.

The facts

3. On 1 May 2001 at about 2 pm a crowd of demonstrators marched into Oxford Circus from Regent Street South. They were joined later by others who entered the Circus, or tried to enter it, from all directions. By the end of the afternoon some 3,000 people were within the Circus and several thousands more were gathered outside in the streets that lead into it. The appellant was among those who went to Oxford Circus as part of the crowd to demonstrate, but she was not one of the organisers. She was prevented from leaving the area by the police cordon for about seven hours. On 29 April 2002 she brought a claim for damages against the respondent for false imprisonment and for breach of her right under article 5(1) of the Convention to liberty. The case went to trial before Tugendhat J who, having analysed the evidence with great care and attention to detail, dismissed her claims: [2005] EWHC 480 (QB); [2005] HRLR 647. What follows is a much abbreviated summary of his account of the event.

4. 1 May 2001, May Day, was not a public holiday in England. Nevertheless the police had been expecting demonstrations. On three previous occasions within the past two years, when the theme had been protests against capitalism and globalisation, they had resulted in very serious breakdowns in public order. The officers in charge of policing on this occasion were the most experienced public order officers in England. They feared that a breakdown in public order would be repeated in 2001. About 6,000 police officers were deployed on the streets of London. This was about as large a number as had ever been so deployed. The Special Branch assessment was that there would be about 500 to 1,000 hard core demonstrators looking for confrontation, disorder and violence. The organisers had deliberately given no notice

to the police of their intentions. They had refused to co-operate with them in any way at all. Their literature included incitement to looting and violence, multiple protests to avoid the police and the encouragement of secrecy. Their publicity material had led the police to expect a gathering on Oxford Circus at 4 pm. But no warning was given of any march or procession or of the route which the demonstrators might take. The arrival there of such a large procession at 2 pm, when the area was already busy with shoppers and traffic, took the police by surprise and led them to respond as they did. They decided that, if they were to prevent violence and the risk of injury to persons and damage to property, they had no alternative but to impose an absolute cordon round the entire crowd that had gathered there.

5. The imposition of the cordon had not been decided upon in advance. Things might have been different if the crowd had built up gradually. As it was, the police decided that if they did not take control of the crowd when it arrived the opportunity to do this might not recur. Their aim was to establish control over it prior to and during a planned dispersal. It was not possible to impose the cordon without including the appellant in it because she was standing not on a pavement at the perimeter of the Circus but on the roadway. It took about 5 to 10 minutes to put in place a loose cordon, and about 20 to 25 minutes to put in place a full cordon. The full cordon was effectively in place by about 2.20 pm. Five minutes later, at 2.25 pm, a senior officer started to plan for the start of a controlled dispersal. At 2.45 pm he had reached the point where he expected the release to start within about an hour. On a number of occasions the order was given to start controlled release but it had to be suspended because of the conduct of protesters either inside or outside the contained area. At 4 pm the crowd were told that they were being contained to prevent a breach of the peace and that they would be released in due course by a prescribed exit. They were asked to be patient. The judge was satisfied that the police had no intention of holding the demonstrators longer than was necessary. The object was not to hold the crowd for any reason other than to carry out a controlled release as soon as it was practicable and safe to do so. In the event the dispersal was not completed until 9.30 pm.

6. The delay in the dispersal was substantially contributed to by the attitude of the crowd within the cordon which was not co-operating with the police. While about 60% remained calm about 40% were actively hostile, pushing and throwing missiles. Those who were not pushing or throwing missiles were not dissociating themselves from the minority who were. Some members of the crowd were very violent. They broke up paving slabs and threw the debris at the police. The crowd did

nothing to help the police when they entered the cordon to arrest a suspect. It was a dynamic, chaotic and confusing situation. It was made all the more difficult by the fact that there were a large number of protesters in the immediate vicinity outside the cordon. They were engaged in the same quest for Oxford Circus that had driven the original crowd there at 2 pm and were refusing to accept control by the police.

7. The judge held that it was not practicable for the police to release the crowd earlier than they did. For them to have done so earlier would have been a complete abnegation of their duty to prevent a breach of the peace and to protect members of the crowd and third parties, including the police, from serious injury. The policy that was communicated to police officers was that they should seek to identify and release those who obviously had nothing to do with the demonstration but were caught up in the cordon because they had just happened to be in Oxford Circus. This was subject to their discretion to release individual demonstrators. Up to about 400 individuals were released individually. Some of them were bystanders who had been caught up in the demonstration. Others had medical problems or had suffered some injury. The judge was satisfied that there was no other release policy which could and should have been adopted, especially as the police had had no opportunity to plan for the event.

8. Few of those who were attending the demonstration can have been unaware that there was a substantial risk of violence. On 24 April 2001 an article by the Mayor of London, Ken Livingstone, appeared in the *Evening Standard* newspaper. He said that he supported the aims of the demonstration, which would be calling for the cancellation of Third World debt, the eradication of poverty, a stop to the privatisation of the London Underground and an end to pollution of the environment. But on this occasion violence was central to the objectives of its organisers. What was planned was not a peaceful protest that might go wrong but a deliberate attempt to create destruction in the capital. He urged all Londoners to stay away from it. The appellant had taken part in such events before. The judge held that when she chose to join this demonstration she was well aware that the protest was not expected by anyone to end without serious violence. There is no suggestion that she herself was involved in any violent acts or that she had any other intention than to engage in peaceful protest. Nevertheless she willingly took the risk of violence on the part of other demonstrators with whom she chose to be present, and her own conduct was unreasonable in joining with others to obstruct the highway.

