REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2017-03452**

IN THE MATTER OF THE JUDICIAL REVIEW ACT CHAP 7:08

AND

IN THE MATTER OF AN APPLICATION BY FISHERMEN AND FRIENDS OF THE SEA ("FFOS"), AN INCORPORATED BODY UNDER THE COMPANIES ACT ; IN A REPRESENTATIVE CAPACITY PURSUANT TO SECTION 5(2) (b) OF THE JUDICIAL REVIEW ACT NO 60 OF 2000 FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION OF THE ENVIRONMENTAL MANAGEMENT AUTHORITY ("EMA") DATED ON OR ABOUT THE 22ND DAY OF JUNE, 2017, TO ISSUE A CERTIFICATE OF ENVIRONMENTAL CLEARANCE ("CEC") TO THE MINISTRY OF WORKS AND TRANSPORT ("MOWT") FOR THE SPECIFIC PURPOSE OF "THE ESTABLISHMENT OF A 5000 METER HIGHWAY ALIGNMENT" COMMENCING AT A POINT 300 METERS EAST OF THE CUMUTO MAIN ROAD AND ENDING AT A POINT 600 METERS WEST OF GUAICO TRACE, SANGRE GRANDE

BETWEEN

FISHERMEN AND FRIENDS OF THE SEA

Intended Claimant

AND

ENVIRONMENTAL MANAGEMENT AUTHORITY

Intended Defendant

THE MINISTRY OF WORKS & TRANSPORT

First Interested Party

KALL COMPANY LIMITED also called KALLCO

Second Interested Party

Before The Honourable Mr. Justice K. Ramcharan

Appearances:

For the Intended Claimant: **Mr. Anand Ramlogan, SC, Ms. Jayanti Lutchmedial, Mr. Alvin Pariagsingh and Mr. Ganesh Saroop,** *instructed by* **Mr. Robert Abdool-Mitchell**

For the Intended Defendant: **Ms. Deborah Peake, SC, Ms. Amirah Rahaman and Mr. Ravi Heffes-Doon** *instructed by* **Ms. Giselle Landeau-Birmingham and Jenell Partap.**

For the First Interested Party**: Mr. Ian Benjamin and Ms. Tekiyah Jorsling** *instructed by* **Ms. Svetlana Dass.**

For the Second Interested Party: **Mr. Douglas Mendes, SC, Mr. Devesh Maharaj** *instructed by* **Ms. Kandace Bharath.**

DECISION

Background Facts

1. In any modern society, from the most advanced and developed, to the least advanced, there exists a tension between the need and desire to develop infrastructure, and engage in general human activity, and the preservation of the natural environment. Trinidad and Tobago is no different. To help draw a balance between these 2 conflicting needs, Parliament has established the intended Defendant, the Environmental Management Authority ("the EMA") to regulate and control development, so as to protect the natural environment, and to mitigate against polluting factors that can be caused by development.

2. The actions and powers of the EMA are governed by the Environmental Management Act CH 35:05 ("the EM Act") and the Rules and regulations made thereunder. The powers of the EMA under the act are vast, and it is provided that any significant development must receive approval from the EMA[1], via a Certificate of Environmental Clearance (CEC). This includes the construction of any highway by the Government. A CEC may be granted with or without conditions.

3. The EMA also has power to declare any area an Environmentally Sensitive Area ("ESA") under section 41 of the Act in accordance with the Environmentally Sensitive Area Rules. Pursuant to this power, by legal notice 152 of 2007, the EMA declared the Aripo Savannas an ESA.

4. The Aripo Savannas are described as Trinidad and Tobago's last natural savanna. It comprises some 1,788 hectares and is said to be the home of some 457 different plant species, including several rare or threatened plants, and at least 2 species of herbs and grasses which are endemic (unique) to the area[2]. According to Legal Notice 152 of 2007, the Aripo Savannas are a place of international renown, and of great scientific and research value. Among the renowned species to be found in

[1] Section 35 of the EM Act, the Certificate of Environmental Clearance (Designated Activities) Order
[2] CANARI management plan p. 19

the area is the Moriche Palm, or by its scientific name the *Mauritia Setigera,* the moriche oriole, and the red-bellied macaw[3]. After the designation of the savannas as an ESA, the EMA commissioned the Caribbean Natural Resources Institute (CANIRI), to develop a management plan for the Aripo Savannas.

