Area-based restrictions to maintain public order: the distinction between freedom-restricting and liberty-depriving public order powers in the European legal sphere

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ABSTRACT

This contribution aims to make a clear distinction between public order measures that constitute a mere restriction of the free movement, thus falling within the ambit of Article 2 of Protocol No. IV to the European Convention on Human Rights, and those amounting to a deprivation of liberty, thus coming within the scope of Article 5 of the European Convention. The boundary between a mere restriction upon the free movement and a more severe deprivation of it is not always clear, while it has important legal consequences. To that end, this article outlines the general principles applied by the European Court of Human Rights when considering whether there is a deprivation of liberty. It then gives an overview of the relevant Strasbourg Court's case law with regard to specific public order measures that have already been considered to involve a restriction of the free movement or a deprivation of it. In order to find some inspiration, it simultaneously compares with the decisions of the Human Rights Committee and the prevailing law on this issue in Belgium and the United Kingdom, where new forms of freedom-restricting public order powers have recently been introduced and have already been assessed for involving a deprivation of liberty.

INTRODUCTION

The Belgian and UK legislator increasingly provide the executive and judges with public order powers that restrict the individual in his free movement. In Belgium, the maintenance of public order is primarily a competence of local administrative authorities, in particular a mayor. For example, in both legal systems, a mayor or a constable in uniform can maintain public order by temporarily prohibiting an offender to enter a particular public area, such as a street or a neighbourhood, via a 'temporary prohibition of place'[2], or, by requiring him to leave and not to return to it, via a 'direction to leave'[3], respectively. In addition, in both legal systems, a civil servant or a judge can subject an offender to a temporary prohibition to enter a football stadium in order to tackle football violence[4] or even a public transport ban comprising the prohibition

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[2] Art.134sexies of the New Municipality Act (Belgium).
[3] s.35(1) of the Anti-social Behaviour, Crime and Policing Act 2014.
[4] Art.24 of the Law of 21 December 1998 on Safety at Football Matches (Belgium) and Art.14B of the Football Spectators Act 1989 (the so-called 'football banning order on complaint'), resp.

to use public transport.[5] All these measures pursue the same goal, namely maintaining public order by temporarily restricting the individual in his free movement with regard to a certain area in a particular state, or, in other words, by imposing *area-based restrictions*.

This trend is unlikely to end soon, given the current increase in dangerous situations, such as situations of terrorism threat, which may in turn lead to an increase in far-going public order powers. For example, in Belgium, the New Flemish Alliance party (N-VA) – a centre-right Flemish nationalist party in the coalition – proposed the introduction of 'administrative house arrest' in the fight against terrorism as a competence of the National Security Council, which is a public body coordinating state action against terrorist threats.[6] However, further considerations as to the (potential) content of this measure are not given and no legislative proposals have yet been submitted. It should be noted that house arrest is already introduced in Belgian criminal law, via the 'penalty under electronic surveillance'. This penalty requires the individual to temporarily remain in a certain residence, which is in turn controlled via electronic means.[7] However, it is then a penalty imposed by a judge and not a measure imposed by the executive. Such measures already exist in the United Kingdom. For example, the secretary of state can impose non-derogating control orders[8], which have recently been replaced by terrorism prevention and investigation measures (TPIMs).[9] These measures can include overnight home curfews, requiring the individual to remain at a specified residence during the night[10].[11]

However, the above-mentioned public order powers involve serious restraints of our fundamental rights and freedoms, more specifically the right to freedom of movement as

[5] Flemish Decree of 8 May 2009 on Public Transport Ban (Belgium) and via an injunction based on Part 1 ACPA 2014, resp.

[6] They proposed it as a possible measure when the state of emergency would be introduced in the Belgian legal system (see N-VA, Niveau V (Sept 2016), https://www.n-va.be/sites/default/files/generated/files/news-attachment/niveau_v_-_10092016.pdf [accessed 31 January 2017]).

[7] Ars 37*ter*-37*quater* of the Criminal Code (Belgium).

[8] ss.2 and 3 (1)(a) of the Prevention of Terrorism Act 2005. These orders are called 'non-derogating', since they do not derogate from Article 5 ECHR. They merely restrict the individual in his free movement, without depriving him of all liberty.

[9] Terrorism Prevention and Investigation Measures Act 2011, as amended by Part 2 of the Counter-Terrorism and Security Act 2015.

[10] Schedule 1, Part 1 of the Terrorism Prevention and Investigation Measures Act 2011, as amended by Part 2 of the Counter-Terrorism and Security Act 2015.

[11] Note that also other measures are already introduced in the United Kingdom in the fight against terrorism, such as temporary exclusion orders (TEOs) under the Counter-Terrorism and Security Act 2015, which are moreover deemed to be used for the very first time following the recent Manchester attack in May 2017 ("General election 2017: Extremist exclusion orders 'used'" (28 May 2017), www.bbc.com [accessed 15 June 2017]). These orders enable the executive to temporarily ban British citizens suspected of fighting abroad from returning to the UK. However, such orders interfere with the individual's right *to enter* his own country and not with his right *to move freely within the area* of that particular country, thus falling outside the scope of this contribution. See for more information on TEOs: Helen Fenwick, "Terrorism threats and temporary exclusion orders: counter-terror rhetoric or reality?" (2017) 3 European Human Rights Law Review 247-271.

guaranteed in, *inter alia*, Article 2 of the Fourth Additional Protocol to the European Convention on Human Rights (FAP).[12] The first paragraph of this Article reads as follows:

> "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".