9. There was sufficient space within the cordon for people to walk about and there was no crushing. But conditions within it were uncomfortable. The weather was cold and wet. No food or water was provided and there was no access to toilet facilities or shelter. The appellant, like others who were present, was not adequately dressed for the occasion. She had an 11 month old baby who was in a crèche. She had planned to be on the demonstration for two or three hours before collecting her, but in the event she was prevented from doing so. Nevertheless the judge held that she was not much distressed, but was stimulated by the event. At various times in the afternoon she had a megaphone and told people not to push. She was in the company of friends throughout. When she came out of the police cordon she did not rush home but participated in a TV interview and responded to questions from the press.

10. The judge said that there was no deprivation of liberty during the period between 2.00 pm and 2.20 pm, as the cordon was not absolute and people were free to leave by the pavements if they wished to do so. But during the subsequent period no one was free to leave without permission. He held that once the full cordon was in place there was a deprivation of liberty within the meaning of article 5(1), but that the containment was capable of being justified under article 5(1)(c) as the police reasonably believed that all those present within the cordon, including the appellant, were demonstrators and were about to commit a breach of the peace. He rejected the appellant's claim at common law for false imprisonment. The Court of Appeal (Sir Anthony Clarke MR, Sir Igor Judge P and Lloyd LJ) dismissed her appeal: [2007] EWCA Civ 989; [2008] QB 660. In doing so however it upheld the appellant's appeal against the judge's finding that the police reasonably believed that all those within the cordon were about to commit a breach of the peace. The police were aware that there were those in the crowd who would not do this, and it was wrong to say that everyone in the crowd was a suspect: para 61. But the police did what was necessary to avoid an imminent breach of the peace. In this very exceptional case the actions of the police were lawful at common law.

11. There is no appeal to your Lordships against the Court of Appeal's findings on the common law. The respondent accepts that, if the appellant's detention was an unlawful deprivation of liberty contrary to article 5(1) of the Convention, the finding that this was a lawful exercise of breach of the peace powers at common law cannot stand. The appellant for her part accepts that, if her detention did not amount to an unlawful deprivation of liberty contrary to article 5(1), she was contained within the cordon in the lawful exercise of police powers.

Her appeal is directed solely to the Court of Appeal's decision that her rights under article 5(1) of the Convention were not infringed.

Article 5(1)

12. Article 5(1) of the Convention provides:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the 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;
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

13. The list in sub-paragraphs (a) to (f) of the cases where deprivations of liberty are permitted is exhaustive and is to be narrowly interpreted, as the European Court of Human Rights has repeatedly emphasised: *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, para 57; *Kurt v Turkey* (1998) 27 EHRR 373, para 122: *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45; [2008] 1 AC

385, para 5, per Lord Bingham of Cornhill. Of those listed, the only ones that it was suggested might be applicable in this case are those referred to in sub-paragraphs (b) and (c). In view of its decision that there had been no deprivation of liberty in this case the Court of Appeal found it unnecessary to decide whether, if there had been a deprivation of liberty, it would have been justified under either of these paragraphs.

14. The United Kingdom has not ratified article 2 of Protocol 4, nor are the rights that it sets out among the Convention rights within the meaning of the Human Rights Act 1998. But it is convenient to set out its provisions here too, as it is mentioned in some of the Strasbourg authorities that I am about to refer to:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country including his own.
>
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of '*ordre public*', for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

15. The rights mentioned in article 2 of Protocol 4 are relevant only in so far as they indicate that there is a distinction, for Convention purposes, between conditions to which a person may be subjected which are a restriction on his movement and those which amount to a deprivation of his liberty. The European Court has said that under its established case law article 5 is not concerned with mere restrictions on liberty of movement. They are governed by article 2 of Protocol 4. This is an important distinction, even though the rights that this article

describes are not binding on the United Kingdom. Article 2 of Protocol 4 is a qualified right. The protection that article 5(1) provides against a deprivation of liberty is absolute, subject only to the cases listed in sub-paragraphs (a) to (f). In *McKay v United Kingdom* ~~44~~ (2006) 44 EHRR 827, para 30, the court said:

> "Article 5 of the Convention is, together with articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of an individual and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty."

Article 2 of Protocol 4 helps to put the ambit of this absolute right into its proper perspective.

16. In *Secretary of State for the Home Department v JJ and others* [2008] 1 AC 385, para 35, Lord Hoffmann said that the point about the right to liberty under article 5(1) is that it is unqualified. Its place in the scheme of other unqualified rights shows that it deals with literal physical restraint. Such is the revulsion against detention without charge or trial that it ordinarily trumps even the interests of national security. Liberty of movement may be restricted in the interests of public safety or to maintain public order. But the right to liberty under article 5(1) is absolute. As was observed in *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, para 58, this article contemplates individual liberty in its classic sense – the physical liberty of the person. Moreover a comparison between article 5 and the other normative provisions of the Convention and its Protocols shows that it is not concerned with mere restrictions upon liberty of movement. In this case the appellant's liberty of movement was restricted by the police cordon. The question is whether this was also a deprivation of liberty.

The threshold

17. If the difference between a restriction of liberty and a deprivation of liberty was to be measured merely by the duration of the restriction, it would be hard to regard what happened in this case as anything other than a deprivation of liberty. The interference with the appellant's freedom of movement was not merely transitory, as in *R (Gillan) v Commissioner of the Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307 where detention in the exercise of stop and search powers

would ordinarily be for a few minutes only. In this case the detention that resulted from the police cordon was measured in hours, not minutes. But it is very well established that, in order to determine whether the threshold has been crossed, a much wider examination of the facts and circumstances is appropriate. In *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, para 59, for example, the court said that a disciplinary measure which would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian might not possess that characteristic when applied to a serviceman. But it would not escape the terms of article 5 if it deviated from the normal conditions of life within the armed forces of the Contracting States. In order to establish whether this was so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question.