5. The Intended Claimant, Fishermen and Friends of the Sea (FFOS) is described as a non-profit company whose aims are to represent communities that lack the necessary financial, human and technological resource to interpret and address the environmental and social issues that affect their life economy, health and safety[4]. The welfare of the Aripo Savannas therefore falls squarely in the remit of FFOS.

6. For some time now, there has been a plan by the government of Trinidad and Tobago to extend the highway from Cumuto to Toco. It was decided that this project would be implemented in different phases, the first of which would be the stretch between Cumuto and Sangre Grande. This is a 5 kilometre stretch which it is proposed will run south of the border of the Aripo Savannas. This project was under the auspices of the Ministry of Works and Transport, the First Interested Party (the Ministry).

[3] ibid
[4] Affidavit of Gary Aboud filed on 29th September 2017

7. Pursuant to the requirements of the EM Act, the Ministry applied to the EMA for a CEC. Pursuant to the CEC regulations, the EMA provided the Ministry with a draft Terms of Reference (TOR), for the Ministry to consider, with "appropriate" consultation, and then return to the EMA with any recommendations for changes to the TOR. At the end of this process, the Ministry indicated to the EMA that there was no response to the correspondence they had sent to various state agencies, and therefore, there was no objection to the draft TOR being finalised in their current state. It is to be noted that there was no consultation with the public at large at this stage. Among the requirements set out by the TOR was the undertaking of an Environmental Impact Assessment (EIA), by the Ministry.

8. After this, the process of obtaining the CEC was outsourced by the Ministry to the National Infrastructural Development Company (NIDCO). After receiving the finalised TOR, NIDCO held the first of 2 public consultations required where an EIA is required on the 16th December 2016. Senior Counsel for the Claimant took issue with the fact that the first consultation was advertised before the final TOR was sent to the Ministry, as the Court noted, the Ministry had already indicated that it was consenting to the draft TOR being made final, so there was little to be taken from that point. At the first consultation, some 105 persons attended. The second consultation took place on the 13th January 2017 and was attended by some 120 people.

9. After this consultation, the Ministry (through NIDCO) submitted a draft EIA for consideration by the EMA on the 30th January 2017, who, having found a number of defects in it sent with a preliminary review of the EIA to NIDCO on the 2nd February 2017, and indicating that it was unacceptable for further consideration.

10. NIDCO submitted a final (described as a "second" by FFOS) EIA on the 23rd February 2017. This was considered by the EMA acceptable for further consideration. As such, NIDCO submitted 17 hardcopies and 4 digital copies of the EIA to the EMA by letter dated 10th March 2017. The EIA was then gazetted for public consultation. The period for the pubic consultation was between the 27th March 2017 and the 28th April 2017, some 33 days. Pursuant to section 33(5) and 28 of the EM Act, the minimum length required for public comment is 30 days.

11. After the period for commenting was completed, by letter dated the 22nd May 2017, the EMA sent to NIDCO a Review and Assessment Report (RAR) which identified certain deficiencies in the EIA, which needed addressing. A response to that was forthcoming on the 7th June 2017, and a CEC subject to certain conditions was granted to the Ministry on the 22nd June 2017 and placed on the National Register as required by rule 8 of the Certificate of Environmental Clearance Rules on the 3rd July 2017.

12. Having discovered the grant of the CEC on the 6th July 2017 after checking the National Register, FFOS sought certain information from the EMA, and thereafter issued a pre-action protocol on the 12th September 2017, and then filed this application for leave to file for judicial review against the decision to issue the conditional CEC to the Ministry. In it they also sought interim relief, not rising to the level of an injunction restraining the Ministry from commencing the works. At the first hearings of the Application for Leave, the EMA and the Ministry indicated to the court that there were conditions in the CEC which were not complied with, and that therefore work could not immediately commence. The Ministry further indicated that the contract for the construction of the highway had not yet been signed, although already awarded to the Second Interested Party, Kall Company Ltd (Kallco). However, the Ministry declined to give an undertaking not to commence any works once all relevant approvals were obtained.

