1 October 2018

PRESS SUMMARY

Fishermen and Friends of the Sea (Appellant) v Environmental Management Authority and others (Respondents) (Trinidad and Tobago) [2018] UKPC 24
On appeal from the Court of Appeal of the Republic of Trinidad and Tobago

JUSTICES: Lord Reed, Lord Wilson, Lord Carnwath, Lady Black, Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

In June 2017, the Environment Management Authority ('EMA') of Trinidad and Tobago issued a Certificate of Environmental Clearance ('CEC') to the Ministry of Works and Transport ('the Ministry') for the building of a new 5,000 metre stretch of highway. The proposed route runs approximately 120 metres south and parallel to the southern border of the Aripo Savannas Strict Nature Reserve, which had been designated in 2007 as an Environmentally Sensitive Area. It constitutes a unique ecosystem of national and international importance, due to its array of habitats and high density of rare, threatened and endemic species.

The highway is part of a larger project, known as the Churchill-Roosevelt Highway Extension Projection, which will be a limited-access dual 2-lane freeway that will be 32.5km long. This is intended to contribute to the Government's efforts to stimulate the regional economy of the north and east and to decentralise its administrative and planning functions to the regions.

As part of the application process for a CEC, the Ministry informed the EMA that an Environmental Impact Assessment ('EIA') would be required, and it provided draft terms of reference for the EIA. Rule 5(2) of the CEC Rules provides that an applicant will conduct a consultation on the draft terms where appropriate. The Ministry consulted several government entities on the draft, but there was no public consultation at that stage.

The EMA issued the CEC on 22 June 2017. The appellants first became aware of the CEC in July 2017 and they commenced judicial review proceedings on 29 September 2017, claiming that the CEC was unlawful on 14 grounds. Section 11 of the Judicial Review Act provides that applications must be made promptly and, in any event, within three months from the date when the grounds for the application first arose. The Court may extend the period if there is good reason for doing so.

The trial judge refused leave to apply for judicial review on the grounds of delay and because the challenge raised no arguable grounds. The Court of Appeal dismissed the appeal for the same reasons, although Mr Justice Smith JA held that two of the grounds were arguable and had some realistic prospect of success, but not to the extent that they would outweigh dismissal on the ground of undue delay. A differently constituted Court of Appeal granted conditional leave to appeal to the Board and an interim injunction to prevent highway works pending the appeal.

JUDGMENT

The Judicial Committee of the Privy Council will humbly advise Her Majesty that the appeal should be dismissed. Lord Carnwath gives the advice of the Board.

REASONS FOR THE JUDGMENT

The Board considered four issues in the appeal. The Court of Appeal had given leave on the first three but had reserved to the Board the question of leave on the fourth issue **[20]**.

(i) Refusal to extend time for filing the application for leave

The Board is satisfied that the courts below were right to adopt a strict approach to any application to extend time, as the proceedings would result in delay to a project of public importance **[25]**. There is no doubt that the application for leave was out of time and the first instance judge had found no evidence that any delay in publicising the decision contributed to the appellant's failure to observe the time-limit. In fact, the appellant had sent a detailed pre-action protocol letter within the three-month period, so should have been in a state of readiness to file within the same period if necessary **[26-27]**.

The Board finds no flaw in the reasoning of the judge on this issue and sees no basis for interfering. There was no adequate explanation for the failure to respect the time-limit. **[28-29]**.

(ii) No consultation on the draft terms of reference for an Environmental Impact Assessment

The Board sees no arguable merit in this ground. Rule 5(2) was not a mandatory requirement in all cases. It is left to the applicant, at least in the first instance, to determine whom to consult. Moreover, the terms of reference process does not pre-empt in any way the rights of the public to take part in the statutory public comment procedure on the terms of the final EIA **[6]**. The Board finds it hard to envisage a case where a failure to consult at the preliminary stage could invalidate the final certificate, particularly as any matter that had been inadequately considered could be raised by way of objection to the EIA **[34]**.

(iii) Absence of a cumulative impact assessment in relation to the highway and the proposed continuation of the road beyond the highway

The Board agrees with the majority of the Court of Appeal, that there was no arguable breach of the rule requiring the consideration of cumulative effects. Although the Ministry had failed to provide information on the possible cumulative impact of future phases, it had explained that this was due to the lack of adequate knowledge of the specific design and operation of any possible future packages **[39]**. The EMA accepted this explanation and the good faith of that acceptance was not questioned. It is impossible to say that the EMA failed to have regard to this issue, or that its response was irrational **[46]**.

(iv) Rationality of the decision to issue the CEC

The Board is not persuaded that leave should be granted to advance a revised argument that the CEC wrongly deferred certain matters to be dealt with under conditions. The power to impose conditions on a CEC is unlimited and there is no reason why it should not include an updated EIA **[48-49]**. There was nothing inherently unlawful or irrational in the course adopted by the EMA. The original grounds ought to have included a precise formulation of any flaw in the EMA's consideration of this aspect, and without that it would be wrong in principle to allow the matter to be revisited before the Board **[51]**.

There is therefore no reason to question the exercise of discretion by the trial judge when refusing to extend time for the judicial review. The appeal is dismissed and the interim injunction discharged.

NOTE
This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html.