18. In *Guzzardi v Italy* (1980) 3 EHRR 333, where the applicant was sent for three years to live under special supervision on a small island, the court decided by a majority of 11 votes to 7 that he had been deprived of his liberty, both the majority and the minority were agreed that the question was one of degree. In para 92 of its judgment, following *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, para 59, the court said that, in order to determine whether someone has been 'deprived of his liberty' within the meaning of article 5, the starting point must be his concrete situation and that account must be taken of a whole range of criteria, such as the type, duration, effects and manner of implementation of the measure in question. In para 93 however it added these words:

> "The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the court cannot avoid making the selection upon which the applicability or inapplicability of article 5 depends."

The point that is being made in the first sentence of para 93, which the court has repeated in many subsequent cases, is that it is not enough that what was done could be said in general or colloquial terms to have amounted to a deprivation of liberty. Except in the paradigm case of close confinement in a prison cell, where there is no room for argument,

the absolute nature of the right requires a more exacting examination of the relevant criteria. There is a threshold that must be crossed before this can be held to amount to a breach of article 5(1). Whether it has been crossed must be measured by the degree or intensity of the restriction.

19. The same point was developed more fully by Sir Gerald Fitzmaurice in his dissenting opinion in *Guzzardi*. In para 5 he said that, while the question whether the conditions of the applicant's existence on the island were sufficiently stringent to amount to a sort of imprisonment was a matter of appreciation and opinion, what to him decisively tilted the balance was the fact of article 2 of Protocol 4 to the Convention. In para 6 he said that its existence showed that those who framed the Convention did not actually contemplate that article 5 should extend to mere restrictions on freedom of movement, or they would not have considered it necessary to draw up a separate Protocol about that.

> "The resulting picture is that article 5 of the Convention guaranteed the individual against illegitimate imprisonment, or confinement so close as to amount to the same thing – in sum against deprivation of liberty *stricto sensu* – but it afforded no guarantee against restrictions (on movement or place of residence) falling short of that."

In para 7 he said that he deduced from the existence of article 2 of Protocol 4 that the concept of deprivation of liberty under article 5 of the Convention must be interpreted fairly strictly.

20. In *Secretary of State for the Home Department v JJ and others* [2008] 1 AC 385, para 37, Lord Hoffmann referred to the paradigm case, which he said amounted to a complete deprivation of human autonomy and dignity. He gave this description of it:

> "The prisoner has no freedom of choice about anything. He cannot leave the place to which he has been assigned. He may eat only when and what his gaoler permits. The only human beings he may see or speak to are his gaolers and those whom they allow to visit. He is entirely subject to the will of others."

But he recognised that one might have some deviation from the standard case without it ceasing to be a deprivation of liberty. He referred to Judge Matscher's comment in his dissenting opinion in *Guzzardi v Italy* (1980) 3 EHRR 333 that the concept had a core which could not be the subject of argument but which was surrounded by a "grey zone" where it was extremely difficult to draw the line. He accepted that the concept may include features which lack certain features of the paradigm case. The difference of opinion among the members of the Appellate Committee in *JJ* shows how difficult it may be to decide where the line should be drawn in such cases.

21. Drawing these together, the following general points can be made. Whether there is a deprivation of liberty, as opposed to a restriction of movement, is a matter of degree and intensity. Account must be taken of a whole range of factors, including the specific situation of the individual and the context in which the restriction of liberty occurs: *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, para 59; *Guzzardi v Italy* (1980) 3 EHRR 333, para 92; *HM v Switzerland* (2002) 38 EHRR 314, para 42; *HL v United Kingdom* (2004) 40 EHRR 761, para 89; *Foka v Turkey*, application no 28940/95, 24 June 2008, para 74; *Stefanov v Bulgaria*, application no 65755/01, 22 May 2008. And it is helpful to have regard to how the case in hand compares with the core or paradigm case, which cannot be the subject of argument. The court seems to have had this mind in *Guzzardi v Italy*, para 95, when it referred to the difference between the applicant's treatment and classic detention in prison or strict arrest imposed on a serviceman, as in *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, para 63. Sir Gerald Fitzmaurice clearly did when he referred in para 6 of his opinion to "confinement so close as to amount to the same thing." On the other hand, as the court observed in *Guenat v Switzerland* (1995) 81-B DR 130 and again in *Stefanov v Bulgaria*, para 71, article 5(1) may apply to deprivations of liberty of even a very short duration.

22. This case however is not simply a threshold case. It raises a more fundamental issue of principle which was not dealt with in *Guzzardi v Italy* (1980) 3 EHRR 333. Is it relevant, when considering whether a case falls within the ambit of article 5(1), to have regard to the purpose for which a person's freedom of movement has been restricted? If so, in what kinds of cases can this be relevant? And, if the purpose of the restriction is relevant, what conditions must it satisfy to avoid being proscribed by the article?