13. After receiving the relevant approvals, the Ministry and Kallco commenced the project on the 8th January, which prompted the FFOS to file an application for an injunction on the 15th January 2018. That application was listed for the 16th January 2018, and after giving directions, the application for the injunction was adjourned to the 22nd January 2018 to meet the Application for Leave to apply for Judicial Review. The Court also took the unusual step of ordering that the work on the project cease with certain limited exceptions.

14. An application to amend the Notice of Application for Leave to apply for Judicial Review was filed on the 19th January, 2017, but on the hearing of this Application, leave was not granted to abridge time for service, nor was an adjournment granted for the Intended Claimant to comply with the rules with respect to service of applications. The effect of this, regardless of the decision of the court is that the application to amend will of necessity be rendered otiose. If the Application for Leave is granted, then the order will be for an application for judicial review for the relief sought in the original application, and if it is dismissed, then there is nothing before the court to amend.

15. The role of the Court in judicial review proceedings is now trite law. The court does not sit as an appellate body, to substitute its own decision where it disagrees with the decision-making body. The Court's role is to ensure that the decision maker has followed the proper process, and has not taken irrelevant matters into consideration. If the proper process is followed, and the decision is not an unreasonable one, then the Court will not interfere with the decision, no matter how much it may disagree with the decision. Further, the more specialised the body, the less likely the Court will be to interfere, once the proper procedure is followed. The Court will, unless good reason is shown, give deference to the expertise of the decision-making body.

16. The EMA, the Ministry and Kallcoo all contend that FFOS have delayed in filing the Application for Leave under the provisions of the Judicial Review Act and the Civil Proceedings Rules 1998 as amended.

17. Section 11 of the **Judicial Review Act (JRA)** deals with the issue of delay in applications for judicial review. Section 11 reads as follows:

"(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 considered relevant."

18. Part 56 of the Civil Proceedings Rules (CPR) 1998 as amended deals with applications for judicial review. Part 56.3 particularly addresses the application for

leave for judicial review and provides at 56.3 (g) that the application for leave must state **"whether any time limit for making the application has been exceeded and, if so why..."**

19. Part 56.5 addresses delay in respect of the application for leave and the grant of relief. Part 56.5 provides that:

"(1) The judge may refuse leave or grant relief in any case in which he considers that there has been unreasonable delay before making the application.

(2) Where the application is for leave to make a claim for an order of certiorari the general rule is that the application must be made within three months of the proceedings to which it relates.

(3) When considering whether to refuse leave or grant relief because of delay the judge must consider whether the granting of leave or relief would likely to –

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b) be detrimental to good administration."

20. Section 11 provides that an application for judicial review **"shall be made promptly and in any event within three (3) months from the date when the grounds for the application first arose unless ... there is good reason for**

extending the time within which the application shall be made." To echo the words of Jamadar J.A. in ***Favianna Gajadhar v. Public Service Commission***[5] **"promptitude is the standard by which delay is to be measured."** Therefore, according to section 11 (1) where an application is made outside of the three (3) month period, the court will refuse leave unless it is satisfied that there is good reason for extending the time.

21. In ***Dennis Graham v Police Service Commission & the Attorney General of Trinidad and Tobago***[6] Mendonca J.A. commented on the effect of section 11 of the JRA and noted as follows:

"... under section 11 an application for judicial review shall be made promptly and in any event within three months. Time runs from the date when the grounds of the application first arose and not when the claimant first learnt of them. If the application is not made promptly the Court may refuse leave to apply for judicial review. The Court however has a discretion to extend the time for the making of the application if there is good reason for so doing (11 (1))."

22. In considering whether an applicant has provided "good reason" section 11(3) mandates the court to have regard to the time when the applicant became aware

[5] Civil Appeal No. P170 of 2012
[6] Civil Appeal No. 8 of 2008

of the making of the decision. The court is also permitted to have regard to such other matters that it considers relevant.

23. Notwithstanding there may be "good reason", 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: See section 11 (2) of the JRA.

24. In ***Devant Maharaj v National Energy Corporation of Trinidad and Tobago***[7] Bereaux J.A. observed at para 7 that the combined effect of section 11 (1) and CPR 56.5 (1) and (3) maybe summarised as raising three issues for the judge namely:

    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

[7] Civil Appeal No.115 of 2011

likely cause substantial hardship or substantial prejudice to a third party, or would be detrimental to good administration.

