Michaelmas Term
[2018] UKPC 24
Privy Council Appeal No 0055 of 2018

JUDGMENT

Fishermen and Friends of the Sea (Appellant) *v* Environmental Management Authority and others (Respondents) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Reed
Lord Wilson
Lord Carnwath
Lady Black
Lord Lloyd-Jones

JUDGMENT GIVEN ON

1 October 2018

Heard on 30 July 2018

Appellant
Anand Ramlogan SC
Richard Wald

(Instructed by Alvin Pariagsingh Attorney/Solicitor)

Respondent
Peter Knox QC
Ravi Heffes-Doon
Amirah Rahaman
Jenell Partap
(Instructed by Charles Russell Speechlys LLP)

First Interested Party (Ministry of Works and Transport)
Ian L Benjamin SC
Tekiyah Jorsling
(Instructed by Charles Russell Speechlys LLP)

LORD CARNWATH:

Introduction

1. This is an expedited appeal from the refusal of leave to challenge by judicial review a "Certificate of Environmental Clearance" ("CEC") issued by the Environmental Management Authority ("the Authority") to the Ministry of Works and Transport ("the Ministry") for the building of a new 5,000 metre stretch of highway ("the highway"). The proposed route runs some 120 metres south, and roughly parallel to, the southern border of the Aripo Savannas Strict Nature Reserve, designated in 2007 as an Environmentally Sensitive Area. It constitutes a unique ecosystem, of national and international importance, due to its array of habitats not seen elsewhere in the country and its high density of rare, threatened and endemic species. The appellant is a non-profit company concerned to promote effective regulation of the environment of Trinidad and Tobago.

2. The trial Judge (Ramcharan J) refused leave, on the grounds both of delay, and also because the challenge raised no arguable grounds. The Court of Appeal (G Smith, J Jones and A Des Vignes JJA) dismissed the appeal for the same reasons, save that G Smith JA held that two of the grounds were arguable with some realistic prospect of success, but not so strongly as to outweigh the dismissal of the application on the ground of undue delay. These two grounds were whether public consultation was necessary under rule 5(2) of the Certificate of Environmental Clearance Rules 2001 ("the CEC rules") in relation to the draft Terms of Reference agreed with the Authority, and whether a "cumulative impact assessment" was necessary to take into account the impact of the highway taken together with its proposed continuation beyond the five kilometres for which the application for a Certificate was made. On 20 April 2018 a differently constituted Court of Appeal (R Narine, P Moosai and C Pemberton JJA) granted conditional leave to appeal to the Judicial Committee of the Privy Council together with an interim injunction to prevent any highway works pending the appeal.

Certificates of environmental clearance

3. Sections 35 to 38 of the Environmental Management Act 2000 ("the Act") provide for the relevant Minister to designate activities requiring a Certificate of Environmental Clearance from the Authority before commencement. The proposed highway was such a designated activity. In considering an application for a CEC, the Authority may require an "environmental impact assessment" ("EIA"), in accordance with the prescribed procedure (section 35(4)). By section 35(5), an application which requires an EIA must be submitted for public comment in accordance with the "public

comment procedure" laid down by section 28. Section 36 provides that, after considering all relevant matters "including the comments or representations made during the public comment period", the Authority may issue a certificate subject to such terms and conditions as it thinks fit.

4. The procedure for such applications is laid down by the CEC Rules. Rule 3(5) sets out the information to be provided in support of an application. Rule 4(1)(d) provides for the Authority, where it so determines, to "notify the applicant that an EIA is required in compliance with a TOR"; TOR is defined as "terms of reference for an EIA" (rule 2). The TOR is first prepared in draft by the Authority for consultation with the applicant. Rule 5(2) provides that, on receipt of the draft TOR, the applicant -

> "shall, where appropriate, conduct consultations with relevant agencies, non-governmental organisations and other members of the public."

The applicant may then make written representations to the Authority requesting modifications to the TOR, and reporting on its consultations. Following consideration of the representations the Authority must issue the final TOR within a defined time-limit (rule 5(3)).

5. Rule 7 provides for the determination of the application, by grant subject to such "terms and conditions as the Authority sees fit", or refusal. Rule 8 provides that details of any application for a Certificate (including in particular the information supplied in support of the application and the CEC), and its grant or refusal, are to be noted on a "National Register of Certificates of Environmental Clearance", which is open to inspection by the public.