For this contribution, I will only focus on the individual's right to move freely within the territory of a particular state and not (also) the right for the individual to choose his residence.

The right to move freely within the territory of a particular state prohibits national authorities to *restrict* the individual's free movement in an arbitrary way. Additionally, every individual also has the right not to arbitrarily lose all free movement and thus not to be arbitrarily *deprived* of it, as guaranteed via the right to liberty and security anchored in *inter alia* Article 5 ECHR.[13] Thus, restraints of the individual's free movement can occur in various gradations, ranging from a mere restriction upon the free movement under Article 2 FAP to the more far-reaching deprivation of all liberty under Article 5 ECHR.

According to the European Court of Human Rights, the right to freedom of movement in Article 2 FAP must be clearly distinguished from the right to liberty in Article 5 of the Convention. In *Austin v the United Kingdom*, the Grand Chamber stated that the rights guaranteed under the ECHR – which are incorporated into UK domestic law by the Human Rights Act 1998 via the so-called Convention rights – and more specifically the right to liberty in Article 5, may not be interpreted as (also) providing the requirements of the Fourth Protocol as regards contracting states who have not yet ratified it, such as the United Kingdom[14].[15] As a result, UK citizens cannot bring claims for breaching Article 2 FAP before national courts – contrary to Belgium, having ratified the Fourth Protocol which has direct effect in Belgian domestic law. Importantly, the Strasbourg Court has held that restrictions of the right to freedom of movement may also interfere with other fundamental rights, such as the right to privacy in Article 8 ECHR.[16] Hence, UK citizens can bring claims before national courts for breaching the right to freedom of movement based on other Convention rights, such as Article 8, but also, for example, Articles 10 and 11, provided that the limitations on the freedom of movement amount to limitations to any of these rights.

The question arises to what extent area-based restrictions involve a restriction upon the free movement, thus falling within the ambit of Article 2 FAP (or other Convention rights), and when they amount to a deprivation of liberty, thus invoking Article 5 ECHR. This question is not an easy one to answer. As will be seen below, the boundary between a restriction upon the free movement and a deprivation of it is not always clear. However, this distinction has

[12] See also Art.13 Universal Declaration of Human Rights and Art.12 International Covenant on Civil and Political Rights (ICCPR).
[13] See also Art.3 Universal Declaration of Human Rights and Art.9 ICCPR.
[14] However, it did sign it, so that the UK may not act contradictory to the object and the aim of the Protocol (Art.18 Vienna Convention of 23 May 1969 on the Law of Treaties).
[15] *Austin v the UK* [GC] (2012) 55 E.H.R.R. 14, at [55].
[16] *Iletmiş v Turkey* (2011) 52 E.H.R.R. 35. *Iletmiş v Turkey (App. No.29871/96), judgement of December 6, 2005,* para.50.

important consequences, since the restriction grounds are very different. A measure restricting the individual's free movement is already possible when it (i) is prescribed by law, (ii) pursues a legitimate aim, such as maintaining public order and (iii) is necessary in a democratic society, i.e. proportionate.[17] A deprivation of liberty is only possible in a limited number of situations listed in Article 5(1) ECHR, which must be narrowly interpreted.[18]

It is important to point out that – unlike the limiting clauses in Article 2 FAP – there is no 'exception' under Article 5(1) ECHR for public order measures, so that, strictly spoken, deprivations imposed to safeguard public order cannot be justified in the light of this Article. It should be noted that the right to liberty and security as enshrined in Article 9 of the International Covenant on Civil and Political Rights (ICCPR)[19], does not include an enumeration of possible restriction grounds. Hence, a deprivation of liberty for public order reasons seems, in principle, to be possible under the ICCPR.[20]

Consequently, it is imperative for the national legislator, when drafting legislation on new freedom-restricting public order powers, such as area-based restrictions, but also for the competent national authorities when imposing such measures, to be acquainted with the factors that should be taken into account, to make sure that these measures only imply a restriction of the free movement and not a deprivation of it. After all, a deprivation of liberty for public order reasons can in principle not be justified under the Convention. Hence, the aim of this contribution is to distinguish between freedom–restricting and liberty-depriving area-based restrictions, via a first exploratory analysis of the relevant factors put forward in the Strasbourg Court's case law, compared to the decisions of the Human Rights Committee (HRC) and the prevailing law on this issue at the national level, more specifically in Belgium and the UK[21].

Before analysing in detail to what extent area-based restrictions involve a deprivation of liberty, we first consider some general points on Article 2 FAP and Article 5 ECHR.

