

# Crime brief

Thus far, arguably the most significant output of the HS2 project has been a stream of litigation: David Walbank KC charts the path to judicial review



## IN BRIEF

- ▶ HS2 protesters tunnelling under Euston Square Gardens.
- ▶ Offence of aggravated trespass.
- ▶ Scope of the 'lawful activity' being obstructed or disrupted.

The economic benefits of the high-speed railway HS2 may sometimes seem illusory. Nebulous phrases like 'connectivity', 'capacity' and, dare I say it, 'levelling up' are bandied about, while a hard-headed costs/benefits analysis is harder to come by and grows ever more elusive as project costs continue to spiral. Only history will judge whether this state-of-the-art high-speed rail link, supposedly bringing London and the North of England closer together, is ultimately seen as a marvel of modern engineering or the biggest white elephant ever to burn through our increasingly straitened public finances. However, one identifiable sub-class of our fellow citizens that it has undoubtedly benefited is the criminal lawyer. Rarely has any major construction project given rise to such a rich seam of contentious litigation.

## Going underground

The latest instalment in the HS2 saga is *R (on application of the Director of Public Prosecutions) v Highbury Corner Magistrates' Court* [2022] EWHC 3207 (Admin). It arose from events at Euston Square Gardens, an area which is covered by the compulsory purchase provisions of the High Speed Rail (London—West Midlands) Act 2017. The plan was to put a taxi rank there. However, protesters occupied the land and, when HS2 then took possession pursuant to the 2017 Act, they would not budge. After a warrant was issued for their eviction, it emerged that they had not just built a ramshackle wooden structure made of plywood and pallets (dubbed, in a rare flash of humour from such eco-warriors, *Buckingham Pallets*), but had also tunnelled underground. The operation to evict them involved the full panoply of specialist teams and emergency services and, after an elaborate game of cat and mouse, it was another month before the site was

cleared, at a cost of more than £4m.

Several of the protesters were charged with aggravated trespass, contrary to s 68 of the Criminal Justice and Public Order Act 1994 (CJPOA 1994). The case was put on the basis that, in their efforts to avoid removal, they had, in the words of the charge, 'disrupted or obstructed HS2 construction'. However, the district judge ruled that there was no case to answer, given that the construction contractor had not been present at the time and given that the only lawful activity occurring on site at that point was the eviction itself (which she found was not encompassed by the allegation of disrupting or obstructing HS2 construction). Ultimately, the judge came to the conclusion that the real beef of the complaint here was the frustration of the eviction order and that, so she held, was a far cry from the offence of aggravated trespass.

The prosecution applied for judicial review.

## Cause of frustration

In handing down judgment, Dame Victoria Sharp P set out the relevant words of s 68, CJPOA 1994:

'(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect - ... (b) of obstructing that activity, or (c) of disrupting that activity' (at para [23]).

The judge reasoned as follows. The lawful enforcement of an eviction order made in civil proceedings was a lawful activity, the frustration of which was tantamount to its disruption or obstruction. The frustration of an eviction could, therefore, constitute this element of the offence. The phrase 'HS2 construction' was broad enough to cover any works that were part of the overall construction project and all activities undertaken in the course of the development, including any initial clearance work to enable the contractor to enter onto the site

(that being a necessary first step in the construction); the securing, clearance and preparation of the land; the transportation of materials onto the land; and the subsequent construction of the railway and its associated structures.

The court also addressed the question whether there is any requirement that those about to undertake the lawful activity should be *physically* present on the land. That question did not actually arise on the facts of the case because those carrying out the eviction were in fact physically present. However, the court nonetheless considered the issue since it appeared to have influenced the way in which the Crown had chosen to put its case, focusing on the eviction rather than the planned construction works. The judge noted that the words of the statute did not connote physical presence, as distinct from being on the land in the sense of having a right to possess, occupy or use the land. She also observed that someone who is about to carry out a lawful activity on land may be intimidated (s 68(1)(a), CJPOA 1994) or disrupted or obstructed even if they are not yet physically present on that land and, indeed, the fact that they are not physically present on the land may be due to such intimidation, disruption or obstruction. On this, the judge said:

'We consider... that it is open to argument that the section 68 offence may be committed where the person undertaking a lawful activity is not physically present on the land—particularly where for example the offence is based on an anticipated lawful activity ("about to take place") rather than a lawful activity that is already taking place' (at para [42]).

Accordingly, the claim for judicial review was allowed, and the Divisional Court exercised its discretion to remit the case to the magistrates' court for a retrial. **NLJ**

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