23. The application of article 5(1) to measures of crowd control is an issue which does not appear so far to have been brought to the attention of the court in Strasbourg. So there is no direct guidance as to whether article 5(1) is engaged where the police impose restrictions on movement for the sole purpose of protecting people from injury or avoiding serious damage to property. The need for measures of crowd control to be adopted in the public interest is not new, however. It is frequently necessary, for example, for such measures to be imposed at football matches to ensure that rival fans do not confront each other in situations that may lead to violence. Restrictions on movement may also be imposed by the police on motorists in the interests of road safety after an accident on a motorway, or to prevent local residents from coming too close to a fire or a terrorist incident. It is not without interest that it has not so far been suggested that restrictions of that kind will breach article 5(1) so long as they are proportionate and not arbitrary.

24. The restrictions that were imposed by the police cordon in this case may be thought, as compared with the examples that I have just mentioned, to have been greater in degree and intensity. But Lord Pannick QC for the respondent submitted that one could not sensibly ignore the purpose of the restriction or the circumstances. Detention in the paradigm sense was not in the minds of anyone. There would have been no question of there being a deprivation of liberty if the cordon had remained in place for only 20 minutes. The fact that it remained in place for much longer ought to make no difference, as the fact that it was not possible to release everyone from the cordon earlier was due to circumstances that were beyond the control of the police. This was a case, he said, where the answer to the question whether what was done was within the scope of article 5(1) was to be determined by striking a fair balance between the rights of the individual and the interests of society. It was, of course, necessary to give full effect to the fact that article 5 was a fundamental right whose importance was paramount. But the fact that infringement was not open to justification except in the cases listed in sub-paragraphs (a) to (f) pointed to the need for care to be taken to identify the limits of its application.

25. Ms Williams QC for the appellant, on the other hand, said that the purpose for which the measure was employed was irrelevant. The fact that it was a necessary response and was proportionate was a pre-condition for establishing the measure's legality for the purpose of sub-paragraphs (a) to (f) of article 5(1). But it went no further than that. There was no balance to be struck when consideration was being given to the initial question whether article 5(1) applied to the measures adopted by the police. Questions of purpose and balance only arose

when consideration was being given to the cases listed in sub-paragraphs (a) to (f).

Is purpose relevant?

26. The decision whether there was deprivation of liberty is, of course, highly sensitive to the facts of each case. Little value can be derived therefore from decisions on the application of article 5 that depend entirely on their own facts. But they are of value where they can be said to illustrate issues of principle. In the present context some assistance is to be derived from the cases as to the extent to which regard can be had to the aim or purpose of the measure in question when consideration is being given as to whether it is within the ambit of article 5(1) at all.

27. If purpose is relevant, it must be to enable a balance to be struck between what the restriction seeks to achieve and the interests of the individual. The proposition that there is a balance to be struck at the initial stage when the scope of the article is being considered was not mentioned in *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 or *Guzzardi v Italy* (1980) 3 EHRR 333. Nor can it be said to be based on anything that is to be found in the wording of the article. But I think that there are sufficient indications elsewhere in the court's case law that the question of balance is inherent in the concepts that are enshrined in the Convention and that they have a part to play when consideration is being given to the scope of the first rank of fundamental rights that protect the physical security of the individual.

28. In *X v Federal Republic of Germany* (1981) 24 DR 158, where the Commission had regard to the fact that the purpose for which the children were taken to the police headquarters and kept there for about two hours was to question them, not to arrest or detain them. This led to the conclusion that the action in question did not constitute a deprivation of liberty in the sense of article 5(1). Similarly, in *Guenat v Switzerland*, application no 24722/94, 10 April 1995, the Commission had regard, in reaching its decision that the application was manifestly unfounded, to the fact that the police acted out of humanitarian considerations, given the applicant's strange behaviour, when they took him to the police station where he remained for nearly three hours and was never locked up as there was never any question of arresting him. And in *HM v Switzerland* (2002) 38 EHRR 314 the court, in holding that article 5(1) was not applicable, had regard to the fact that applicant was

placed in a foster home in her own interests in order to provide her with the necessary medical care, as well as satisfactory living conditions and hygiene: para 48. It would seem in principle that the more intensive the measure and the longer the period it is kept in force the greater will be the need for it to be justified by reference to the purpose of the restriction if it is not to fall within the ambit of the article.

29. In *Nielsen v Denmark* (1988) 11 EHRR 175 the applicant, who was a minor, complained about his committal to a child psychiatric ward of a state hospital at his mother's request. The question was whether this was a deprivation of his liberty in violation of article 5. The applicant said that it was, as the ward in which he was placed was a closed ward, he was unable to receive visitors except with the agreement of the staff, special permission was required for him to make telephone calls and for persons outside the hospital to get into contact with him and he was under almost constant surveillance: para 65. On those facts his situation was close to the paradigm case described in *Secretary of State for the Home Department v JJ and others* [2008] 1 AC 385, para 37, by Lord Hoffmann. But the court said in para 72 that it did not follow that the case fell within the ambit of article 5. The restrictions that were imposed on the applicant were not of a nature or degree similar to the cases of deprivation of liberty specified in article 5(1). He was not detained as a person of unsound mind so as to bring the case within paragraph (e). He was there at the request of his mother, as to whom there was no evidence of bad faith. The court summed the matter up in this way in para 72:

> "Hospitalisation was decided upon by her in accordance with expert medical advice. It must be possible for a child like the applicant to be admitted to hospital at the request of the holder of parental rights, a case which is clearly not covered by paragraph (1) of article 5."

30. In *Soering v United Kingdom* (1989) 11 EHRR 439 one of the applicant's complaints was that the decision to extradite him to the United States of America, if implemented, would give rise to a breach of article 3 as, if he were to be sentenced to death, he would be exposed to inhuman and degrading treatment on death row. In para 89 the court stressed the need for a fair balance to be struck:

> "What amounts to 'inhuman or degrading treatment or punishment' depends on all the circumstances of the case. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases."

