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

2. In this submission, we highlight some of the threats to human rights posed by the police use of surveillance to support enforcement of The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, specifically regulation 6, the restrictions on movement in public spaces.

SUMMARY

- Any use of surveillance technology to record or monitor the public in this context poses a risk of violating Article 8 of the European Convention on Human Rights (ECHR), and undermining public trust in the police.
- Any use should be carefully managed, proportionate to a legitimate aim, and have a clear legal basis.
- We have observed some forces using technology on the public in an ad hoc, experimental, and disproportionate manner.
- Police forces should be issued with guidance on the use of surveillance technology in response to the COVID-19 pandemic, and individual forces who wish to make use of this technology should publish information on how they plan to use technology and their legal mandate for this use.

PUBLIC SURVEILLANCE AND ARTICLE 8

3. Any use of surveillance technology to monitor the public and enforcing the restrictions on movement and gatherings imposed under The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, regulations 6 and 7 must comply with the United Kingdom’s existing framework for the protection of human rights. This framework requires that the use of surveillance technologies by police, which pass the threshold of interfering with an individual’s right to respect for private life, under Article 8(1) of the European Convention on Human Rights (ECHR), must (following the criteria set out in Article 8(2)) be lawful, ‘in pursuit of a legitimate aim’ and ‘necessary in a democratic society’ in order to comply with Article 8 ECHR.

4. The European Court of Human Rights has consistently held that that the right to the protection of one’s image and to control the use of that image is thus an essential component of Article 8(1) (Reklos v Greece [2009] EMLR 16 at [40]). In PG and JH v United Kingdom, the ECtHR also observed that, where a public authority creates a systematic and permanent record of material collected from the public domain, such as an impression of an individual’s image taken from a closed circuit television (CCTV) camera monitoring a public area, this can engage Article 8(1) (PG and JH v United Kingdom (2001) 46 EHRR 1272 at [57]). Domestic courts have held that the protection of the rights in Article 8(1) does not extend to those committing a criminal offence in
public space (*In re JR38* [2015] UKSC 42 at [94]). Thus the mere recording of the images of individuals walking through parks or in other vicinities of public space, many of whom will not have committed any criminal offence (discussed below), engages Article 8(1), and must satisfy the criteria in Article 8(2).

5. The requirements of Article 8(2), in terms of whether a measure is ‘in accordance with the law’, and ‘necessary’ in pursuit of a legitimate aim, will vary depending on the features of the particular surveillance system that is used, the context in which it is used, and the safeguards that are in place to regulate a particular deployment. For example, if the police use ‘non intrusive’ forms of surveillance such as overt photography then, following *R. (Bridges) v Chief Constable of South Wales Police* [2019] EWHC 2341 (Admin) at [74], the police will be able to rely on their common law powers to prevent crime and protect life as the legal basis regulating the interference (subject to the important proviso that they can demonstrate a belief that the measures are necessary). As an aside, while we take the view that the broad common law powers of the police are inadequately prescribed to regulate the police use of overt surveillance technology, and suggest there are sound normative reasons for not conferring such an expansive power on the police, we both accept (for these purposes at least) the current doctrinal orthodoxy in *Bridges*. However, the use of aerial drones at altitude will often constitute covert surveillance and, where it does, must satisfy the more exacting demands of a directed authorisation process under the Regulation of Investigatory Powers Act 2000 (see Home Office, *Covert Surveillance and Property Interference Revised Code of Practice* (2018) 21).

6. Most surveillance activities done as part of a local police or council response to COVID-19 will pursue a legitimate aim, particularly the ‘prevention of disorder or crime’ or ‘protection of health’. However, it is less clear that the use of drones, facial recognition technology or other forms of surveillance to record or monitor individuals in public space will be ‘necessary in a democratic society’. Any assessment of this limb is, of course, contextual. The public authority must show that the measure is rationally connected to the legitimate aim, is proportionate, and responds to a pressing social need.