Comment

6. Given the importance attached by the appellants to rule 5(2), it is worth noting at this stage its relatively limited place in the procedure. The TOR is not a requirement of the Act. It appears to be no more than a preparatory step under the rules, designed to set the parameters of the EIA as between the Authority and the applicant. Although the implication is that the EIA will be prepared "in compliance with" the TOR, there is nothing in terms in the Act or the Rules to limit the consideration of the final decision on the CEC by reference to it. The requirement to consult other agencies and members of the public "where appropriate" shows that this is not a mandatory requirement in all cases; nor does it grant any general right to the public to be consulted at that stage. The implication seems to be that there may be agencies or individuals with a special interest in, or able to make a particular contribution to, setting the parameters of the EIA at an early stage. It is left to the applicant, at least in the first instance, to determine whom to

consult. The responses if any are reported to the authority by the applicant; the consultees have no independent right to make representations on the draft TOR. On the other hand the TOR process does not pre-empt in any way the rights of the public to take part in the statutory public comment procedure under sections 28 and 35(5), and to have their comments taken into account in the Authority's final decision.

Factual background

7. On 21 September 2016 the Ministry applied to the Authority for a CEC for a highway, described as -

> "commencing at a point 300 metres east of the Cumuto Main Road and ending at a point 600 metres west of Guaico Trace, Sangre Grande."

The highway forms "Package 1" of a larger project, known as the Churchill Roosevelt Highway Extension Project ("CRHE") which will be a limited-access dual 2-lane freeway 32.5 km long. The application was prepared by the National Infrastructure Development Co Ltd ("NIDCO"), which had been appointed as executing agency for construction of the CRHE.

8. The CRHE is regarded by the Ministry as of national importance. It was described in the Ministry's Environmental Impact Assessment as follows:

> "The CRHE is a cornerstone of Government efforts to stimulate the regional economy of the north and east and is a key component of Government plans to decentralise its administrative and planning functions to the regions. It is envisaged that the highway will help to close the income and communications gap that exists between rural and urban Trinidad by:
>
> - supporting agriculture in the region;
>
> - facilitating the regeneration of the town of Sangre Grande and consolidating its role as a regional centre, and
>
> - promoting tourism development on the north and eastern coasts."

9. In November 2016 the Authority notified the Ministry that an EIA would be required, and that it would prepare a draft TOR. On 11 November 2016 it notified the Ministry that the draft TOR was ready for collection, adding -

> "Please note that rule 5(2) [of the CEC Rules] makes provision for the applicant to conduct consultations with the public and, in particular, affected communities within the project area, relevant agencies and non-governmental organisations on the draft TOR."

10. The draft TOR included detailed sections setting out the legal framework of the EIA, its objectives and the required contents. A section headed "stakeholder consultation" (section 7) described the purpose of such consultation as part of the EIA procedure, and the requirements including the need for the applicant to "identify all relevant stakeholder groupings", to facilitate a minimum of two meetings with these stakeholders, and to include "any communities that may be affected by the project". In a section headed "analysis of environmental impacts" (section 8) it was stated that the description of impacts must include -

> "… an assessment of the cumulative environmental impacts that are likely to result from the proposed activities in combination with other existing, approved and proposed projects in the area that could reasonably be considered to have a combined effect;
>
> The cumulative assessment must be based on an adequate understanding of the design and operation of the proposed highway, as well as other existing, approved and proposed projects …"

The Ministry consulted a number of government entities on the draft TOR, but there were no consultations with the general public at that stage.

11. On 24 November 2016 the Ministry notified the Authority that it wished to agree the draft TOR without modification. On 12 December the Authority informed the Ministry that the draft TOR was deemed final under the rules. Later in that month the draft TOR and final TOR were placed on the National Register and so open to public inspection. Public consultations as required by the TOR were held at the Lower Cumuto Government Primary School on 16 December 2016 and 13 January 2017, and were attended by the Authority. Minutes, with written summaries of concerns and responses, were prepared. The appellants did not take any part in those consultations.