31. In *O'Halloran and Francis v United Kingdom* (2007) 46 EHRR 397 drivers whose vehicles had been caught on a speed camera complained under article 6(1) that they had been compelled to give incriminating information as to their identities in violation of their right to remain silent and the privilege against self-incrimination. They contended that this destroyed the very essence of the right to a fair trial. The court said in para 53 that it was unable to accept this argument. It did not follow from previous cases that any direct compulsion will automatically result in a violation:

> "While the right to a fair trial under article 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case."

In para 57, the court said that those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities as part of the regulatory framework relating to motor vehicles. In para 58 the court brought into account the limited nature of the inquiry which the police were authorised to undertake, that the relevant statute did not sanction prolonged questioning about facts giving rise to criminal offences and that, as Lord Bingham noted in *Brown v Stott* [2003] 1 AC 681, 705, the penalty for declining to answer was moderate and non-custodial.

32. In *N v United Kingdom* (2008) 47 EHRR 885 the applicant was seriously ill on her arrival in the United Kingdom on a false passport from Uganda and was diagnosed as being HIV positive. She improved after prolonged medical treatment in this country. When steps were taken for her removal to Uganda she claimed that this would violate her rights under article 3 as the medication that she needed would only be available at considerable expense and would not be easily accessible. In para 44 the court repeated the observation that it had made in *Soering* that inherent in the whole Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Advances in medical science, together with social and economic differences between countries, meant that the levels of treatment available there might vary considerably:

> "While it is necessary, given the fundamental importance of article 3 in the Convention system, for the court to retain a degree of flexibility to prevent expulsion in very exceptional cases, article 3 does not place an obligation on the contracting state to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the contracting states."

33. In *Saadi v United Kingdom*, application no 13229/03, 29 January 2008, the Grand Chamber examined the notion of arbitrary detention in the context of the first limb of article 5(1)(f) which authorises the detention of a person to prevent his effecting an unauthorised entry to the country: paras 67 to 74. Its observations were directed to the restrictions permitted by the various sub-paragraphs of article 5(1). In para 67 the Grand Chamber said that it is a fundamental principle that no detention that is arbitrary can be compatible with article 5(1) and that the notion of "arbitrariness" extends beyond lack of conformity with national law. In para 68 it said that the notion of arbitrariness in the context of this article varies to a certain extent depending on the type of detention involved. In para 74 it said that, to avoid being branded as arbitrary, such detention must be carried out in good faith and its length should not exceed that reasonably required for the purpose pursued. The ambit of article 5(1) was not the point at issue in that case. But it must follow from these observations that measures of crowd control which involve a restriction on liberty, if they are not to be held to be arbitrary, must be carried out in good faith and should not exceed the length that is

reasonably required for the purpose for which the measure was undertaken.

34. I would hold therefore that there is room, even in the case of fundamental rights as to whose application no restriction or limitation is permitted by the Convention, for a pragmatic approach to be taken which takes full account of all the circumstances. No reference is made in article 5 to the interests of public safety or the protection of public order as one of the cases in which a person may be deprived of his liberty. This is in sharp contrast to article 10(2), which expressly qualifies the right to freedom of expression in these respects. But the importance that must be attached in the context of article 5 to measures taken in the interests of public safety is indicated by article 2 of the Convention, as the lives of persons affected by mob violence may be at risk if measures of crowd control cannot be adopted by the police. This is a situation where a search for a fair balance is necessary if these competing fundamental rights are to be reconciled with each other. The ambit that is given to article 5 as to measures of crowd control must, of course, take account of the rights of the individual as well as the interests of the community. So any steps that are taken must be resorted to in good faith and must be proportionate to the situation which has made the measures necessary. This is essential to preserve the fundamental principle that anything that is done which affects a person's right to liberty must not be arbitrary. If these requirements are met however it will be proper to conclude that measures of crowd control that are undertaken in the interests of the community will not infringe the article 5 rights of individual members of the crowd whose freedom of movement is restricted by them.

Article 5(1)(b) and (c)

35. The respondent's written case contains submissions directed to the cases mentioned in article 5(1)(b) and (c) as alternatives to his principal submission that there was no deprivation of liberty within the meaning of that article in the circumstances of this case. He submits that the police conduct was lawful under article 5(1)(b), as the police were acting in a proportionate manner to secure the appellant's fulfilment of an obligation prescribed by law, namely the common law obligation to assist a constable in dealing with a breach of the peace. Alternatively he submits that the police confined the appellant lawfully under article 5(1(c), because they reasonably believed that this was necessary to prevent her committing the common law offence of refusing to aid a constable to prevent a breach of the peace. He accepts

that to develop this argument he would need to persuade your Lordships that the reasoning in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15 as to the way this subparagraph should be construed was unsound.

36. Although he did not abandon these arguments, Lord Pannick did not develop either of them in oral argument. The Court of Appeal found it unnecessary to reach a concluded view on these points, and so do I. But in my opinion it would be most unfortunate if the police were to have to rely on these sub-paragraphs, or either of them, when they were considering whether or not it was lawful for them to resort to measures of crowd control. It is obvious that neither of them were designed with that way of preserving public order in mind. It is safe to assume that, if they had thought that such measures were at risk of being held within the ambit of article 5(1), the framers of the Convention would have used language similar to that which is to be found in article 10(2). As it is, the tests which they lay down, which must be construed strictly, are highly specific to the position of the individual whose right to liberty is guaranteed by the article. They refer to what the court in *Guzzardi v Italy* (1980) 3 EHRR 333, para 92 described as the concrete situation of the person who complains that his right to liberty has been violated. The police would have to identify each and every individual in the crowd and determine whether it was necessary in his particular case for his liberty to be restricted. In almost every situation that can be imagined this would be an impossible exercise – especially in an emergency, when measures of crowd control were most needed to preserve life and limb and avoid serious damage to property.