Whether the application was filed promptly?

25. In its application for leave to apply for Judicial the Intended Claimant made the following statement in relation to the issue of promptness:

"M. Time Limit for filing the application

This application has been made promptly and in any event within three (3) months from the date when the grounds of the application first arose. To the extent (if any) that he issue of delay is raised by the Intended Defendant, the Claimants will contend as follows:

This is a case which concerns the possible development major and complex highway project which carries serious risks to the environment, sensitive areas, sensitive species and human health.

... there is serious disparity in resources available to the Intended Claimants as compared to those available to the Intended Defendant

... the intended Claimants' task of informing themselves as to the details surrounding the grant of the CEC has been made more difficult by the Intended Defendant's only partial provision of such information, its failure to maintain a full and proper administrative record and is failure to ensure a proper process."

26. In affidavit evidence filed on the 19th January, 2018, in support of an application to amend leave for judicial review, the deponent, Mr. Gary Aboud, who is the corporate secretary of the intended claimant deposed that programme co-ordinator Ms. Lisa Premchand visited the library of the intended Defendant and requested copies of certain documents relative to the Certificate of Environmental Clearance (CEC) application which was lodged in the National Register. Having viewed the register, the programme co-ordinator noted that the CEC was granted on the 22nd of July, 2017 but was lodged in the Register on the 3rd of July, 2017.

27. The timeline of events for the purpose of the issue of delay according to Notice of Application and the affidavit evidence of Mr. Gary Aboud are as follows:

    i. On the 21st of September 2016 the application for the CEC was made by the Ministry of Works and Transport (MOWT) for the grant of a CEC.

    ii. The CEC was issued on the 22nd of June, 2017.

    iii. Enquiries were made by the Intended Claimant on the 3rd of July, 2017

    iv. On the 6th of July, 2017, the claimant reviewed and requested copies of documents relevant to the CEC Application which was lodged in the National Register.

    v. On the 2nd of August, 2017, the Intended Claimant made an FOIA application for all reports, reviews, assessments and other documents

prepared by the Intended Defendant in relation to the processing of the CEC application and the grant of the CEC.

vi. On the 7th of August, 2017 the Intended Claimant wrote to the President and Prime Minister of the Republic of Trinidad and Tobago and several government entities regarding the grant of the CEC. They were responded to on the 24th of August, 2017.

vii. By letter dated 1st September 2017, the intended Defendant wrote to the Intended claimant stating that there were no further reports or reviews assessments prepared by external consultants and/ or experts in relation to the processing of the CEC application.

viii. On the 7th September, 2017, a memorandum issued by the Intended Defendant was delivered to the Intended Claimant. The memorandum was dated the 21st June, 2017.

ix. A pre-action protocol letter dated the 12th September, 2017 was issued by Attorney at law for the Intended Claimant.

x. On the 29th September 2017 an application for leave to apply for Judicial Review was made by the Intended Claimant.

28. On the 22nd of January, 2018, oral submissions were made by Senior Counsel for FFOS with regards the issue of delay. Senior Counsel noted that having regard to the chronology of events that there is no basis for the claim of undue delay.

29. Senior Counsel submitted that having regard to the learning in ***Dennis Graham*** (supra) time began to run against FFOS when it became aware of the order i.e. on the 6th of July, 2017 when the National Register was reviewed. Further, Senior Counsel suggested that even if they are not within time, there are ample reasons why time should be extended.

30. With the greatest of respect to Senior Counsel, this is not what Dennis Graham says at all. At paragraph 64, the Court of Appeal makes it clear that time starts to run when the decision is made. However, at paragraph 80, the point is made, as provided for in the legislation, that the time that an applicant became aware of the decision can be a good reason to extend the time.

31. In this case, the CEC was made on the 22nd of June, 2017. The Applicant became aware of the CEC application on the 6th of July, 2017. Time began to run from the date when the grounds of the application first arose and not when the claimant first became aware of them. The application for leave was made on the 29th of September, 2017 a period of 7 days outside of the 3 month period. The Application clearly was not made promptly under the provisions of the Act. The question that therefore arises is having regard to the circumstances of this case; the Court can exercise its discretion to extend time for leave.

