Written evidence from Professor David Mead and Dr Joe Purshouse,
School of Law, University of East Anglia (COV0068)

1. We are legal academics with long-standing interests in policing, public order, human rights and surveillance.

2. The coronavirus undoubtedly poses such a threat that it engages the UK’s positive duty under Art 2 to take action to save life, and not to impose “harm” as aspects of Arts 3 and 8 ECHR. This paper does not address that but instead its focus is on one question, the human rights implications of The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 specifically on regulation 6, the restrictions on movement.

SUMMARY

3. The restrictions on movement in regulation 6 are not on their face sufficiently severe as to constitute for everyone a deprivation of liberty under current ECHR case law on Article 5 but for some citizens/groups, the isolating or other effects might be such as to do so. However, while it is lawful to deprive someone of their liberty in order to prevent the spreading of infectious diseases, there are human rights concerns here that make it uncertain whether the Government could withstand challenge. These relate to or stem from (legal) certainty and foreseeability – for example the gap between the law and Government guidance, and arising from operational policing.

Regulation 6

4. Regulation 6(1) has recently been amended, and now proscribes both being outside AND leaving one’s place of residence without reasonable excuse, which includes (but is not limited to) 13 listed reasons.

5. ECHR case law is clear - see e.g. De Tommaso v. Italy. Article 5 protects the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion. It is not concerned with mere restrictions on liberty of movement, governed by A2P4, which the UK has not ratified and does not constitute a Convention right under the Human Rights Act 1998. The difference is one of degree or intensity, not one of nature or substance (again De Tommaso). The starting point in determining whether there has been a deprivation is someone’s concrete situation and 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.

6. Applying these general principles to the application of Regulation 6(1)...

   (i) Regulation 6(1) taken alone does not constitute a form of house arrest. At the very least, reg 6(2) allows for exercise and forms of shopping and for some, might allow them to leave in order to work as well.
(ii) Regulation 8, which allows an officer to direct someone to return home or actually to remove them back home, does not change this. It does not include an additional power to ban repeated leaving of the house.

7. That said, there are indications in some Article 5 case law (both here and at Strasbourg) that the reality facing some citizens might more closely resemble a deprivation of liberty

(i) Article 5 can be made out by “confinement in a particular restricted space for a not negligible length of time” (Storck v Germany [74]) though there the period was 20 months

(ii) An ability or not to maintain social contact, and generally the level of isolation

(iii) There is also a measure of support – albeit factually very different (control orders imposed on terrorism suspects) – in the House of Lords decision JJ [2007] UKHL 45. There an 18-hour curfew (much longer than anticipated in the 2020 Regulations for most) and social isolation was held to constitute a deprivation of liberty, albeit there too was possible state intrusion into the property and previous relocation from family and friends.

In short, we think on balance that if the Regulations were to remain in place for many weeks, it would at least be arguable for some groups that Article 5(1) is engaged: those with no outside space, confined to one piece of exercise and making infrequent trips for shopping (under HMG Guidelines at least), especially the elderly/those who have retired and/or those with limited internet access (albeit with the capacity to phone) and/or especially those who have heeded the repeated message to “self-isolate” if they suspect they have contracted the virus, and the clinically extremely vulnerable who have been “strongly advised” to ‘shield’ until June.

We do not think it could be argued that someone self-isolating had imposed the deprivation on themselves (i.e. they had consented to it). Given the social and moral pressure to conform and remain indoors, that would not be seen as “valid” consent (Storck [74]).

8. By contrast, supporting the view that there is no deprivation here

(i) there is no “continuous supervision and control” of anyone remaining at home (HL v UK [90])

(ii) Recent cases have stressed that in determining whether or not a deprivation has occurred, purpose or motive might play a role. In Austin v UK ([59]) the Grand Chamber put it thus: the “context in which action is taken is an important factor to be taken into account, since situations commonly occur in modern society where the public may be called upon to endure restrictions on freedom of movement or liberty in the interests of the common good.” That was a short lived (five-hour) police kettle or containment – and the other examples of analogous situations where the public accepts temporary restrictions such as motorway stoppages, or attendance at a football match have little traction.