37. If measures of this kind are to avoid being prohibited by the Convention therefore it must be by recognising that they are not within the ambit of article 5(1) at all. In my opinion measures of crowd control will fall outside the area of its application, so long as they are not arbitrary. This means that they must be resorted to in good faith, that they must be proportionate and that they are enforced for no longer than is reasonably necessary.

Conclusion

38. I would hold, in agreement with the Court of Appeal, that the restriction on the appellant's liberty that resulted from her being confined within the cordon by the police on this occasion met these criteria. This was not the kind of arbitrary deprivation of liberty that is proscribed by the Convention, so article 5(1) was not applicable in this

case. I would respectfully endorse the further remarks of my noble and learned friend, Lord Walker of Gestingthorpe, with which I am in full agreement. I would dismiss the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

39. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends, Lord Hope of Craighead and Lord Neuberger of Abbotsbury, and am in full agreement with the reasons they have given for dismissing the appeal. I agree, in particular, that, when deciding whether a confinement or a restriction of movement imposed on an individual by some public authority constitutes a deprivement of liberty for the purposes of article 5.1 of the European Convention, the purpose of the confinement or restriction and the intentions of the persons responsible for imposing it rank very high in the circumstances to be taken into account in reaching the decision. The imposition by the police of the Oxford Circus cordon on the appellant, and many others, was done for the purposes of protecting the physical safety of the demonstrators, including the appellant, and of protecting the neighbourhood properties from the violence that it was justifiably feared some of the demonstrators would perpetrate, violence that the appellant herself regarded as likely to happen. The intention of the police was to maintain the cordon only so long as was reasonably thought necessary to achieve those purposes and it is accepted by the appellant that the cordon was not maintained longer than was necessary to achieve those purposes. In the circumstances the confinement and restriction of movement that the cordon inevitably imposed on those within it did not, in my opinion, constitute an Article 5 deprivation of their liberty. I, too, would dismiss this appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

40. I have had the great advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. I am in full agreement with it, and for the reasons given by Lord Hope I would

dismiss this appeal. Because of the importance of the appeal, I add a few remarks of my own, but they are no more than footnotes to Lord Hope's opinion.

41. The opening words of article 5(1) refer to "the right to liberty and security of person." There is no clear Strasbourg jurisprudence as to what "security of person" adds to "liberty", but at least the added words emphasise that the article is concerned with liberty of the person (rather than, for instance, intellectual or economic freedom). In *Bozano v France* (1986) 9 EHRR 297, a case of "disguised extradition", the Court (paras 59 and 60) attached weight to the fact that the applicant had been transported in handcuffs for 12 hours in concluding that his treatment was not compatible with the right to security of person. In some more recent cases (such as *Kurt v Turkey* (1999) 27 EHRR 373, paras 122-124, and *Timurtas v Turkey* (2000) 33 EHRR 121, paras 99-106) the Court has referred to "security of person" in connection with the ill-treatment or disappearance of prisoners while in state custody (see also *McKay v United Kingdom* (2006) 44 EHRR 827, para 30 and footnote 4). All this is consistent with close personal confinement, against one's will and to one's discomfort, being the paradigm case of a breach of article 5(1).

42. It is worth noting that article 2 of the Fourth Protocol, which the United Kingdom has not ratified, is not a new measure. It dates from 1963, and it was therefore in existence when all the Strasbourg authorities cited to your Lordships were decided. In *Guzzardi v Italy* (1980) 3 EHRR 333 it was referred to in the dissenting opinion of Sir Gerald Fitzmaurice, who noted that it was not an issue in that case because it had not been ratified by Italy. It is also worth noting that the qualifications in article 2 of the Fourth Protocol to the right of liberty of movement and freedom to choose one's residence (set out in para 14 of Lord Hope's opinion) constitute wider and less demanding grounds of justification than the six exceptions in article 5(1). As Lord Hope observes, article 2 of the Fourth Protocol puts the ambit of the absolute article 5(1) right into its proper perspective.

43. In paras 26ff of his opinion Lord Hope poses the question "Is purpose relevant?" His conclusion is a very guarded one, that is (para 34) that there is room, even in the case of fundamental rights, for a pragmatic approach which takes full account of all the circumstances. I respectfully agree that it is right to be cautious on this point. The Strasbourg Court has frequently made clear that all the surrounding circumstances may be relevant in determining whether there is a

deprivation of liberty: see for instance *HM v Switzerland* (2004) 38 EHRR 314, para 42:

> "In order to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question."

It is noteworthy that the listed factors, wide as they are, do not include purpose.

44. The purpose of confinement which may arguably amount to deprivation of liberty is in general relevant, not to whether the threshold is crossed, but to whether that confinement can be justified under article 5(1)(a) to (f): see for instance (in relation to article 5(1)(e)) *Nielsen v Denmark* (1988) 11 EHRR 175; *Litwa v Poland* (2001) 33 EHRR 1267; *Wall v Sweden*, (10 December 2002) admissibility decision 41403/98; *HM v Switzerland* (above); *HL v United Kingdom* (2005) 40 EHRR 32; *Enhorn v Sweden* (2005) 41 EHRR 633; and *Storck v Germany* (2006) 43 EHRR 96. If confinement amounting to deprivation of liberty and personal security is established, good intentions cannot make up for any deficiencies in justification of the confinement under one of the exceptions listed in article 5(1)(a) to (f), which are to be strictly construed.