12. On 30 January 2017 NIDCO submitted an EIA for preliminary review by the Authority. This version was not put into the public domain. On 2 February 2017 the Authority informed NIDCO that on a preliminary review, the EIA submitted was unacceptable for further processing because it failed to comply with certain aspects of the Final TOR, as described in an attached Preliminary Review Report. These defects included failure to provide a description of the baseline environment of the study area, and the absence of any cumulative impact assessment. On 23 February NIDCO submitted a revised EIA, which was accepted for further processing. The revised EIA included a section headed "Cumulative impacts" which stated:

> "… With regard to foreseeable actions, the proposed development of the 5,000m alignment, as well as the future proposed extension of the CRH beyond Guaico Trace (Package 2, Package 3 and future development - see figure 4) are likely to have cumulative environmental impact - Table 22. The impacts associated with Package 1 only are elaborated throughout the remainder of this section."

Public notice was given of the submission of the application for public comment pursuant to the Act, with an indication that the record was available for public viewing from 27 March to 28 April. Between March and May meetings were held by the EMA with various agencies, and comments were received from members of the public.

13. On 22 May 2017 the EMA notified the Ministry that it had identified several deficiencies in the revised EIA, which were described in an attached Review and Assessment Report ("RAR"). In particular it referred to the TOR requirement for an assessment of cumulative impacts, and the lack of any such assessment for other segments of the "larger road network" of which it formed part (section G para 1). The NIDCO responded on 8 June:

> "It is beyond the scope of the current project to consider those future cumulative impacts as a part of the current EIA because the exact details (location, design etc) for future phases have not yet been finalized or approved. All consideration of these cumulative impacts will be included in forthcoming discussions with the EMA on Package 2, and future Phases of the CRHE."

14. On 22 June 2017 the Authority issued the CEC for the highway, subject to a long list of conditions, including requirements to submit a revised EIA, to undertake a number of baseline studies, and to prepare and submit for approval an Environmental Management Plan. A copy of the CEC was placed on the National Register on 3 July 2017. On 17 August a revised version of the EIA was submitted ("the final EIA").

Between October and November baseline reports on various matters required by the conditions were submitted and approved. Meanwhile in September 2017 the contract for construction of the highway was awarded to the second interested party ("KALLCO"), and an Environmental Management Plan prepared by them was submitted. On 1 December NIDCO gave public notice of the construction of the highway beginning on 2 January 2018.

15. Final approval for the commencement of works was given by the Authority on 22 December 2017. Work commenced on 8 January 2018, but on 15 January the appellants obtained an interim injunction restraining further work. Although this was discharged by Ramcharan J when refusing leave on 6 February 2018, it was reinstated by another judge pending the appeal, and (as already noted) again in April 2018 by the Court of Appeal pending the appeal to the Privy Council.

The involvement of the appellants

16. Until the issue of the certificate the appellant seems to have shown no interest in the project, nor taken any part in the consultations. The first record of any involvement was on 6 July 2017 when its programme co-ordinator consulted the National Register and became aware of the CEC. On 7 August 2017 it wrote to the Minister of Planning and Sustainable Development expressing strong concerns at what was said to be the unlawful grant of approval for the highway. The letter was said to follow an examination of "all the relevant documents".

17. Meanwhile it had submitted a Freedom of Information Request to the EMA for all reports and assessments prepared by EMA or external consultants relating to the processing of the CEC. The EMA replied on 1 September saying there were no further such reports. However, on 7 September the appellant obtained, from an un-named source, a copy of an EMA Internal Memorandum. In it the EMA Technical Team expressed strong objection to the issue of the CEC at that time, on a number of grounds, including lack of proper baseline studies, failure to comply with aspects of the Final TOR, and the deferring to conditions on matters necessary for a proper EIA. These objections were not accepted by the Authority, for reasons set out by the EMA Managing Director, Mr Hayden Romano, in an affidavit in these proceedings.

18. On 12 September the appellant sent to the Authority a Pre-action Protocol letter, running to more than 20 pages, in which it set out its concerns under four headings: in short (a) the deferral of the performance of baseline studies until after the issue of the CEC (b) failure to give proper consideration to the Integrated Management Plan for the Savannah, particularly a proposed 500 metre Buffer zone; (c) failure to conduct a full consultation with the public and relevant stakeholders; (d) failure properly to assess the impact of the project on the Ocelot and other species, in contravention of the

precautionary principle. The EMA responded on 20 September dealing briefly with each of the four points. The present proceedings were commenced on 29 September 2017. The claim asserted that the certificate should be set aside as unlawful on 14 grounds.