<u>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.</u>

32. In ***Devant Maharj*** Bereaux J.A observed that that once there is a lack of promptitude there must be a good reason shown for extending the period within which the application shall be made. If there is no good reason leave will more than likely be refused: **"promptness is the governing concern. If there is a failure to act promptly or within three months there is undue or unreasonable delay."**[8]

33. One such reason submitted on behalf of the intended claimant is that the application for leave to apply for judicial review is one made in the public interest. Senior Counsel for the FFOS made reference to the fact that environmentally sensitive protected areas that are world renowned in Trinidad and Tobago should be considered properly by the court. Further, Senior Counsel in oral submissions has also relied on the above chronology of events cited at paragraph 11 as a reason cited in support of its application for leave to apply for extension of time.

34. Apart from oral submissions made on the point, the Intended Claimant has not filed affidavit evidence in support of its claim that the application for leave to

[8] Paragraph 4

apply for judicial review was made with promptness. Further, there is no evidence filed in support of the claim that even if the application was not made promptly that there is a good reason to extend the time for the application. Section 56.3 (4) of the CPR 1998 as amended provides that **"the application must be verified by evidence on affidavit which must include a short statement of all the facts relied on."**

35. Where the application to apply for leave is not made promptly, the applicant must seek and obtain an extension of time to apply for leave. However, according to section 11 (2) the applicant must show "a good reason for the extension."

36. FFOS has not filed affidavit evidence in support of its application to extend time for leave to apply for judicial review. They have sought to rely on affidavit evidence filed in support of its application to amend as a basis for "good reason" in relation to the extension of time application. Cleary, this goes against the letter of section 56.3 (4) of the CPR which requires that **"... application must be verified by evidence on affidavit which must include a short statement of all the facts relied on."**

37. Further, as noted above, FFOS contends that the application has been made in time but has listed a number of factors in the event that there has been delay. However,

there is no evidence to back this up, apart from the fact that the Aripo Savannas are an environmentally sensitive area, and the chronology of events.

38. The mere fact that the Aripo Savannas are an environmentally sensitive are cannot be good reason on its own for extending the time. While it is recognised that this makes the matter very important and significant, this on its own cannot be enough to trigger the court's discretion. If it were that it would touch the decision-making process of the EMA in the future, then perhaps that might be a different consideration, but that is not the case here.

39. Further, the chronology set out does not constitute good reason either. At the end of the day, FFOS was in a position to send out a pre-action protocol letter to the EMA well within the 3-month period. This suggests that they should also have been in a state of readiness to file within the 3-month period. There is no good reason set out in the chronology why this was not, or could not, be done.

40. Therefore, in the circumstances, I am not satisfied that there is a good reason to extend the time for making the application for leave to apply for judicial review.

Should the Applicant be granted Leave to Apply for Judicial Review on the merits of the Application?

41. In the event that I am wrong, and there is good reason for extending the time for making the application. I have considered the grounds for applying for judicial review as contained in the Notice of Application filed on the 29th September 2017.

What is the appropriate threshold test to be applied to applications for Leave to Apply for Judicial Review?

42. The test to be applied when determining whether to grant leave to apply for judicial review is to be found in the dicta of the majority judgement of the Privy Council in ***Sharma v Browne-Antoine***[9], at paragraph 14(4) where the Board opined **"The ordinary rule now is that the court will not grant leave to apply for judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success."**.

43. Senior Counsel for the FFOS submitted that this must be read in light of the judgement of Kangaloo, J.A. in ***Ferguson & Anor v The Attorney-General***[10], essentially submitting that this test was applied in ***Sharma*** because it was a challenge to the decision of the constitutionally appointed office holder given power to wield prosecutorial powers. With respect, ***Ferguson*** does not attempt to nuance or water down ***Sharma*** in anyway. What Kangaloo, J.A. was seeking to

[9] [2006] UKPC 57
[10] Civ App 207 of 2010

do was merely to point out what was explicitly laid out in ***Sharma***. That is to say, that just as in civil matters, there is one standard of proof, (on a balance of probability), but more serious allegations such as fraud will require more cogent and compelling evidence to reach the standard of a balance of probability; in applications for judicial review, the seriousness of the nature of the issue to be argued must also be taken into consideration, so the more serious the nature of the issue, the higher the threshold that needs to be climbed.