45. Many of these article 5(1)(e) cases also raise issues as to express or implied consent (to admission to a psychiatric ward or old people's home). Some of the earlier cases seem questionable today insofar as they relied on "parental rights" (especially *Nielsen*, which was a nine-seven decision that the admission to a psychiatric ward of a twelve-year old boy was not a deprivation of liberty, because of his mother's "parental rights"). *Storck* has, I think, sent out a clear message indicating a different approach to the personal autonomy of young people (although the unfortunate claimant in that case was 18 years of age at the time of her compulsory medication in a locked ward in the clinic at Bremen, for which she was made an exceptionally large award for non-pecuniary loss).

46. I also feel some unease about the decision in *X v Germany* (19 March 1981) admissibility decision 8819/79; police stations can be intimidating places for anyone, particularly children, and it seems rather disingenuous to reason that

> "in the present case the police action was not aimed at depriving the children of their liberty but simply to obtain information from them about how they obtained possession of the objects found on them and about thefts which had occurred in the school previously."

47. Having said all that, however, I conclude that it is essential, in the present case, to pose the simple question: what were the police doing at Oxford Circus on 1 May 2001? What were they about? The answer is, as Lord Hope has explained in his full summary of the judge's unchallenged findings, that they were engaged in an unusually difficult exercise in crowd control, in order to avoid personal injuries and damage to property. The senior officers conducting the operations were determined to avoid a fatality such as occurred in Red Lion Square on 15 June 1974. The aim of the police was to disperse the crowd, and the fact that the achievement of that aim took much longer than they expected was due to circumstances beyond their control.

LORD CARSWELL

My Lords,

48. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend, Lord Hope of Craighead, with which I am in complete agreement. For the reasons which he has given I too would dismiss the appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

49. Article 5(1) of the European Convention begins by stating that everyone has "the right to liberty and security of person", and it goes on to provide that "[n]o one shall be deprived of his liberty" subject to six specified exceptions. Those exceptions include, in paras (b) and (c), "the lawful arrest or detention of a person" in certain specified events.

50. In *McKay v United Kingdom* (2007) 44 EHRR 41, para 30, the Grand Chamber of the European Court of Human Rights ("the ECtHR") described article 5, along with articles 2, 3 and 4, as being "in the first rank of fundamental rights that protect the physical security of the individual and as such its importance is paramount". As Lord Hoffmann said in *Secretary of State for the Home Department v JJ* [2008] 1 AC 385, para 35, "[t]he point about the right not to be deprived of one's liberty under article 5 is that, subject to the exceptions, it is *unqualified*".

51. Accordingly, where, as happened to the appellant in this case, a person is confined in an area against her will by the police for well over six hours, in circumstances where paras (b) and (c) do not apply, the notion that there has been no infringement of article 5 seems, at least on the face of it, surprising. All the more so, given that the appellant was required to remain, in circumstances of some discomfort, in an area of some 2,000 square metres, cordoned in together with apparently some 3,000 other people, and where the confinement was in the context of the appellant exercising her undoubted right to demonstrate.

52. Having said that, it is important to bear in mind that in *McKay* (2007) 44 EHRR 41, para 30, immediately following the passage quoted above, the court said that the "key purpose" of article 5 "is to prevent arbitrary or unjustified deprivations of liberty". Apart from importantly describing the purpose of article 5, this suggests that it is necessary to examine the circumstances of a particular case in order to see if it is within the ambit of article 5, particularly when it is not a paradigm case (which is "being in prison, in the custody of a gaoler" – per Lord Hoffmann in *JJ* [2008] 1 AC 385, para 36). This view is supported by much Strasbourg jurisprudence, and, in this connection, I would refer to two relatively recent decisions of the ECtHR.

53. In *HM v Switzerland* (2004) 38 EHRR 17, para 42, the court explained that, in deciding "whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned". The court then said that "account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question" and that the "distinction between a deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance". In *Saadi v United Kingdom* (Application no 13229/03), 29 January 2008, the Grand Chamber said at para 68 that "key principles" relating to article 5 "have been developed on a case-by-case basis", and that "the notion of arbitrariness in the context of article 5 varies to a certain extent depending on the type of detention involved".

54. *Saadi* (Application no 13229/03) is also important in the present context, because it seems to make it clear that, contrary to the appellant's contention, the state of mind of the person responsible for the alleged detention can be a relevant factor in deciding whether article 5 has been infringed. In para 69, the court said that detention, even if complying with the national law, could be contrary to article 5 if "there has been an element of bad faith or deception on the part of the authorities". Given the fact-sensitive nature of the enquiry and the significance of arbitrariness, this appears to me to be entirely consistent with the more general approach of the court to article 5 cases.

55. However, these considerations should not be relied on to dilute the importance or the effectiveness of article 5. They simply serve to emphasise that, like all the rights enshrined in the Convention, those contained in article 5 must be approached in the way described by the ECtHR in relation to article 3, another of the "first rank of fundamental rights", in *Soering v United Kingdom* (1989) 11 EHRR 439, para 89:

> "What amounts to 'inhuman or degrading treatment or punishment' depends on all the circumstances of the case. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."

56. Accordingly, particularly as the instant facts do not amount to a "paradigm case", the issue of whether they fell within article 5, so that the appellant was "deprived of [her] liberty", raises what is very much a

fact-sensitive question. In that connection, the bare facts so far recited do not represent, by any means, "all the circumstances of the case".