GENERAL PRINCIPLES APPLIED BY THE STRASBOURG COURT TO DISTINGUISH BETWEEN FREEDOM-RESTRICTING AND LIBERTY-DEPRIVING MEASURES

[17] Art.2(3) FAP. Note that the fourth paragraph provides another restriction ground, already enabling restrictions when they are "justified by the public interest in a democratic society". However, and regardless of the applied restriction ground, the measure must always be at least *proportionate*. See also Liesbeth Todts, "The legitimacy of area-based restrictions to maintain public order: giving content to the proportionality principle from a European legal perspective" (Public Administration Yearbook, Pedagogical University of Cracow, 2017), 22 p. *(To be published).*

[18] See, e.g. *Winterwerp v the Netherlands* (1979) 2 E.H.R.R. 387*,* at [37] and *Al-Jedda v the UK* [GC] (2011) 53 E.H.R.R. 23, at [99].

[19] Both Belgium and the UK have ratified the Covenant. In the United Kingdom, however, it is not directly applicable, since it is not incorporated into domestic law, whereas in Belgium the Covenant is (at least implicitly) accepted to have direct effect in domestic law.

[20] See also UN Human Rights Committee (HRC), *General Comment No.35, Article 9,* CCPR/C/GC/35, at [14].

[21] References in this contribution to the United Kingdom should be read as comprising (only) England and Wales.

Neither Article 2 FAP nor Article 5 ECHR comprises a definition of what is to be understood by a restriction of the free movement or a deprivation of it. According to the established Strasbourg Court's case law, Article 5 concerns the *physical* liberty of the person[22] and involves arrest and detention in the *classic sense*, such as detention in prison.[23] However, it appears from this case law that Article 5 is not limited to these situations, but may take numerous other forms.[24]

Furthermore, the fact that a person is not handcuffed, put in a cell or in any other way physically restrained does not constitute a decisive factor when establishing the existence of a deprivation of liberty.[25] In the *Guzzardi* case, the Strasbourg Court gave some general guidance as to the factors that should be taken into account, especially for restrictions falling short of arrest or detention in the classic sense. Guzzardi was suspected of being a member of the Italian mafia and therefore subjected to an order involving *compulsory residence*, imposed as a preventive measure, i.e. before any conviction or acquittal and independent of the criminal proceedings against him. He had to stay on a small and remote island, practically only in the company of policemen and other persons subjected to the same measure, combined with a number of added restraints, such as the obligation to regularly report to the police and severe (telephone) communication restrictions. Although Guzzardi was not bound by any physical barrier, the combination of the imposed restrictions resembled detention in an (open) prison, thus invoking Article 5.[26] The Court attached particular significance to the nature and the extremely small size of the area (i.e. the island), the almost permanent police supervision and the fact that there were few opportunities for social contact, other than with his near family, his fellow 'residents' and policemen.[27]

The *Guzzardi* case indicates that the Strasbourg Court analyses whether the *overall* situation of the person concerned is in practice sufficiently comparable with the situation of a person in prison, having regard at the effect of the restraints imposed, "cumulatively and in combination".[28] It in particular assesses the effect of the measure in question on the life that the individual would have been living otherwise.[29]

The right to liberty in Article 5 ECHR is not concerned with mere restrictions on the right to freedom of movement, as enshrined in Article 2 FAP. This distinction, however, will not always be easy to identify. According to the Strasbourg Court, the difference between the two concepts is not one of nature or substance, but merely one of *degree* or *intensity*.[30] Echoing Harris *et al.*,

[22] *Engel v the Netherlands* (1979-80) 1 E.H.R.R. 706, at [58]. See also *Guzzardi v Italy* (1981) 3 E.H.R.R. 333, at [92].
[23] *Guzzardi v Italy*, fn.22 above, at [95].
[24] *Ibid*.
[25] *MA v Cyprus* (App. No.41872/10), judgement of 23 July 2013, at [193].
[26] *Guzzardi v Italy*, fn.22 above, at [95].
[27] *Ibid*.
[28] *Ibid*. See also Lord Bingham in *Secretary of State for the Home Department v JJ* [2007] UKHL 45; [2007] 3 W.L.R., at [16].
[29] *Engel v the Netherlands* (1979-80) 1 E.H.R.R. 706, at [59] and [61].
[30] See, e.g. *Engel v the Netherlands* (1979-80) 1 E.H.R.R. 706, at [58] and *Guzzardi v Italy*, fn.22 above, at [93].

deprivation of liberty involves an *extreme form* of restriction upon the freedom of movement.[31] In *Guzzardi*, for example, the Strasbourg Court held that an order involving compulsory residence under special police supervision, does not of itself bring along a deprivation of liberty, but it may result into one when it is carried out in such a way that there is hardly any free movement left for the individual, thus implying a de facto deprivation of liberty.[32]

In order to decide whether the imposed restriction is of a degree to fall within the scope of Article 5 ECHR, it is a well-established principle in the Strasbourg Court's case law that the starting point must be the specific situation of the individual and that account must be taken of a whole range of factors, such as the type, duration, effects and manner of implementation of the measure.[33] The Court does not consider itself as bound by the domestic legal classification of the measure and assesses it in an autonomous way.[34]

We turn now to an overview of the Strasbourg Court's case law with regard to area-based restrictions that have already been considered as only restricting the individual's free movement and those amounting to a deprivation of it, in order to analyse the decisive factors put forward by the Court. We will subsequently discuss orders prohibiting the individual to be at a certain public place, compulsory residence orders, home curfews and crowd-control orders.