Issues in the appeal

19. The Agreed Statement of Facts and Issues records as agreed issues for the Board the following: whether the Court of Appeal -

> i) erred in refusing to extend time for filing the application for leave, and if so whether time should be extended.
>
> ii) erred in holding that neither rule 5(2) of the CEC Rules nor the EMA's letter of 11 November 2016 required consultation on the draft TOR with affected members of the public or relevant NGOs.
>
> iii) erred in holding that the EMA was entitled to grant the Certificate, notwithstanding the absence of a cumulative impact assessment in relation to the Highway when taken together with the proposed continuation of the road beyond the Highway.

Two further issues, not agreed, are recorded as proposed by the appellant: (iv) "whether the application … was filed out of time"; (v) "whether it is arguable that the decision to grant the CEC was taken in breach of statutory duty and/or ultra vires and/or irrationally". Issue (iv) is no longer pursued as a separate ground.

20. In his judgment on the application for leave to appeal to the Board, Narine JA recorded (para 7) that counsel for the appellant had identified four issues for consideration. The first three correspond to the three agreed issues for the Board. The fourth was expressed in these terms:

> "The rationality issue concerning the grant of the CEC with conditions over the objections of the technical staff with respect to several deficiencies identified by the technical staff."

While expressing no view on the merits of this point, he indicated that he expected it to be raised before the Privy Council. As the Board understands the effect of the Court of Appeal's judgment, therefore, the appellant has leave to advance arguments on issues (i) to (iii), but the court reserved to the Board the question of leave on issue (iv) as then

presented. That question, and the scope of any other issues properly arising under the heading of "rationality" will be considered at the end of this judgment.

Issue (i) - Delay

21. Section 11 of the Judicial Review Act, headed "Delay in applying for relief" provides:

> "(1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.
>
> (3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant.
>
> (4) Where the relief sought is an order of certiorari in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or decision."

22. Rule 56.5 of the Civil Proceedings Rules ("Delay") lays down a similar set of tests, but with a somewhat different emphasis. Mr Knox QC for the Authority sought to explain the differences by reference to the history of the respective provisions. The Board finds it unnecessary to consider those points. It is clear that, in so far as there are differences, the Judicial Review Act must prevail over the Rules. It is important to emphasise that there is a duty to act "promptly" regardless of the three-month limit. It seems also that the purpose of that specific limit is to provide a degree of certainty to those affected, and accordingly that strong reasons are needed to justify extending it where other interests, public or private, are involved. It is also clear that the discretion under section 11(1) is that of the trial judge, with which an appellate court will only

interfere if it finds some flaw in his reasoning (see *Fishermen and Friends of the Sea v Environmental Management Authority* [2005] UKPC 32).

23. The appellant has drawn attention to a difference of approach at Court of Appeal level. In the present case the court adopted the three-step approach of Bereaux JA in *Devant Maharaj v National Energy Corporation of Trinidad and Tobago*, Civ App No 115 of 2011, para 7.

> "(i) Whether the application was filed promptly. (ii) If the application was not prompt whether there is good reason to extend the time. If there is no good reason to extend the time, leave to apply for judicial review will be refused for lack of promptitude. (iii) If however, there is good reason to extend the time, whether permission should still be refused on the ground that the grant of the remedy would likely cause substantial hardship or substantial prejudice to a third party, or would be detrimental to good administration."

24. For the appellant, Mr Ramlogan SC criticises this as too narrow, in so far as it limits consideration of hardship or prejudice to cases where good reason has otherwise been shown to extend time. In support he refers to the earlier decision of the Court of Appeal in *Abzal Mohammed v Police Service Commission*, Civ App No 53 of 2009.

25. The Board finds it unnecessary to resolve this difference in the present appeal. It is satisfied that where, as here, the proceedings would result in delay to a project of public importance, the courts were right to adopt a strict approach to any application to extend time. It was unnecessary to show specific prejudice or hardship to particular parties. There was no such competing public interest in the *Abzal Mohammed* case, which concerned a challenge by a police officer to an individual decision of the Police Service Commission. However, in considering whether there is good reason to extend time, there may, as Mr Knox QC for the Authority accepts, be some overlap between sections 11(1) and (2), so that the issues including the relative merits of the applicant's case, and any prejudice, public or private, may be taken into account in the overall balance.