57. In very summary terms, those circumstances included the following significant features, all of which were identified by the Judge, after a very full hearing:

- The cordon was imposed purely for crowd control purposes, to protect people and property from injury;
- The cordon was necessary as many of the demonstrators were bent on violence and impeding the police, and its imposition was in no way attributable to policing failures;
- The purpose and reason for imposing the cordon were at all times plain to those constrained within it;
- The cordon lasted for as short a time as possible; during its imposition, the police attempted to raise it on a number of occasions, but decided that it was impractical;
- The inclusion of the appellant and the demonstrators constrained with her within the cordon was unavoidable;
- Those who were not demonstrators, or were seriously affected by being confined, were promptly permitted to leave;
- Although the appellant suffered some discomfort, it was limited, and the police could not have alleviated it; further, she could move around within the cordon;
- The appellant knew in advance that many of the demonstrators intended to cause violence, and that the police were concerned about this.

58. The police are under a duty to keep the peace when a riot is threatened, and to take reasonable steps to prevent serious public disorder, especially if it involves violence to individuals and property. Any sensible person living in a modern democracy would reasonably expect to be confined, or at least accept that it was proper that she could be confined, within a limited space by the police, in some circumstances. Thus, if a deranged or drunk person was on the loose with a gun in a building, the police would be entitled, indeed expected, to ensure that, possibly for many hours, members of the public were confined to where they were, even if it was in a pretty small room with a number of other people. Equally, where there are groups of supporters of opposing teams at a football match, the police routinely, and obviously properly, ensure that, in order to avoid violence and mayhem, the two groups are kept apart; this often involves confining one or both of the groups within a relatively small space for a not insignificant

period. Or if there is an accident on a motorway, it is common, and again proper, for the police to require drivers and passengers to remain in their stationary motor vehicles, often for more than an hour or two. In all such cases, the police would be confining individuals for their own protection and to prevent violence to people or property.

59. So, too, as I see it, where there is a demonstration, particularly one attended by a justified expectation of substantial disorder and violence, the police must be expected, indeed sometimes required, to take steps to ensure that such disorder and violence do not occur, or, at least, are confined to a minimum. Such steps must often involve restraining the movement of the demonstrators, and sometimes of those members of the public unintentionally caught up in the demonstration. In some instances, that must involve people being confined to a relatively small space for some time.

60. In such cases, it seems to me unrealistic to contend that article 5 can come into play at all, provided, and it is a very important proviso, that the actions of the police are proportionate and reasonable, and any confinement is restricted to a reasonable minimum, as to discomfort and as to time, as is necessary for the relevant purpose, namely the prevention of serious public disorder and violence.

61. It was suggested on behalf of the appellant that, at any rate in some of the examples I have given, consent to being confined could be imputed to the people concerned. I am not sure that that is a satisfactory analysis, not least because, unless the consent is to be treated as being involuntary or irrebuttably deemed to be given, it would not deal with the case of a person who informed the police that he objected to being confined. However, if imputed consent is an appropriate basis for justifying confinement for article 5 purposes, then it seems to me that the confinement in the present case could be justified on the basis that anyone on the streets, particularly on a demonstration with a well-known risk of serious violence, must be taken to be consenting to the possibility of being confined by the police, if it is a reasonable and proportionate way of preventing serious public disorder and violence.

62. So, in agreement with the Court of Appeal, I would hold that, in the light of the findings of the Judge, as summarised in para [57] above, the actions of the police in the present case did not give rise to any infringement of the appellant's article 5 rights. The feature of the present case which gives particular cause for concern is the length of the period

of confinement, nearly seven hours. However, having reached the conclusion that reasonable and proportionate constraint, which is requisite to prevent serious public disorder and violence, does not infringe article 5, it seems to me hard to contend that the mere fact that the period of constraint was unusually long can, of itself, convert a situation which would otherwise not be within the ambit of article 5 into one which is. I think that some support for that view can be found in cases where it has been held that detention in prison is not taken out of article 5 because it was only for a short time – see e.g. *Novotka v Slovakia* (Application No 47244/99) 4 November 2003.

63. As already indicated, it appears to me that the intention of the police is relevant, particularly in a non-paradigm case, such as this, and where the intention is manifest from the external circumstances. If it transpired, for instance, that the police had maintained the cordon, beyond the time necessary for crowd control, in order to punish, or "to teach a lesson" to, the demonstrators within the cordon, then it seems to me that very different considerations would arise. In such circumstances, I would have thought that there would have been a powerful argument for saying that the maintenance of the cordon did amount to a detention within the meaning of article 5. However, as is apparent from the clear and careful findings made by the Judge, which have quite rightly not been challenged on appeal, there could be no question of such a contention being raised in the present case.

64. Furthermore, it is worth bearing in mind that, at least as I see it, if the restraint in the present case did amount to detention within article 5, it would not be possible for the police to justify the detention under the exceptions in paras (b) or (c), not least because of the reasoning of the European Court in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15. I consider that the fact that the restraint in the present case could not be justified under any of the exceptions in paras (a) to (f) supports the contention that the constraint did not amount to detention within article 5 at all. It would appear to me to be very odd if it was not be open to the police to act as they did in the instant circumstances, without infringing the article 5 rights of those who were constrained.

65. For these reasons, which are little more than a summary of those advanced by my noble and learned friend, Lord Hope of Craighead, with whose opinion (which I have had the privilege of reading in draft) I agree, I would dismiss this appeal.