APPLICATION OF THE GENERAL PRINCIPLES TO AREA-BASED RESTRICTIONS

Orders prohibiting the individual to be at a certain public area

Measures temporarily prohibiting the individual to enter a particular public area are generally considered as less severe measures, thus only restricting the individual in his free movement. This is for instance the case for measures excluding the individual from a certain district or village.[35] In *Landvreugd*, concerning an order imposed by a mayor prohibiting the individual to enter a certain public place to tackle the traffic in and the use of hard drugs in that place, the order was treated as a restriction of the free movement.[36] This is also true for the above-mentioned Belgian temporary prohibition of place. The Belgian Constitutional Court already stated that this measure only involves a restriction of the free movement, without depriving the individual of all liberty.[37]

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[31] David J. Harris, Michael O'Boyle, Edward P. Bates and Carla M. Buckley (eds), *Law of the European Convention on Human Rights* (OUP, 2014), p.289.
[32] *Guzzardi v Italy*, fn.22 above, at [94].
[33] See, e.g. *Guzzardi v Italy*, fn.22 above, at [92] and *Riera Blume v Spain* (2000) 30 E.H.R.R. 632, at [28].
[34] See, e.g. *HL v the UK* (2004) 40 E.H.R.R. 761, at [90]; *HM v Switzerland* (2004) 38 E.H.R.R. 17, at [30] and [48] and *Creangă v Romania* [GC] (2013) 56 E.H.R.R. 11, at [92].
[35] See, e.g. HRC, *Ackla v Togo,* No.505/92, at [10].
[36] *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56. *Cf. Olivieira v the Netherlands* (2003) 37 E.H.R.R. 32.
[37] Belgian Constitutional Court ('Grondwettelijk Hof'), 23 April 2015, No.44/2015, at [B.62].

These decisions indicate that, when the domestic legislator or the competent national authority introduces or imposes measures that still provide the individual with all free movement, save for the area covered by the prohibition order, they are deemed to merely restrict the individual in his free movement. It can be argued that this will also be the case, for instance, for a football stadium ban, leaving the individual with all free movement, save for the football stadium.

Compulsory residence orders

In a number of similar cases against Italy, among which the above-mentioned *Guzzardi* case, the classification of compulsory residence orders was at stake, imposed on persons suspected of criminal activities as preventive measures, independent of the criminal proceedings against them. For instance, in *de Tommaso* (Grand Chamber), the most recent one, the individual was obliged to reside and stay in his municipality under severe police supervision, combined with a number of additional restraints. These restraints consisted of, amongst others, the obligation to report once a week to the police, not to go to bars or nightclubs and not to attend public meetings as well as communication and association restrictions.[38] In all these cases, the Court contrasted with the far-going residence order imposed in the previous *Guzzardi* case and stated that the measure in question did not amount to a deprivation of liberty.[39]

However, in none of these cases, the Court provided further justification on why these post-*Guzzardi* cases apparently included various less restrictions compared to *Guzzardi*. The basis of this case law appears to be a paragraph in *Raimondo*, which simply states that "the measure in issue did not amount to a deprivation of liberty within the meaning of Article 5 para.1", but that they "fall to be dealt with under Article 2 of Protocol No. 4"[40].[41]

Some guidance can be found in the recent Grand Chamber judgement *de Tommaso*. The Grand Chamber observed that the applicant was – unlike the one in *Guzzardi* – not forced "to live within a restricted area", but allowed to remain in his own municipality. Moreover, the measure did not make it impossible for him "to have a social life and maintain relations with the outside world", contrary to Guzzardi, who had to live within a very small and remote island, mainly with his fellow 'residents' and policemen. Therefore, the compulsory residence did not amount to a deprivation of liberty, according to the Court.[42]

This case law indicates that the nature and the surface of the area where the individual is confined to will be of particular importance when analysing whether there is a deprivation of liberty. The competent national authorities may thus well introduce or impose public order powers, such as compulsory residence orders, merely amounting to a restriction of the

[38] *De Tommaso v Italy* [GC] (App. No.43395/09), judgement of 23 February 2017.
[39] *Ibid.*, at [84]; *Ciancimino v Italy* (1991) 70 D.R. 112-113; *Labita v Italy* [GC] (2008) 46 E.H.R.R. 50, at [193] and *Monno v Italy* (App. No.18675/09), decision of 8 October 2013, at [21]-[23]. *Cf.* HRC, *Celepli v Sweden*, No.456/1991, at [6.1]-[6.2] and HRC, *Karker v France*, No.833/1998, at [8.5]-[8.6].
[40] *Raimondo v Italy* (1994) 18 E.H.R.R. 237, at [39].
[41] See also the partly dissenting opinion of Judge Pinto De Albuquerque in *de Tommaso* [GC], fn.38 above, at [15].
[42] *De Tommaso* [GC], fn.38 above, at [85].

individual's free movement, insofar as the area of confinement is not too limited and far away, but rather consists of the usual place of residence. In this way, the individual is still able to have social contacts and maintain relations with the outside world.

