30 January 2019

PRESS SUMMARY

Maharaj (Appellant) v National Energy Corporation of Trinidad and Tobago (Respondent) [2019] UKPC 5
On appeal from the Court of Appeal of the Republic of Trinidad and Tobago

JUSTICES: Lord Reed, Lady Black, Lord Lloyd-Jones, Lord Briggs, Lord Kitchin

BACKGROUND TO THE APPEAL

This appeal concerns delay in the making of an application for leave to apply for judicial review and, in particular, the precise significance of the presence or absence of prejudice to the rights of any person or detriment to good administration resulting from the grant of leave or any relief.

On 28 July 2009 the appellant, Mr Devant Maharaj, submitted a request for information to the respondent, the National Energy Corporation of Trinidad and Tobago ("the NEC"), under the Freedom of Information Act 1999 by which he asked for the curriculum vitae and qualifications of the Chief Executive Officer of the NEC. By letter dated 18 August 2009 the NEC refused the request. Between 18 October 2009 and 13 January 2010, representatives for the appellant and the NEC engaged in pre-action correspondence in the course of which the NEC made a proposal for alternative dispute resolution which was rejected by the appellant. On 20 January 2010 the appellant issued an application for leave to apply for judicial review of the NEC's refusal to supply the requested information.

By order dated 21 January 2011, following an *ex parte* application, Boodoosingh J granted the appellant leave to apply for judicial review. On 22 February 2011 the NEC applied for an order setting aside the grant of leave on the grounds that the appellant's application had not been made promptly and there had been unreasonable delay. Following a hearing on 3 June 2011, Boodoosingh J granted the NEC's application and set aside the grant of leave. He stated that there was no proper explanation for the delay in filing the application beyond 7 December 2009 and concluded that there had been unreasonable delay in filing the application for judicial review.

The appellant appealed to the Court of Appeal (Jamadar JA, Bereaux JA and Smith JA). The appeal was heard on 29 July 2016. On 26 April 2017 the Court of Appeal (Jamadar JA dissenting) dismissed the appeal on the grounds that: (1) there had been unreasonable delay in bringing the application for leave to apply for judicial review; (2) the judge had not erred in declining to extend time on the sole ground of unreasonable delay; (3) since the objection was to delay, that did not require consideration of prejudice or detriment to good administration; and (4) the judge's exercise of his discretion to set aside a prior grant of leave on the basis of the perceived unreasonable delay had not been plainly wrong. Final leave to appeal to the Judicial Committee of the Privy Council was granted by order dated 24 July 2017.

JUDGMENT

The Judicial Committee of the Privy Council allows the appeal. Lord Lloyd-Jones gives the advice of the Board.

REASONS FOR THE JUDGMENT

This appeal concerns the interaction of section 11 of the Judicial Review Act, 2000 ("JRA") and rule 56.5 of the Civil Procedure Rules, 1998 ("CPR"). These provisions are not entirely happily drafted. In this they resemble the provisions in England and Wales (*i.e.*, section 31, Supreme Court Act 1981 and Rules of the Supreme Court Order 53, rule 4). Various provisions overlap and there is a degree of repetition. In interpreting them it is desirable to arrive at a reading which gives compatible effect to all of the provisions. In the event of an irreconcilable conflict, the primary legislation must, of course, prevail **[33]**.

Delay or lack of promptitude is addressed in both subsections 11(1) and 11(2) and in CPR rule 56.5(1). In this regard, it seems clear that the requirement that an application shall be made promptly and in any event within three months from the date when the grounds first arose (section 11(1)), "undue delay" (section 11(2)) and "unreasonable delay" (rule 56.5(1)) all refer to a single concept **[34]**.

The scheme of the legislation does not provide any support for the view that section 11(1) should be applied in isolation from other provisions, in particular section 11(2). Furthermore, rule 56.5(3), which does not have a counterpart in the relevant legislation in England and Wales, expressly provides that when considering whether to refuse leave or relief because of delay the judge must consider the issues of prejudice and detriment. Moreover, subsection 11(3) provides that "in forming an opinion for the purpose of this section" the court may have regard to such other matters as it considers relevant **[35]**.

More generally, and quite independently of the particular provisions in Trinidad and Tobago, as a matter of principle, considerations of prejudice to others and detriment to good administration may, depending on the circumstances, be relevant to the determination of both whether there has been a lack of promptitude and, if so, whether there is good reason to extend time **[36]**. In the same way, questions of prejudice or detriment will often be highly relevant when determining whether to grant an extension of time to apply for judicial review **[38]**. If prejudice and detriment are to be excluded from the assessment of lack of promptitude or whether a good reason exists for extending time, the law will not operate in an even-handed way **[39]**.

The allocation of issues of delay and extension of time, on the one hand, and prejudice and detriment to good administration on the other, to discrete hearings may have lent some support to the notion that extension of time is a threshold issue and that issues of prejudice or detriment do not arise at that stage. However, *R v Dairy Produce Quota Tribunal for England and Wales, Ex p Caswell* [1990] 2 AC 738 provides no justification for the claimed insulation of these issues from each other **[41]**. Similarly, the Board does not consider that there is any inconsistency between its considered view and the approach adopted by the Board in *In re Fishermen and Friends of the Sea* HCA No 1715 of 2002 **[42]**.

For these reasons the Board accepts that, far from constituting an insulated residual discretion, considerations of prejudice and detriment are capable of being of key relevance to the issues of promptitude and extension of time **[43]**.

The Board therefore considers that the approach of Boodoosingh J in setting aside leave and the approach of the majority in the Court of Appeal were flawed **[45, 46].** Rather, the Board finds itself in agreement with Jamadar JA's view that, reading section 11 as a whole, a judge considering whether there is a good reason for extending time must take account of a broad range of factors, including but not limited to, considerations under subsections 11(2) and 11(3), the merits of the application, the nature of the flaws in the decision making process, whether or not fundamental rights are implicated and any public policy considerations, to the extent that they may be relevant **[46]**.

In light of the foregoing and having regard to all the circumstances of the case the Board proposes to allow the appeal with costs **[50]**.