26. There is no doubt that the application for leave was out of time, even if by only a few days, as the judge rightly held (para 31). Section 11(4) makes clear that time runs from the date of the relevant decision itself, whether or not that has been publicised or the applicant has notice of it. Section 11(3) indicates that such matters may be relevant to the exercise of discretion in deciding whether there is good reason to extend time.

27. In the present case the judge found no evidence that any delay in publicising the decision contributed to the appellant's failure to observe the time-limit. He noted the applicant's reliance, in support of its request for an extension, on the environmental sensitivity of the Aripo Savannas, and on "the chronology of events". He regarded neither as providing good reason to extend time. In particular he observed that the applicant had been able to send a detailed pre-action protocol letter with the three-month period, and should have been in a state of readiness to file within the same period if necessary (para 39). Agreeing with his approach in the Court of Appeal, G Smith JA (para 43) also drew attention to the fact that in its letter of 7 August 2017 the applicant indicated that it had by then examined all the documents in the register and identified its legal objections.

28. Before the Board, Mr Ramlogan for the appellant has relied on a range of factors as justifying an extension of time. They included the importance of the project and of the environmental concerns it raises, the underlying merits of the grounds, the status of the appellant as a non-profit organisation dedicated to the protection of the environment, and the fact that the limit was only exceeded by seven days. He also relies on the failure of the Authority, as he puts it, "to properly deal with the appellant's Freedom of Information request or to discharge its duty of candour by disclosing relevant documents".

29. Subject to the "underlying merits" which will be considered below, and in agreement with the Court of Appeal, the Board finds no flaw in the reasoning of the judge on this issue, and sees no basis for interfering. There was no doubt about the date of the decision to grant the CEC. It was referred to in the appellant's letter of 7 August. As an experienced litigator it must have been aware of the ordinary time-limit set by section 11(1) and the need to show good reason for any extension. None of the matters put forward begins to explain why the time-limit was not respected. In particular, whether or not there was any deficiency in the disclosures made by the Authority (on which the Board finds it unnecessary to comment), there is nothing to indicate why it should have delayed the commencement of proceedings.

30. The Board would add one comment on the appellant's reliance on its status as a public interest litigant. This is undoubtedly an important role, which is recognised in section 7 of the Judicial Review Act ("Leave of Court in public interest"). However, this is not in itself a reason for applying the delay rules with less rigour, particularly where, as here, there are strong competing public interests on the other side.

31. Mr Knox relied on comments of Laws J on the importance of discipline in such public interest litigation in *R v Secretary of State for Trade and Industry Ex p Greenpeace Ltd* [1998] Env LR 415, 424-425. Such discipline was he said -

> "… marked by an insistence that applicants identify the real substance of their complaint and then act promptly, so as to ensure that the proper business of government and the reasonable interests of third parties are not overborne or unjustly prejudiced by litigation brought in circumstances where the point in question could have been exposed and adjudicated without unacceptable damage …"

He also referred to the special position of a public interest litigator (such as in that case the environmental NGO Greenpeace):

> "Such a litigant ... has to act as a friend of the court; precisely because he has no rights of his own, his only locus is to assert the public interest. Litigation of this kind is now an accepted and greatly valued dimension of the judicial review jurisdiction, but it has to be controlled with particular strictness. It is a field especially open to potential abuse. ... Strict judicial controls, particularly as regards time, will foster not hinder the development of such litigation in the future. … Of course the court will still look at the strength and importance of his case; but in my judgment delay will be tolerated much less readily in public interest litigation."

32. The Board doubts that it is appropriate to apply stricter standards to public interest litigators than to others, and it recognises the need to take account of the limited resources that may be available to them. However, it agrees that full weight must be given to all aspects of the public interest, that respect must be paid to the time-limits laid down by the rules, and that the real substance of the complaint should be identified with reasonable precision at an early stage. The latter is important both for the court, and in fairness to the respondent who is entitled to know the case against him so that he can respond to it. It was unfortunate that the court in this case was faced with no less than 14 grounds of challenge, which themselves differed significantly from the four points identified in the Pre-action letter, and of which only two have been found to have weight by any of the seven judges who have considered the matter.

Issue 2 - rule 5(2)

33. Without disrespect to those members of the Court of Appeal who thought otherwise, the Board sees no arguable merit in this ground of challenge. The judge was right to reject it.