Home curfews

Home curfews, merely requiring the individual to remain inside a particular house, such as his own house, *for a certain time*, e.g. by night, are in principle mere restrictions of the individual's free movement. They must be clearly distinguished from continuous house arrest, requiring the individual to *permanently* stay at home, mostly imposed as a 'less restrictive' measure replacing pre-trial detention. After all, according to the well-established case law of the Strasbourg Court, such continuous house arrest is – in view of its degree and intensity[43] – tantamount to the situation in which a person is being detained in prison, thus involving a deprivation of liberty.[44] The HRC, too, considers house arrest as amounting to a deprivation.[45]

The applicant in the above-mentioned case *de Tommaso* was also subjected to a measure requiring him to remain home between 10 pm and 6 am. Whilst he argued that this eight-hour home confinement amounts to 'house arrest' and hence a deprivation of liberty, the Grand Chamber did not accept this argument. The Court considered that, having regard to the effects and manner of implementation of the measure, there were no added restraints imposed on the free movement during daytime, the applicant thus being allowed to leave his home during the day. For this reason, the applicant was still able to have a social life and maintain relations with the outside world and was therefore only restricted in his free movement.[46]

In *Trijonis*, too, the Strasbourg Court held that the – according to the applicant – imposed 'house arrest' did not amount to a deprivation of liberty. The 'house arrest' was a remand measure, imposed before any conviction or acquittal, which required the applicant to remain in his home during week-ends and from 7 pm to 7 am during week-days. The Court particularly took into account the fact that he was for the remaining free hours "allowed to spend time at work as well as at home" as he wished.[47]

What appears to be decisive for the Strasbourg Court is, reading the cases *Trijonis* and *de Tommaso* together, whether the individual is able to *leave* the place of confinement, for instance to go to work. The measure should still enable the individual to have social contacts, instead of isolating him in the place of confinement, like continuous house arrest. In the words used by

[43] *Buzadji v the Republic of Moldova* [GC] (App. No.23755/07), judgement of 5 July 2016, at [104].
[44] See, e.g. *Mancini v Italy* (App. No.44955/98), judgement of 2 August 2001, at [17]; *Ninescu v the Republic of Moldova* (App. No.47306/07), judgement of 15 July 2014, at [53] and *Delijorgji v Albania* (App. No.6858/11), judgement of 28 April 2015, at [75].
[45] HRC, *Monja Jaona v Madagarcar*, No.132/1982, at [14]; HRC, *Gorji-Dinka v Cameroon*, No.1134/02, at [5.4] and HRC, *Yklymova v Turkmenistan*, No.1460/06, at [7.2].
[46] *De Tommaso* [GC], fn.38 above, at [88]-[89]. *Cf. Labita v Italy* [GC] (2008) 46 E.H.R.R. 50.
[47] *Trijonis v Lithuania* (App. No.2333/02), admissibility decision of 17 March 2005, p.7.

Harris *et al.*, the Court appears to analyse whether the measure generally prevents the individual from pursuing a "normal daily life".[48]

As a result, when the domestic legislator introduces new freedom-restricting public order powers, e.g. the above-mentioned proposed measure of administrative 'house arrest' in Belgium, it is crucial that it does not consist of a permanent confinement of the individual to his house, in order to avoid the classification of it as a deprivation of liberty. By contrast, the competent national authorities may well introduce or impose home curfews to maintain public order merely involving a restriction of the free movement, insofar as they still enable the individual to leave the place of confinement and allow him to continue his 'normal daily life'.

In this regard, and although the Strasbourg Court did not expressly refer to it as being a relevant factor when assessing whether there is a deprivation of liberty, it can be argued that the individual will rather be able to pursue such a normal daily life when being confined to his own house, than to another place.[49] Therefore, in order to avoid the individual being regarded as deprived of liberty, the competent domestic authorities should confine the individual to his own house instead of a specially provided residence.

However, it is not unconceivable that, in some circumstances, home curfews combined with other far-going restraints on the individual's free movement de facto amount to a deprivation of liberty. The English courts, too, struggled with the ambit of Article 5 ECHR as regards home curfews. In the case of *JJ*, a non-derogating control order was imposed. It included a home curfew from 4 pm to 10 am, combined with a number of additional restraints, such as severe geographical limitations on the free movement for the remaining 6 hours and restrictions on association and communication. The majority of the House of Lords held that the individuals' situation was similar to an open-prison regime, so that they were deprived of liberty.[50] Lord Brown, looking for some further justification, suggested that one should in particular take account of the core element of confinement, i.e. the extent to which the individual is actually confined.[51] He considered that a curfew involving home confinement of up to 16 hours a day, leaving the individual with 8 hours of liberty each day – albeit controlled due to the additional restraints imposed – should be classified as only restricting the individual's free movement.[52]

A similar reasoning and equal importance given to the length of actual confinement can be found in the case of *E*, concerning a 12-hour home curfew. The House of Lords unanimously decided that there was *no* deprivation of liberty, considering that the length of the actual