7. The recent change in regulation 6 has caused us to rethink our assessment of the rational connection between surveillance and the legitimate aim pursued. Previously, it was only an offence under the Regulations to be outside and (say) chatting to a friend or washing one’s car if one left the house with that (sole) purpose. That, we would suggest, would in fact have been difficult to prove since the critical element was the individual’s underlying/overarching purpose for leaving home, rather than any particular action an individual takes once outside. Resolution of that was not something that surveillance after the event – maybe an hour or so later in a public park – could have assisted with. Since remaining outside without reasonable excuse is now prohibited, such that it is now an offence under regulation 9(1)(b) to be outside and not engaging in one of the fifteen permissible (albeit non-exhaustive) reasons in regulation 6(2)(a)-(m), surveillance can more easily be justified as a rational mechanism for investigating breaches of the lockdown.
8. While it might now be easier for the police to make good on claims that there is a rational connection to e.g. preventing crime, that alone will not be enough to justify some current surveillances practices.

9. First, the Regulations only have effect within a statutory framework of health-prevention, given their vires under the Public Health (Control of Disease) Act 1984. As a matter of public law then, regulation 6 must be read subject to that statutory purpose (rather than say a public order purpose) and the policing power to conduct surveillance is also so limited, we would suggest. Surveillance and subsequent public dissemination of video footage that is therefore aimed at or used to monitor the frequency of exercise, or with whom someone is exercising, provided they remain at a 2m social distance, or surveillance conducted on what is contained within shopping trollies all cause us concern as these do not seem to satisfy this limb of Article 8 (J. Purshouse, ‘(Over)Policing the Pandemic’ 1 April 2020: https://policing.law.blog/2020/04/01/overpolicing-the-pandemic/; C. Duncan, ‘You must stay at home’: Council uses drones to warn public to follow UK government coronavirus advice’ The Independent, 27 March 2020), or the use of Automated Number Plate Recognition (ANPR) technology to monitor ‘non-essential’ travel (C. Hymas, ‘Police use number plate recognition technology to catch “holidaymakers” in the wrong place at the wrong time’ The Telegraph, 14 April 2020 at: https://www.telegraph.co.uk/politics/2020/04/14/police-use-number-plate-recognition-technology-catching-holidaymakers/).

10. Secondly, provided I have a reasonable excuse both to leave and to be outside, I am acting lawfully; the fact that I may also do something not listed does not change that. I leave my house to exercise or to go shopping but en route decide to let my neighbour at No. 76 have a letter that was mistakenly delivered to me at No. 67. Surveillance that catches me at that moment does not capture the full, lawful picture, and public dissemination of it might subject me to unwarranted harms.

11. Thirdly, the police need still to make good on claims that surveillance is both proportionate and meets a pressing social need. In our view, it is not sufficiently certain that breaches of the regulations can be observed by the authorities through the use of acontextualised general, untargeted surveillance measures, owing to the difficulty of discerning with sufficient precision (see above) through passive observation of a vicinity of public space. There is a significant risk of surveillance overcapture. Indeed, in several of the instances where video surveillance footage has been disseminated online by a public authority, we saw that individuals and groups (plausibly from the same household, although this is impossible to ascertain through passive observation of a public park alone) were observing not only the law, but also the Government and College of Policing guidance on regulation 6 by maintaining social distance and taking exercise. Engaging with groups where there might be some cause believe that they are breaching the regulations seems to be a more effective and less intrusive way of achieving the legitimate aims of protecting health and preventing crime than overt observation and public shaming. We welcome the College of Policing Guidance that recommends that officers should engage, explain and encourage, keeping coercive powers in reserve as a last resort.
Furthermore, when assessing the proportionality of such surveillance it is important to be clear sighted about the potential drawbacks of its use. The use of surveillance and public dissemination tactics may have a chilling effect on the legitimate use of public space, which is likely to disproportionately affect those who are more dependent on public space, such as those who do not have easy access to outside space on their own property, and those who are in an abusive relationship. Arbitrary surveillance may also erode public trust for the authorities, precisely at a time when this trust is most needed. Whilst the public are broadly supportive of the need for police to play an active role in helping to protect public health in response to COVID-19, public support drains away when people are asked about more remote tactics such as the use of social media to name and shame, or new technology such as drones or facial recognition technology (J. Caluori and J. Clements, ‘Policing the COVID-19 lockdown - what the public thinks’ 7 April 2020 at: www.crestadvisory.com/post/policing-the-covid-19-lockdown-what-the-public-thinks). Millions of ordinary citizens are making radical alterations to their lives to help stem the spread of Coronavirus. The police should be slow to clamp down on their efforts to make a bad situation more bearable, especially when these efforts stay within the law and pose minimal, if any, risk to public safety.

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