

The defence submit that the RSPB and the police are so inextricably linked in the investigation and prosecution of offences of this type, that the police must be aware that the RSPB use such covert means. They say, in effect, the RSPB act as agent for the police so it is incumbent upon the RSPB to go to the police in such cases and request they apply for RIPA (Regulation of Investigatory Powers Act 2000) authorisation.

They submit that the police application would then be subject to the stringent test which applies in applications under RIPA.

The defence point to the undisputed fact that the RSPB no longer prosecute their own cases.

They do not seek to persuade the court that the RSPB are a 'public authority' for the purposes of s6 Human Rights Act 1998 but rather submit that the RSPB carried out the investigation to provide evidence to the police. Such evidence would usually be the subject of rigorous scrutiny if obtained by the police as a public authority.

The defence submit that for the Crown to suggest that the placing of the camera was to 'monitor the nesting attempt' is disingenuous. They point to the close working relationship between the police and the RSPB through PAW (Partnership for Action against Wildlife Crime); the experience of the two RSPB Investigating Officers [names redacted] who placed the camera and the knowledge they had of the history of the nesting site at the time; the fact that the Crown concede that they were trespassing on the land without seeking the permission of the landowner and previous cases where the RSPB have sought RIPA authority via the police.

The defence say that the use of the covert camera falls within the definition of 'directed surveillance' under s26 (2) of RIPA and, as such, should be subject to the same stringent safeguards imposed by the statute.

The Crown submit that the camera was placed 1000 metres away from a man-made track and was unlikely to capture any private information. They say the camera was placed only for the monitoring and general surveillance of the nest site. They say, at that stage, there was no criminal investigation and the circumstances do not fall within the s26 RIPA definition.

The Crown accept that there have been previous cases where a RIPA authority has been obtained but say equally there have been those where it has not.

S26 (2) of RIPA provides:

'...Subject to subsection (6), surveillance is directed for the purposes of this Part if it is covert but not intrusive and is undertaken –

- (a) For the purposes of a specific investigation or a specific operation;
- (b) In such a manner as is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation); and
- (c) Otherwise than by a way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation under this Part to be sought for the carrying out of surveillance. The grounds upon which a public authority can grant a directed surveillance authority appear in section 28 of the Act....'

So, does this behaviour fall within section 26 (2)?

I am satisfied that it does.

I reject the Crown's submission that the camera was placed there only to monitor the nesting site. This flies in the face of the information disclosed in the witness statements and common sense.

I asked Mr Yip the direct question; if that were the case why did the RSPB Officers not seek the permission of the landowner to enter the estate (the Crown having conceded that the officers were trespassing)?

Mr Yip could not answer that question nor did he seek an adjournment to call the witness to do so. He accepted it was something I could take account of when assessing the case. In such circumstances, in the absence of any proper explanation and in light of the evidence to which I refer later, I find it is reasonable to infer that the Crown did not want that direct evidence before the court as the landowner was a possible suspect at the time.

[Name redacted] and [name redacted] who placed the camera are ex-police officers with many years' experience in the field of Wildlife Crime. Both describe their roles as Investigation Officer for the RSPB.

They both describe the remit of the department in which they work as:

'....primarily concerned with gathering evidence of infringements of the legislation that protects wildlife in the United Kingdom principally in relation to offences involving wild birds. The Department plays an advisory role, assisting statutory agencies in their investigations, especially through the Police Wildlife Crime Officers' (WCO) network....'

In his statement dated 24 November 2016, [name redacted] states:

'....During the course of my work, I have visited a number of peregrine falcon sites to assess whether criminal offences have been committed and also to install covert video recording cameras at some of these sites with the purpose of detecting incidents of criminality. A number of these camera installations have been at peregrine falcon nest sites in the uplands of Lancashire....'

He describes monitoring the scrape in 2013 and 2015. On the 11 April 2016, following receiving information that a pair were present at the nest site with four eggs he attends with [name redacted] and installs the camera.

I note that [name redacted] does not state from whence the information came nor the nature of it. Without the presence of the witness the court has no direct answer to this question.

I further note that, although he describes the camera as covert, he does not explain that it is hidden beneath heather and therefore camouflaged. This is only revealed by PC Andrew Massingham. If there was an innocent motive to the placing of the camera why did it need to be camouflaged and placed without the permission of the landowner?