[48] Harris *et al., Law of the European Convention*, fn.31 above, p.291.
[49] See also *ibid*.
[50] *Secretary of State for the Home Department v JJ,* fn.28 above, at [24]. See also David Feldman, "Deprivation of liberty in anti-terrorism law" (2008) 67(1) C.L.J. 5-6.
[51] *Secretary of State for the Home Department v JJ*, fn.28 above, at [108].
[52] *Ibid.*, at [105].

confinement, i.e. 12 hours, was within the range that the Strasbourg Court had already accepted as merely involving a restriction of the free movement (see *Trijonis*, above).[53]

Note that, in France, similar measures were introduced in the light of the 2015 Paris attacks and the subsequent implementation of the state of emergency.[54] The Minister of Internal Affairs can, for instance, impose a so-called 'assignation à résidence' on a person suspected of posing a threat to public order and safety. This measure obligates the suspect to reside within at a certain area for a certain period and can be combined with further restrictions, such as a home curfew. The suspect is then required to remain within a specified residence, such as his home, for up to 12 hours per day ('l'astreinte à domicile').[55] The classification of these residence requirements has already been brought before the French Constitutional Council. The Council held that it does not involve a deprivation of liberty within the meaning of Article 66 of the French Constitution[56].[57] However, it also stated that, albeit without any further justification, a home curfew may not be imposed for a period beyond 12 hours per day, for that it does not amount to a deprivation of liberty.[58]

The above approaches, both of the English courts and the French Constitutional Council, suggest that there may be a length of confinement which will always involve a deprivation of liberty. This appears to me, echoing Feldman, not in line with the more general and all-inclusive approach of the Strasbourg Court.[59] The Court does not limit its judgement to only the actual period of confinement, distinguishing it from other, additional restraints imposed, but it analyses in more general terms whether the individual's overall situation is sufficiently akin to the one of someone being imprisoned.[60] For example, in *de Tommaso*, above, the Strasbourg Court also took into account the degree to which the person was controlled *outside* the curfew period, when considering that no other restrictions were imposed on his remaining free time during the day. The curfew length may not be the sole criterion for a deprivation of liberty and account should be taken of all relevant factors, in order to assess whether and to what extent the individual's 'normal daily life' is controlled by the measure.[61]

In this regard, some inspiration can be found in Belgian criminal law, in particular as to the above-mentioned penalty under electronic surveillance. The legislator contrasted this penalty with imprisonment and held that, where the latter clearly involves a deprivation of liberty, the

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[53] *Secretary for the Home Department v E* [2007] UKHL 47, [2007] 3 W.L.R. 720, at [11]. See also David Feldman, "Deprivation of liberty in anti-terrorism law" (2008) 67(1) C.L.J. 6-7 and Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human rights and criminal justice* (Sweet & Maxwell, 2012), p.259.

[54] The state of emergency has been renewed in December 2016 and again extended until 15 July 2017.

[55] See Art.6, Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence, as modified by Art.4 Loi n° 2015-1501 du 20 novembre 2015 and Art.2 Loi n° 2016-1767 du 19 décembre 2016.

[56] This Article reads as follows: "*Nul ne peut être arbitrairement détenu. L'autorité judiciaire, gardienne de la liberté individuelle, assure le respect de ce principe dans les conditions prévues par la loi"*.

[57] French Constitutional Council ('Conseil constitutionnel'), 22 December 2015, No.2015-527, at [6].

[58] *Ibid.*

[59] See David Feldman, "Deprivation of liberty in anti-terrorism law" (2008) 67(1) C.L.J. 7.

[60] As already stated by Lord Hoffman in *Secretary of State for the Home Department v JJ*, fn.28 above, at [43].

[61] See in the same sense Harris *et al*., *Law of the European Convention*, fn.31 above, p.291 and Daniel Moeckli, *Exclusion from Public Space* (CUP, 2016), p.238. *Cf. Secretary of State for the Home Department v AP* [2010] UKSC 24 per Lord Brown, at [3]-[4].

penalty under electronic surveillance only amounts to a restriction of the free movement. The individual is simply subjected to a *daily schedule*, which allows him to leave the determined residence for the necessary movements, such as going to work or having social contacts.[62] The legislator did not specify a maximum number of hours per day that the individual can be confined. It can be argued that this approach is in line with the Strasbourg Court's case law. The Court also seems to require that the measure still enables the individual to leave the place of confinement, for instance to go to work, for the individual not being deprived of liberty, without mainly focussing on the actual length of confinement. Accordingly, it is important for the national competent authorities to provide or impose public order measures that do not permanently confine the individual to a certain place, but that still give him the opportunity to leave the place of confinement, for example via a daily schedule, with the actual length of confinement being less important.