34. Comment has already been made on the limited role of rule 5(2) in the EIA procedure. The Board finds it hard to envisage a case where a failure at that preliminary

stage should be held to invalidate the final certificate, given the extensive statutory provisions for public consultation on the terms of the EIA at a later stage. If it is alleged that lack of consultation on the draft TOR led to some matter being inadequately considered, this can no doubt be raised by way of objection to the EIA. There is in any event no evidence in this case that those who took part in the later consultation were dissatisfied in any way with earlier procedures.

35. It is particularly difficult for the appellant to complain, given its unexplained failure to take any part in the statutory consultation process, or to raise any complaint about the scope of the TOR (which was finalised in December 2016) at an earlier stage. Further, even at this late stage, the appellant has failed to identify which other agencies, public or private, should "appropriately" have been consulted on the draft TOR and why. More importantly it has failed to identify any defect in the draft TOR which might have been corrected by such consultations. Indeed the emphasis of its complaints has been, not that the TOR was deficient, but that some of its requirements (on matters such as cumulative impacts) were relaxed in the final decision.

Issue (iii) - cumulative impacts

36. No reference was made to cumulative impacts in the four issues defined in the Pre-action Protocol letter. However two of the 14 grounds set in the application for leave ((vi) and (ix)) referred to a failure to consider cumulative effects, first of the CEC in respect of the 5,000 metre highway and secondly of the "proposed highway route". The judge (para 63) treated the second as a repetition of the first. This failure was alleged to be either "ultra vires rule 10 of the rules" or a failure to have regard to a relevant consideration.

37. In spite of the apparently limited scope of these grounds as so pleaded, they were presented to the judge as raising a wider issue relating to the failure to consider the impact of future phases of the project (para 57). He thought that there would have been an arguable point with a reasonable prospect of success "if … phase one could not have been considered a stand-alone project within itself", adding:

> "In other words, if it were that the construction of phase one would not make sense without the construction of any of the future phases, then it would clearly be irrational for the EMA to grant a CEC without considering the effects of the other phases upon which usability of Phase one is dependant." (para 59)

However, as he understood it, the present proposal was not "a highway to nowhere, whose sole usefulness depends on the construction of the other phases in the larger

project". Accordingly the Authority was not required to consider the cumulative effects of future phases (para 60).

38. In the Court of Appeal Smith JA (paras 70ff) identified the alleged failure by reference to the consideration of cumulative impacts in the EIA, which he took to be limited to Package 1, rather than to the entire Highway Extension, as requested in the Terms of Reference and the Review and Assessment Report. He thought that a decision to forego such consideration should have reflected "a 'hard look' based on a proper quantitative and qualitative assessment". Whether that had been done was "open to question" (para 78). Hence there was a case with some realistic prospects of success on the "rationality" of the decision to forego a true cumulative impact assessment. However, the merits of this argument were not sufficient to overcome "the discretionary time bars and/or the third party and good administration considerations that negate the case for leave" (para 79).

39. On this point he was in the minority. J Jones JA (with whom Des Vignes JA agreed) noted and rejected the argument that the failure to consider cumulative effects was ultra vires rule 10 of the CEC Rules (para 135). She saw the real issue as being whether, in the face of its request in the TOR for information on the possible cumulative effects of future phases, the Authority acted unreasonably in accepting the Ministry's excuses for not providing it (para 136). She referred to the exchanges between the Ministry and the Authority on the failure to provide this information. She also referred (para 143) to the evidence of Mr Romano for the Authority responding to this allegation, and explaining that the Ministry's approach was acceptable in the light of the lack of adequate knowledge of the specific design and operation of any possible future packages, and that it was regarded as appropriate and not unreasonable for the Ministry to defer such assessment while the other stages were unapproved and in various stages of development.

40. In conclusion (paras 147-149) she accepted that the cumulative effects of other phases were a material consideration, having been accepted as such by the Authority. However, it was for the Authority alone to determine the weight to be given to it in the light of the reasons put forward by the Ministry. The allegation that the Authority had failed to have regard to this material consideration was not supported by the facts, and it had not been shown that their approach was irrational.

