

Photo opportunity

Demonstrating is a lawful activity, but if the police are allowed to take and retain photographs, are those involved not being treated as criminals, asks Paul Harris

CURRENT POLICE TREATMENT of demonstrators is increasingly raising civil liberties concerns, as evidenced by the death of a passer-by, Ian Tomlinson, following an unprovoked police assault during the recent G20 demonstrations.

One aspect of this treatment is the photography of demonstrators and the use to which such photographs are put. Last month *The Guardian* revealed the existence of a national police database containing personal data on thousands of people who had attended demonstrations, most of whom had never been accused of any criminal offence in relation to their demonstrating.

The right to privacy

Coincidentally the Court of Appeal has just heard submissions in *R (Wood) v Metropolitan Police Commissioner*, a judicial review about police photography of demonstrators brought by Andrew Wood, secretary of the Campaign against the Arms Trade. The court is reported to have asked for additional submissions about data retention following *The Guardian* revelations.

Wood complained about being photographed by police as he left a meeting of a company which he had attended legitimately as a shareholder. He had not staged any protest or done anything to draw attention to himself in the meeting. His complaint related both to being photographed and to police retention of the photograph. At first instance McCombe J held that neither the taking nor the retention infringed his right to privacy ([2008] WLR (D) 173, 22 May 2008).

Following the common law tradition that any activity which is not prohibited by law is lawful, it has always been open to anyone, including the police, to photograph anyone else, including police officers, in a public place.

In recent years restrictions have been placed on publication of photographs deemed to infringe the subject's right to privacy under Art.8 of the European Convention on Human Rights, through such cases as *Campbell v MGN* [2004] 2 AC 457, and *Peck v United Kingdom* [2003] 36 EHRR 41. However, in each of these cases it was the publication of the photographs, and not the act of taking them, which was found to infringe privacy rights.



Harris: different rules for the police

Demonstrating is of its nature an attention-seeking activity, and p. Press and TV photographs may be critical to a demonstration's success. In these circumstances it is difficult for demonstrators to object in principle to being photographed also by the police.

There may also be advantages in having a photographic record if trouble does occur, in showing how it started, and pinning blame on the right people. For this reason some experienced demonstration organisers make sure that they have their own video person recording their demonstration. However, there is growing concern that police photography of demonstrators is being extended in a way that raises privacy and freedom of assembly issues.

The European Court of Human Rights has held that the right to demonstrate is an aspect of freedom of assembly and that national authorities are obliged to assist citizens who wish to exercise that right (*Plattform "Arzte fur das Leben" v Austria* [1988] 13 EHRR 130).

Police interference

Despite this there is a tendency for the police to treat peaceful and law-abiding demonstrators as quasi-criminals. Thus police until recently periodically stopped coach-loads of demonstrators miles from their destination and prevented them proceeding, on the flimsy ground that one or more of the people on the coach might be planning to commit a public order offence on arrival. This practice was held to be illegal by the House of Lords in *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105.

The same hostile attitude to demonstrators

is evident from numerous recent instances of intimidatory police photography, including incidents involving Kent Police where both demonstrators and press photographers were followed and photographed by police away from the demonstration area, and also from the retention of photographic data and its use to subject known demonstrators to special attention, such as searches, questioning and more photography, when they have neither committed nor threatened crimes.

At the same time, a restriction has for the first time been placed on the right of the public to photograph the police. Section 76 of the Counter-Terrorism Act 2008 makes it an offence punishable by up to 10 years imprisonment to take a photograph of a policeman "likely to be useful to a person committing or preparing an act of terrorism.". Although most photographs taken of police at a demonstration are unlikely to be useful to terrorists, the existence of the power has already led to numerous reports of abuse, with police demanding that photographs taken of them by demonstrators be handed over.

Recording police abuse

A demonstration against s.76 by several hundred press photographers took place at 10, Downing Street on 16 February 2009 when it came into force. If people other than the police are prevented from photographing policing of demonstrations, it will be hard for demonstrators either to record police abuse or to protect themselves against false accusations of public order crimes. Indeed, abuse of this provision could easily prevent exposure of incidents such as the police assault on Ian Tomlinson, which was only clearly evidenced because someone at the scene recorded it on video.

The combination of intense surveillance and massive data collection on demonstrators shows that far from being accepted as a citizen's right, demonstrating is being actively discouraged and harassed. Whatever is finally decided in *Wood v Metropolitan Police Commissioner* is unlikely to be the last word from the courts in this increasing oppressive situation.

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