Crowd-control orders

In *Austin* (Grand Chamber), the classification was at stake of a measure containing a crowd – protesters and bystanders – for around seven hours within a very small place cordoned by police officers, in order to safeguard public order (the so-called 'kettling-method').[63] The Strasbourg Court referred to the traditional criteria of type and manner of implementation of the measure and held that these criteria enables it to have a look at "the specific context and circumstances" of it.[64] The Court took into account the fact that the situation was very volatile and dangerous as a result of the particularly aggressive behaviour of protesters within and outside the cordon and held that the cordon appears to be the least intrusive and most effective way to avoid a risk of serious injury to persons and damage to property.[65] It decided that, in view of these specific and exceptional facts of the case, the imposed cordon fell outside the scope of Article 5 ECHR.[66]

Two important remarks should be made here. First, although the Strasbourg Court did not expressly refer to the proportionality of the measure when assessing whether it involved a deprivation of liberty, it can be tentatively stated that it did assess the proportionality of it, when considering that the cordon was "the least intrusive and most effective way" to be applied.[67] However, prior to *Austin*, nothing in the Court's case law indicates that the proportionality of the measure should be taken into account when assessing whether there is a deprivation of

[62] Belgian Chamber of Representatives, Parliamentary Documents 2012-13, No.53-1042/002, p.7 and Parliamentary Documents 2015-16, No.54-1418/001, p.37. See also Tom Decaigny, "Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf" (2014) 4 Tijdschrift voor Strafrecht 213. Note that this domestic classification is not decisive, because the Strasbourg Court assesses the concept of deprivation of liberty in an autonomous way, as mentioned above.

[63] *Austin v the UK* [GC], fn.15 above.

[64] *Ibid.*, at [59].

[65] *Ibid.*, at [66]-[67].

[66] *Ibid.*, at [68].

[67] See in the same sense Helen Fenwick, "Enhanced subsidiarity or Appeasement?" in Katja S. Ziegler, Elizabeth Wicks and Loveday Hodson, *The UK and European Human Rights. A Strained Relationship?* (Hart Publishing, 2015), p.202.

liberty, although it may well come into play in the subsequent question of justification of that measure.

Second, the Strasbourg Court seems to have added 'context' to the traditional list of factors, albeit indirectly via the criteria of 'type' and 'manner of implementation'. The Grand Chamber stated in *Austin* that the context in which the measure is taken is an important factor, since "situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good". These are, for instance, measures containing and separating football crowds in order to avoid football violence and measures forcing motorists to wait in a queue of cars after a motorway accident.[68] In its subsequent case law, too, the Strasbourg Court referred to the specific context of the measure and the fact that situations can occur in which the public is required to endure freedom-restricting measures in the public interest.[69] The Court does not consider such commonly occurring restrictions as involving a deprivation, so long as they are "necessary to avert a real risk of serious injury or damage and are kept to the minimum required for that purpose"[70], or, in other words, proportionate.

One may derive from *Austin* and subsequent case law that the *purpose* of the measure imposed is also a factor that should be taken into account. Measures imposed for public-interest purposes, such as the maintenance of public order, would then fall outside the scope of Article 5 ECHR, insofar as they are proportionate to the aim pursued. It is noteworthy that similar purpose considerations were also used by the French Constitutional Council as to the above-mentioned French regime of compulsory residence. The Council held that these measures do not constitute a deprivation of liberty, considering that they are, by their nature, administrative police measures, "only aiming at maintaining public order and preventing offences".[71] However, this argument is inconsistent with the well-established principle in the Strasbourg Court's case law – as confirmed by the Grand Chamber in *Austin*[72] – that the pursued aim has no bearing on the question whether there is a deprivation of liberty, although it may be relevant for the subsequent question of justification of it.[73]

At the same time, a change in stance is apparent in the Strasbourg Court's case law and the Court seems to increasingly take into account the aim of the measure contested, albeit indirectly. The Court's position in *Austin* and subsequent case law may indeed be interpreted as de facto implying that, if the measure in question is necessary for a public-interest purpose, it does not involve a deprivation of liberty, provided that it is proportionate, in this way introducing a 'purpose-proportionality' test. After all, echoing Hamilton, determining the 'context' of the measure will often imply having a look at the pursued aim, since both are often hardly

[68] *Austin v the UK* [GC], fn.15 above, at [59]. *Contra*: David Mead, "Kettling comes to the boil before the Strasbourg court: is it a deprivation of liberty to contain protesters *en masse*?" (2012) 71 (3) C.L.J. 474.
[69] See, e.g. *Gahramanov v Azerbaijan* (App. No.26291/06), judgement of 15 October 2013, at [40]; *Kasparov v Russia* (App. No.53659/07), judgement of 11 October 2016, at [36(ii)] and *de Tommaso* [GC], fn.38 above, at [81].
[70] *Austin v the UK* [GC], fn.15 above, at [59].
[71] French Constitutional Council ('Conseil Constitutionnel'), 22 December 2015, No.2015-527, at [5].
[72] *Austin v the UK* [GC], fn.15 above, at [58].
[73] See, e.g. *Creangă v Romania* [GC] (2013) 56 E.H.R.R. 11, at [93] and *MA v Cyprus* (App. No.41872/10), judgement of 23 July 2013, at [189].

distinguishable.[74] As a result, when referring to the 'context' of the measure, the Court seems to have a look at the purpose of that measure 'through the backdoor'.[75] This was also the main criticism of the joint dissenting opinion in *Austin*. In this way, states could easily circumvent the procedural safeguards enshrined in Article 5 by imposing far-going freedom-restricting measures that (de facto) deprive the individual of liberty. They only have to show that the measure in question is imposed for public order purposes and is proportionate to that purpose.[76]