[Name redacted] does not address these points in his statement.

I find it quite remarkable, and beyond coincidence, that within 3 days of the placing of the camera it apparently detects an individual purportedly interfering with the nest.

[Name redacted], a member of the Bowland Raptor Study Group (BRSB) by way of statement dated 14 December 2016 says:

‘...The BRSB are part of the Northern England Raptor Forum (NERF)...NERF members’ core activity is to monitor and report the breeding success and year round target distribution of target raptor species....’

[Name redacted, BRSB member] goes on to describe how he monitored the [name redacted] site from 2011 onwards. It is clear he was concerned as to why no nesting attempts were successful. He says on the 13 April 2015 he observed the defendant James Hartley through his telescope ‘...in the distance on a hill...’ He decided not to go and check the nest site as ‘...I did not want to draw attention to the site...’

[Name redacted, BRSB member] also refers to a conversation he had with the defendant on an earlier occasion. [Name redacted, BRSB member] asked the defendant whether he had seen any hen harriers around (these also being a protected bird). He says that the defendant remarked that there could be no harriers on there as he was trying to build up the red grouse stocks. This remark concerned [name redacted, BRSB member].

[Name redacted], Investigations Officer for the RSPB provides a statement dated 24 November 2016. He says that bird of prey persecution is one of the RSPB’s highest conservation priorities and the Investigations Department is actively involved in this.

He goes on to say:

‘...There has been concerns for many years about the high level of persecution of birds of prey...This has been largely at the hands of a proportion of those involved with game bird rearing and management who see these birds as a potential threat to their interests...In the uplands, peregrine falcons routinely predate red grouse and this has brought them in to conflict with sporting estates managed for grouse shooting. I have dealt with numerous enquiries relating to the persecution or suspected persecution of peregrine falcons on upland sporting estates....’

In his statement dated 4 December 2016 PC Andrew Massingham, a Wildlife Officer, describes having a ‘...professional working relationship...’ with [name redacted, RSPB Investigator].

The overwhelming picture painted by the written evidence is one of a number of parties working together with a common aim. These are individuals well versed and experienced in this field and know what signs to look for when criminal activity or breaches of legislation is suspected.

This is further corroborated by the membership of the RSPB and wildlife police in PAW. The group is overseen by DEFRA, a governmental department.

The objectives of PAW according to its application for membership form are to:

‘...Raise awareness of wildlife legislation and the impacts of wildlife crime. Help and advise on wildlife crime and regulatory issues. Ensure all wildlife crime is tackled effectively...’

It states that all UK PAW members ‘...should take action to support these overarching objectives...’

It further states that all UK PAW members are expected to ‘...cooperate with the enforcement agencies by providing advice and information, and with any enquiries they may have and be aware of and comply with the law relating to their activities....’

The RSPB and police are bound by this common agreement.

I further note that one of the cases in the Legal Eagle publication produced before the court, dated January 2006, relates to peregrine falcons and states:

‘...concern had been raised about a local peregrine nest site and information from the RSPB that the nest had repeatedly failed suggested human interference....’

That is precisely the situation I am presented with in the case before me. A number of people had been monitoring the site at Bleasdale as the nesting was unsuccessful. The aforementioned article makes it clear that such circumstances lead to the suspicion that there is human interference and, thus, a possible crime being committed. [Name redacted, RSPB Investigator] was present when the camera was placed at the site. I am satisfied he must have had suspicions of human interference at the time.

The cumulative effect of the circumstances described satisfy me that the RSPB through the Crown are being disingenuous as to the purpose of the placing of the camera. The only reasonable conclusion one can reach is that they suspected foul play by someone on the gaming estate and placed the camera for the purpose of detecting crime.

This therefore satisfies s26 (2) (a) RIPA, it being for a specific investigation.

I find that s26 (2) (b) is also satisfied. The camera had both visual and audio recording ability. I know already from the statement of [name redacted, BRSG member] that the defendant was seen in the vicinity when he spotted him through his telescope in April 2015. Further, it is not disputed that the land is an area upon which there is a ‘right to roam’.

[Name redacted, BRSG member] describes the nest scrape being on a steep-sided bank in a small valley known as [site name redacted]. The officers describe reaching the site by accessible means. The Crown have adduced no evidence to tell me who is entitled to access, in what circumstances and how busy or otherwise this area may be. They assert this is a remote area but other than descriptions by witnesses and photographs in the Crown case bundle, of what I presume is the moorland in question, but to which I was not referred during the course of argument, the Crown provide no more information than that.