9. If the restrictions on leaving one’s house do constitute a deprivation of liberty, then it requires justification by one of the six exhaustive grounds in Art 5(1), most obviously Art5(1)(e) – the lawful detention of persons for the prevention of the spreading of infectious diseases.
10. However, for the Government to make good on that, the deprivation must be lawful, something given an autonomous Convention meaning. Not only must it be lawful as a matter of domestic law – and we note the live academic discussion on blogs over vires – but the Regulations must also comply with the principle of legal certainty, the principle of proportionality and the principle of protection against arbitrariness at the heart of Art 5.

11. Here we note concerns about the clarity and foreseeability of the application of the law. This arises not from the Regulations themselves, which we accept are clear but from the combination of Regulations, Government guidance and National College of Policing Guidance. In short, there is uncertainty about what outside activities are permitted, something exacerbated by reputable media reports of inconsistent approaches taken by forces across England and Wales. Some police officers have interpreted the law as prohibiting all ‘non-essential’ activities outside of the home, even when the individuals engaged in the ‘non-essential’ activity had a reasonable excuse for leaving their home under regulation 6. For example, issuing fines to people who drive to secluded areas in order to take exercise, or prohibiting the sale of Easter Eggs by supermarkets that are open to allow individuals to buy essentials (G. Thompson, ‘Dyfed-Powys Police puts up inaccurate coronavirus signs’ Western Telegraph, 4 April 2020; ‘Coronavirus: Easter egg crackdown over essential status 'wrong" BBC, 30 March 2020: https://www.bbc.co.uk/news/business-52090441).

12. We do not consider there to be any arbitrariness in the sense used by Strasbourg, such as an element of bad faith or deception on the part of the authorities or where the order to detain and the execution of the detention did not genuinely conform to the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1): for a detailed overview of the key principles see James, Wells and Lee v UK and Saadi v UK.

13. The last hurdle then is whether the deprivation has been effected in order to prevent the spread of infectious diseases. Here, there is very little Strasbourg case law; the only case we know of is Enhorn v Sweden (2005). It does not provide authority for a general detention power since it concerned one (identified) infected person. Enhorn tells us that measures will only be lawful if they are the “last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest” ([44]). Here, gentler persuasion by ministers and health officials was tried in the lead up to the regulations.

14. More problematic perhaps is not the Regulations but certain aspects of the policing (see above) that foreclose travelling in order to exercise. It is hard to see, if such were enforced, how simply preventing more cars on the road (or fining those who take part in more dangerous forms of exercise) would be necessary to prevent the spread of disease; the rationale given – to prevent overstrecthing the emergency services – is at best a form of indirect, tangential prevention, and almost certainly only so loosely connected as not to provide legitimising cover.

15. The Regulations dictate mass measures based on sound scientific evidence that (i) a percentage of the population has contracted the virus and (ii) without isolating
measures it will spread to many. The Government’s case would be that in such cases, it does not need to demonstrate of any one individual that they either have or are likely soon to contract the virus. We imagine a Court accepting that in the sorts of extreme circumstances confronting the UK now but we do not consider it to be a settled, doctrinal position.

16. Article 5 requires that individuals who are detained have the right to challenge their continued detention at regular intervals, and to be released if the case for doing so can no longer be made out. Of course, doing so in the context here will be difficult – how can anyone “prove” they should no longer be subject to the regulation 6 requirements? The Government has committed to, and indeed the legislation requires, regular review of whether continued lockdown is appropriate. We wonder, tentatively, whether there might be an argument made that the government should also ensure positive testing – so that someone who has recovered can lay good claim to immunity – along the lines of James v UK (2013) 56 EHRR 12?: a failure to provide rehabilitation courses constituted a breach of Art 5(1) as it meant an IPP prisoner remained in prison after the expiry of the minimum term.

17. Some of our concerns have been met by the production of NPCC/College of Policing Guidelines on reasonable excuse (17 April) but (i) these are only police interpretations not authoritative statements of law and (ii) the plethora now risks greater confusion. It is time for governmental and parliamentary clarity, in the form of a Code of Practice and oversight body.

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