41. Before the Board there was some discussion whether the judge had correctly understood the nature of the 5,000 metre highway covered by the CEC itself. It does not in itself show any direct connection to the existing highway, and to that extent might be regarded as a "road to nowhere", if no account is taken of the short connecting roads which (it is said) will link it to the local villages and hence to the wider network. Given the limited way in which the issue was formulated in the original ground, the approach of the judge is understandable. However, it is unnecessary to consider that further, since,

as has been seen, the issue as presented to the Court of Appeal and to the Board relates not to the impact of this limited stretch of highway, but to the impact of the other phases of the CRHE scheme.

42. In support of the view of G Smith JA that it was an argument with realistic prospects of success, Mr Wald relied on the judgment of Stollmeyer J in *Fishermen and Friends of the Sea v Environmental Management Authority* HCA Civ 2148 of 2003. (This appears also to be the source of the "hard look" approach favoured by G Smith JA.) Discussing the assessment of "cumulative impacts" (p 90) the judge said:

> "Rule 10(e) of the CEC Rules requires the EMA to consider the cumulative effects but does not provide any specific guidelines or parameters for cumulative impact assessment. The EMA is given a broad discretion to determine the scope and sufficiency of the assessment but is not provided with any guidance on how this discretion is to be exercised. The term 'cumulative effect' is not specifically defined, but its importance is well recognised as being one of the more important considerations in carrying out an environmental assessment.
>
> The Act and the National Environmental Policy aim at achieving sustainable development and the EMA must consider development projects in a cumulative context. It must be given careful scrutiny because natural resources are seen as being under increasing pressure."

43. He referred (p 91) to what he described as the "most comprehensive definition of cumulative effect" as formulated by the US Council on Environmental Quality (CEQ), created by the US National Environmental Policy Act 1969:

> "… the impact on the environment which results from the incremental impact of the action [being analysed] when added to other past, present, and reasonably foreseeable future actions regardless of what agency … or person undertakes such other actions. …" (CFR, Title 40, Ch V, Pt 1508, para 1508.7)

After reference to what he called "the major Canadian and American authorities" he continued (pp 92-93):

> "The approach to judicial review of cumulative impact assessment in these cases is referred to as the 'hard look doctrine' and

> originated in the context of court review of administrative decisions. The approach adopted by these courts does not in substance differ from the approach adopted in this jurisdiction when considering applications for judicial review of an administrative decision.
>
> The 'hard look' requires the agency to take its statutory responsibilities seriously and take a 'hard look' at all the relevant circumstances. It calls only for the Court 'to ensure that the agency took a hard look at the cumulative environmental consequences' (see *Natural Resources Defense Council Inc v Morton* 458 F 2d 827). Once the agency has taken 'a hard look' by complying procedurally and substantively with the legislative intent, the court cannot impose its views or interject into the agency's discretion as to the action to be taken."

44. Although the definition cited by Stollmeyer J is not in terms imported into the CEC Rules, the Board readily accepts its utility, and the importance of considering cumulative impacts as so defined in appropriate cases. However, it is to be noted that the "cumulative impacts" relied on in that case were quite different from the present. They related, not to future extensions, but to the additional impact of a proposed fourth installation (or "train") for liquid natural gas, when combined with the three existing trains (see p 73). There was therefore no uncertainty about what was involved.

45. The Board is not persuaded that the "hard look" doctrine, familiar in USA authorities, is a necessary addition to the administrative law of Trinidad and Tobago. In any event, the allegation in the present case was not that the authority had failed to take a "hard look", but that it had failed to have regard to this issue at all. It was to that allegation that Mr Romano was responding. As he explained in his affidavit, the Authority accepted that the cumulative impacts of possible future additional phases of the highway could be assessed when the details of any contemplated additional highway segments were known. He noted that any future extensions would lead away from the vicinity of the Aripo Savannas. He said:

> "In the opinion of the EMA, NIDCO's response was acceptable when viewed in the light of the uncertainties due to lack of adequate knowledge of the specific design and operation of any possible future packages concerning any extensions to the highway."

46. On this issue the Board finds itself in full agreement with the majority of the Court of Appeal. There is no arguable breach of rule 10. Although the definition of

"impacts" includes cumulative impacts, the reference is to the impact of the particular "activity". In itself the rule says nothing about the impact of future extensions. For that the case stands or falls on the requirement laid down by the Authority itself in its own TOR and repeated in the review. The Board understands the concerns of the Technical Staff at the Authority's change of position on this aspect. However, in the light of Mr Romano's explanation of the Authority's reasons for not pressing this point (the good faith of which is not questioned), it is impossible to say that the Authority failed to have regard to this issue, or that its response was irrational.