I asked to see the camera footage. Mr Yip informed the court that he did not have it with him nor had he viewed it himself. I found this surprising to say the least given the relevance of that material. Mr Yip did, however, show the court two still images taken from the footage. Mr Yip was not entirely sure where the scrape was but suggested it was towards the centre of the still. One could also see the surrounding area. It was not close up footage neither was it a panoramic view.

Again, in the absence of live evidence and the camera footage, I cannot be satisfied that there it was unlikely that the camera would obtain private information. Indeed, I am satisfied it was placed there with an intention of doing just that.

I am satisfied that s26 (2) (c) does not apply and neither party has sought to persuade me otherwise.

The defence submit it is incumbent upon the RSPB to refer such matters to the police for a RIPA application to be made.

They rely upon the close relationship between the police and the RSPB. They point out that the RSPB are a large wealthy organisation who should be the subject of the same stringent test as that provided in the legislation and they have worked in such a way that results in them circumventing the same.

The defence point to the open letter of the Procurator Fiscal dated 30 May 2017 which address the issue of covert camera evidence and, in particular, the use of it by the police and RSPB. In two cases the Crown Counsel had concluded that the placing of cameras had been for the purpose of detecting crime and the video evidence was obtained irregularly. The irregularity was not capable of being excused in common law and so the evidence was deemed inadmissible.

I note that approach is not binding upon me nor do I have the details of the cases to which the letter refers. It does, however, demonstrate that the police and RSPB are aware that questions have been raised about the propriety of this method of evidence gathering.

The defence also remind the court of the experience of the officers involved in this case, and, in particular, the involvement of Crown witness [name redacted] with the Legal Eagle article which describes the successful use of covert video evidence obtained after the RSPB worked with the police to obtain RIPA authorisation.

The Crown submit that as the RSPB are not a state body and are not listed in Parts 1 or 2 of Schedule 1 of RIPA then they are not bound and no breach has occurred.

On a strict interpretation of the Act I must agree with the Crown. The legislation does not require anyone other than the listed state bodies to comply with the provisions.

The case of R v Rosenberg 2006 EWCA Crim 6 at para 18 has also been considered. Although I acknowledge that dealt with the recording, without sound, of a neighbour by use of a CCTV camera, the presence of which the recorded person was aware and thus the CCTV was not 'covert' for the purposes of RIPA the court at para 18 provided as follows:

‘...While the police were complicit in the surveillance to the extent that they knew of it and were prepared to use it in a criminal prosecution, it cannot in our judgement be regarded, for the purposes of the 2000 Act, as police surveillance. The police neither initiated it nor encouraged it. We would accept that the degree of police involvement could be a factor in deciding on admissibility under Section 78....’

Whilst at first blush it would appear the test I must apply is quite straight forward (i.e. did the police initiate or encourage the behaviour) I do not find it so simple a task.

The Rosenberg case dealt with an overtly placed camera which was not set up by a person tasked with investigating a crime. In that case, the police did discourage against the use of the camera. That has not happened in the case before me as far as I am aware.

I have already found that I am satisfied that the camera was placed for the purpose of detecting a crime by [name redacted] whose job is to investigate infringements of legislation. [Name redacted] goes further and confirms that he installs covert cameras to detect criminality.

In doing so, in the particular circumstances of this case, I am satisfied the RSPB have effectively taken on the role of a police officer but did so without the scrutiny and oversight that comes with it. The circumstances of the Rosenberg case did not have the clandestine undertones of the case I have before me. It can be distinguished for those reasons.

It appears to me that as soon as the RSPB have enough information to suggest the placing of a covert camera is needed to detect a crime, they should be referring the matter to the police. They have done it before and have failed to explain to this court why they chose not to apply on this occasion. To fail to do is, in my finding, disproportionate and nothing more than an attempt to circumvent the safeguards that the Government have put in place to protect the private life of its citizens.

I am satisfied that the nature of the relationship between the RSPB and the specially designated wildlife officers means the police must be aware of this practice and are turning a blind eye.

I find the obtaining of the covert camera footage in the circumstances of this case to be wholly irregular.