



Neutral Citation Number: [2021] EWHC 3055 (Admin)

Case No: CO/1869/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2021

Before:

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
and
MR JUSTICE GARNHAM

Between:

SEBASTIAN ROBLYN **Appellant**
- and -
THE DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

Tom Wainwright (instructed by **ITN Solicitors**) for the **Appellant**
James Boyd (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 3 November 2021

Approved Judgment

Mr Justice Garnham:

Introduction

1. This is an appeal by way of case stated against a decision of DJ Dodds sitting at High Wycombe Magistrates' Court on 16 March 2021. The Grounds of Appeal are that the District Judge (the DJ) was wrong to convict the Appellant of an offence pursuant to s241 (1)(c) Trade Union and Labour Relations (Consolidation) Act 1992. It was alleged that the Appellant was in breach of s241 in that he "hindered a workman in the use of his tools with a view to causing him to abstain from doing a lawful act namely felling a tree."
2. In the Case Stated the DJ poses the following questions for this court:
 - i) Was I right to conclude that the felling of the tree was an act which the contractors had a legal right to do because the HS2 construction scheme is lawful despite evidence that it may have resulted in offences pursuant to section 1 and 5 of the Wildlife and Countryside Act 1981 and paragraph 43(1) Conservation of Habitats and European Species Regulations 2017?
 - ii) Was it open to me in all the circumstances to convict the Appellant?
3. The Respondent has conceded, subject to views of the court, that he cannot resist the appeal. In our judgment, he was right to do so.

The HS2 Statutory Scheme

4. On 23 February 2017 the High Speed Rail (London – West Midlands) Act 2017 (the "HS2 Act") received Royal Assent. The Act confers the powers required to construct the first phase of a proposed new national high speed rail network, "High Speed 2" (or "HS2"). Phase One will involve the construction of new railway lines between London and the West Midlands.
5. Responsibilities for construction are discharged by the nominated undertaker (the "NU"), a body appointed by the Secretary of State for Transport ("SoS"), to be responsible for delivering Phase 1. The NU is under a contractual duty under the HS2 Phase 1 Development Agreement to comply with the published Environmental Minimum Requirements ("EMRs") for construction of Phase 1.
6. The EMRs are set out in a "General Principles" document which was published by the SoS in February 2017. It explains that the objective of the EMRs is to ensure that Phase 1 is delivered in accordance with the Environmental Statement that was produced during the passage of the HS2 Act through Parliament, and accordingly in accordance with the deemed planning permission granted under section 20 of the Act.
7. The components of the EMRs include the Code of Construction Practice ("CoCP"). Paragraph 2.1.3 of the CoCP provides that,

"The [NU] and its contractors will comply as a minimum with applicable environmental legislation at the time of construction, ..."

8. Paragraph 3.3.1 provides that, “The Act requires the [NU] to seek certain additional approvals from statutory bodies and undertakers (e.g. the Environment Agency and highway authorities).”
9. The CoCP specifies (at section 9) the measures that the NU and its appointed contractors are obliged to apply for the purpose of managing the impact of HS2 construction works on ecology. These measures include consulting with the appropriate bodies such as Natural England, and obtaining and complying with the requirements of any wildlife licences, including protected species licences necessary for the construction of Phase 1.

The Facts

10. The facts found by the District Judge were that HS2 Ltd had contracted with contractors to conduct vegetation clearance on the bank of the River Colne in the Denham Country Park. The work included the taking down of an alder tree for which at least one workman was contracted to climb into the tree and saw off branches.
11. In an attempt to stop damage to, or the destruction of, the tree or wildlife using it the Appellant climbed into the tree, thereby preventing workmen from doing any work on it, including using tools to cut down the tree. The police asked the Appellant to come down from the tree but he refused to do so, stating that his actions were to prevent potential wildlife crimes.
12. The DJ heard expert evidence from an ecologist called on behalf of the Appellant to the effect that any damage to or felling of the tree could amount to offences under the Wildlife and Countryside Act 1981 and the Conservation of Species and Habitat Regs 2017 which make it illegal intentionally or recklessly to destroy or damage nesting sites or the habitat of various species (“wildlife offences”). The prosecution had called no evidence from an ecologist because, as a result of a failure by the prosecution to comply with preparation for trial and case management directions, the DJ had refused to admit such evidence.
13. However, the DJ concluded that
 - “(dd) While I agree that the HS2 project and scheme did not provide immunity from prosecution there were ways to deal with actual or alleged offences through lawful means within a functioning democratic society...
 - (ee)...in the context of the HS2 project and scheme the prosecution did not have to adduce rebuttal evidence that individual aspects of the work might result in actual or likely wildlife offence given the extensive safeguards already in place and given the acceptance that the project would cause environmental damage and that remedial work was being undertaken to ameliorate the damage caused...”

14. He went on to find that, despite the evidence that the tree felling might have resulted in wildlife offences, the contractors had the legal right to fell the tree.

Discussion

15. An essential element of the alleged offence under s241(1) of the 1992 was that HS2 ltd and its contractors were acting lawfully and had a lawful right to fell the tree. To make out their case, the prosecution had to prove that the activity was lawful (compare *Richardson v DPP* [2014] UKSC 8; [2014] AC 635.)
16. As is apparent from the first question posed in the stated case, the DJ found that the felling of the tree might lead to the commission of a specified offence. That finding meant that the prosecution had failed to establish that the activity was lawful. Nonetheless, the judge held that the possibility of the commission of these offences did not mean that the workman did not have a legal right to fell the tree. He relied on the fact that this was a lawful construction project that had been approved by central and local government.
17. At paragraph 16 in *Packham v Secretary of State for Transport* [2020] EWHC 828 (admin) this court held that the HS2 Act does not

“relieve the ... nominated undertaker (or its appointed contractors) of the duty to comply with, for example, the requirements of Parts 3 and 4 of the Conservation of Species and Habitats Regulations 2017 (SI2017No.1012)(“the Habitats Regulations”) in respect of the protection of species and habitats. As the Respondent properly concedes, this is also self-evident from the terms of the CoCP cited above, compliance with which is mandatory under the EMRs for the construction of Phase 1.”

18. It follows that, as a matter of law, it is possible for HS2 appointed contractors to commit wildlife offences. Indeed, at paragraph 6 (dd) of the Stated Case the DJ acknowledged that the HS2 project and scheme did not provide immunity from prosecution.
19. That being so, if, as the DJ had found to be the case, there was evidence that the construction scheme, including the felling of the tree in question, “may have resulted in” wildlife offences then it cannot be said that contractors were acting lawfully or had a lawful right to fell the tree.

Conclusions

20. In those circumstances, each of the two questions posed in the Stated Case must be answered in the negative. The DJ was wrong to conclude that the felling of the tree was an act that the contractors had a legal right to do and it was not open to him to convict the Appellant.

Lord Burnett of Maldon CJ:

21. I agree.