Issue (iv) - Rationality

47. Issue (iv) in the much wider terms proposed by the appellant in the Agreed Statement is not within the scope of the appeal, and will not be addressed in this judgment. As has been noted above, the argument as understood by Narine JA related more specifically to the disagreement with technical staff. As such this is not an arguable ground. It is clear that an Authority is not bound by the views of its staff, however strongly expressed. The mere fact of such disagreement does not provide grounds for legal challenge.

48. In the appellant's written submissions to the Board the disagreement with staff has been linked to a "vires/rationality" argument, as it is described, in more specific terms related to the grant of the CEC subject to conditions. Relying on the English case of *Smith v Secretary of State for the Environment, Transport and the Regions* [2003] EWCA Civ 262, it is submitted that the CEC wrongly deferred certain aspects to be dealt with under conditions. These were said to be "essential matters relevant to a proper EIA and mandated in the TOR such as the completion of baseline studies …". Specific mention was also made of various points, such as for example an alleged failure to allow for a buffer zone between the Aripo Savannas and the highway, as recommended in a report ("the CANARI report"), commissioned by the Authority in 2008.

49. The Board is not persuaded that leave should be granted to advance an argument in this revised form. The genesis of the August EIA is explained in the evidence of Mr Romano:

> "… there is no third EIA. Condition 1.1 of the General Terms and Conditions of the CEC required the Interested Party to submit a corrected and comprehensive version of the EIA reflecting all adjustments/additions made as a result of the review and assessment process, such report to integrate the updated version of all reports submitted in support of the application for the CEC. In compliance with this condition, NIDCO submitted the finalized EIA to the EMA on 17 August 2017."

No reason has been put forward to doubt the accuracy of this statement. On that basis it is difficult to see any grounds for a legal challenge. The power to impose conditions on a CEC is in terms unlimited. There is no reason why it should not include an updated EIA. This does not in itself establish the inadequacy of the earlier EIA or of the other information on which the grant was based. Nor does the English case relied on lay down any general rule to that effect.

50. The Board notes that a similar argument was advanced and rejected in *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment (Belize)* [2004] UKPC 6; [2004] Env LR 38 ("*BACONGO No 2*"), as Lord Hoffmann explained:

> "31. The Chief Justice and the Court of Appeal rejected the claims that the EIA was inadequate or that the DOE acted unreasonably or irrationally in giving approval. Before their Lordships, this argument has been presented in a slightly different form. It is said that there were certain matters which were omitted from the EIA but which ought, as a matter of law, to have been included. Instead, the investigation of these questions was deferred; left to be dealt with to the mutual satisfaction of the developer and the DOE under the conditions imposed by the ECP. The result is that information which ought to have been part of the published material for public debate is now a matter between the developer and the government.
>
> …
>
> 33. The appellants contend that because, after its first meeting, the NEAC asked for more information, it follows that the EIA did not contain enough. It therefore did not fulfil the requirements of the statute. Their Lordships think that this is a fallacy. The fact that the NEAC asked for information does not imply any judgment on whether the EIA would otherwise have been inadequate. On the contrary, the terms in which the information was sought make it clear that the EIA was accepted as complete for the purposes of the Act and Regulations …"

Later in the judgment (para 71) Lord Hoffmann described environmental control in Belize as "an iterative process which does not stop with the approval of the EIA"; it was "wrong to approach an EIA as if it represented the last opportunity to exercise any control over a project which might damage the environment".

51. Similar considerations apply in the present statutory context. There is nothing inherently unlawful or irrational in the course adopted by the Authority. If there was thought to be some flaw in the detailed consideration given to this aspect by the Authority, the case needed to be formulated with precision in the original grounds, so that it could be answered by the respondents and addressed by the trial judge. That not having been done it would be wrong in principle, and unfair to the Authority, to allow the matter to be revisited at this level.

Conclusion

52. For these reasons, in agreement with the Court of Appeal, the Board sees no reason to question the exercise of discretion by the judge when refusing to extend time under section 11(1). The appeal is accordingly dismissed, and the interim injunction will be discharged.