In my opinion, some more pragmatic reasons may be underlying the judgement in *Austin* and subsequent case law. In *Austin*, the Strasbourg Court considered that "Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public".[77] Article 5, however, does not allow someone being deprived of liberty for a public-interest purpose, such as the maintenance of public order, as mentioned above. Therefore, it can be tentatively stated that the Strasbourg Court seems to want to enable national authorities to take far-going, freedom-restricting measures in the public interest, to the extent that these measures are proportionate. A person who is subjected to measures imposed on, for instance, public order grounds, such as the police cordon in *Austin*, is not said to be deprived of liberty, because otherwise Article 5 would then prevent, or at least make it very difficult, such measures ever being justified.[78]

The above approach of the Strasbourg Court may be of great consequence. As already pointed out by the dissentients in *Austin*, this approach leaves the way open for *carte blanche* for national authorities when maintaining public order.[79] After all, it is not unconceivable that the 'purpose-proportionality' test to which the Court recently seems to allude when assessing whether there is a deprivation of liberty, is also applicable to other situations, such as terrorism threats.[80] This test would then allow the competent national authorities to introduce or impose far-going (de facto) liberty-depriving measures to tackle terrorism, without the necessity to comply with the procedural safeguards as enshrined in Article 5, provided that the measures are proportionate. This in turn brings along an imperative role to be played by national authorities competent for imposing such measures. They will have to ensure that, when they impose such measures, they are proportionate to the public order aim pursued, in order to avoid the individual being regarded as deprived of liberty.

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[74] Michael Hamilton, "'Kettling' and Article 5(1) ECHR: Austin and Others v UK (2012)" (23 March 2012), https://ueaeprints.uea.ac.uk [accessed 31 January 2017].

[75] See in the same sense Andrew Ashworth, "Human rights: article 5 - application to measures of crowd control by police" (2012) 7 Crim. L.R. 547.

[76] Joint dissenting opinion in *Austin v the UK* [GC], fn.15 above, at [3]-[5]. See also Andrew Ashworth, "Human rights: article 5 - application to measures of crowd control by police" (2012) 7 Crim. L.R. 547 and Helen Fenwick, "Enhanced subsidiarity or Appeasement?" in Katja S. Ziegler, Elizabeth Wicks and Loveday Hodson, *The UK and European Human Rights. A Strained Relationship?* (Hart Publishing, 2015), p.203.

[77] *Austin v the UK* [GC], fn.15 above, at [56]. *Cf. Ostendorf v Germany* (App.No.15598/08), judgement of 7 June 2013, at [88].

[78] Joint dissenting opinion in *Austin v the UK* [GC], fn.15 above, at [9]. See in the same sense David Mead, "Kettling comes to the boil before the Strasbourg court: is it a deprivation of liberty to contain protesters *en masse*?" (2012) 71 (3) C.L.J. 475.

[79] Joint dissenting opinion in *Austin v the UK* [GC], fn.15 above, at [7].

[80] And contrary to its previous case law: see, e.g. *A v the UK* [GC] (2009) 49 E.H.R.R. 29, at [171], as also indicated by the dissentients in *Austin v the UK* [GC], fn.15 above, at [6].

CONCLUSIONS

This contribution aimed to make a clear distinction between freedom-restricting public order powers, such as area-based restrictions, only involving a restriction upon the free movement and those amounting to a deprivation of it, via a first exploratory analysis of the relevant Strasbourg Court's case law. As to area-based restrictions, I argued that at least the following factors can be put forward as relevant to assess whether these restrictions amount to a deprivation of liberty:

First, the **type of the measure**, i.e. the degree in which it restricts the individual's free movement. Measures still enabling the individual to come and go wherever he pleases, save for the area covered by the prohibition order, involve a mere restriction of the free movement. Continuous house arrest, on the contrary, requiring the individual to permanently stay at home is more problematic and is deemed to constitute a deprivation of liberty.

Second, the **effects and manner of implementation of the measure**. This factor is of particular importance for compulsory residence orders and home curfews. As to compulsory residence, for not amounting to a deprivation of liberty, the area of confinement should not be too limited and far away, but should rather be the area where the individual usually resides, thus allowing him to maintain social contacts. As far as home curfews are concerned, the restrictions imposed should not imply a permanent confinement of the individual to a specified residence, like continuous house arrest. The restrictions imposed – both the actual confinement and the added restraints outside the curfew hours – should still allow the individual to leave the place of confinement and to have a social life. Additionally, it is recommended to confine the individual to his own house, rather than another place, in an attempt to allow him to continue his 'normal daily life'.

Third, the **duration of the measure**. The length of the actual confinement, however, may not be regarded as the sole criterion for loss of liberty. It is simply one of the factors to be considered when assessing whether the individual's *overall* situation indicates a deprivation of liberty.

Fourth, the **context of the measure**, which indirectly allows the Court to have a look at the *aim* of the measure and to consider whether it is *proportionate* to the aim pursued. However, caution is needed and the precise position of this factor under the Convention is not clear yet. This contribution is thus also a call for a clearer and more convincing approach of the Strasbourg Court on what constitutes a restriction of the free movement and what amounts to a deprivation of liberty, in particular in the area of freedom-restricting public order powers.