44. In the instant case, all parties agree that this matter deals with 2 very important issues on each side. The importance of the preservation of the Aripo Savannas and the flora and fauna contained therein on the one hand, and the infrastructural development of the country, making communities in the east of the island more accessible. In that regard, I do not agree with Senior Counsel for the Claimant when he says that based on the ***Ferguson*** judgement the threshold in the instant case is a low one. Rather, while perhaps not as robust as in the ***Sharma*** case, the instant case lies on the higher end of the scale.

45. Fourteen grounds were filed by the FFOS in their application for leave as follows:

    The EMA in granting the CEC

    i. Acted *ultra vires* and/or perversely of its duties under Rules 5(2) and 5(3) of the CEC Rules, these decisions are unreasonable and/or irrational and/or illegal and/or constitute procedural irregularity.

ii. Acted *ultra vires* s28(2) the EM Act in that it failed to include within the administrative record certain key documents, this decision demonstrates *mala fides* and is unreasonable and/or irrational and/or illegal and/or constitutes a procedural irregularity.

iii. Acted unfairly in allowing insufficient time for any meaningful consultation, although the bare minimum time permissible at law was given it was woefully inadequate given the complexity, volume of documents and logistics involved in accessing same for review.

iv. Acted unfairly in permitting only a selection of invitees to participate in consultation, this decision is unreasonable and/or irrational and/or illegal and/or constitutes a procedural irregularity.

v. Acted *ultra vires* s.16 of the EM Act and/or in breach of national policy and/or without accounting for material considerations by failing to supervise the Interested Party's purported consultation on the draft TOR with the Public, this action is unreasonable and/or irrational and/or illegal and/or constitutes a procedural irregularity

vi. Failed to consider the cumulative effect of the constituent elements of the decision of the Intended Defendant to issue a CEC dated 22nd June 2017 pursuant to section 36 of the EM Act, to the Ministry of Works and Transport for the "Establishment of a 5000 metre highway alignment commencing at a point 3000 metres east of Cumuto Main Road and ending

at a point 600 metres west of Guaico Trace, Sangre Grande" (CEC 4952/2016) and thereby acted *ultra vires* Rule 10 of the Rules and/or failed to have regard to a material consideration.

vii. Failed to have proper regard for the effect of the proposal on human health and thereby erred in law.

viii. Acted *ultra vires* Regulation 4(1) of the Fees and Charges Regulation in failing to budget for and/or commission external expertise to properly inform itself of the risks of the proposal to human health or the environment.

ix. Failed to consider the cumulative effect of the proposed highway route and thereby acted *ultra vires* Rule 10 of the Rules and/or failed to have regard to a material consideration.

x. Acted *ultra vires* section 28(2) of the EM Act and/or in breach of the legitimate expectation of affected persons by deferring until after the grant of the CEC and the conclusion of the purported process of consultation, the determination of certain key issues likely to have implication on the environment and/or on human health, this decision demonstrates *mala fides* and is unreasonable and/or irrational and/or illegal and/or constitutes a procedural irregularity.

xi. Failed to take account numerous defects in the EIA and thereby erred in law, this decision is unreasonable and/or irrational and/or illegal and/or constitutes a procedural irregularity.

xii. Acted unreasonably in relying upon a defective TOR and EIA which did not properly identify, evaluate or select actions to prevent and/or reduce risks to a sensitive are and sensitive species.

xiii. Failed to take account of Sensitive Area and Sensitive Species and designation of the Aripo Savannah (sic) as and Environmentally Sensitive Area by The Environmentally Sensitive Area (Aripo Savannas Strict Nature Reserve) Notice 2007, this decision is unreasonable and/or irrational and/or illegal and/or constitutes a procedural irregularity.

xiv. Acted in an arbitrary, unreasonable and irrational manner in determining that the buffer zone would be adequate at between 110 and 120 metres while the prevailing view from scientific research conducted by CANARI in 2008 set it at 500 metres.

Do any of the grounds in the application have a reasonable prospect of success?

46. Looking at the first ground, it is clear that neither rule 5(2) or 5(3) impose any obligation on the EMA to conduct any consultations, so this ground clearly has no realistic prospect of success.

47. With respect to the ground (ii), when asked which documents the FFOS were contending ought to have been included in the administrative record, Senior Counsel for the FFOS submitted 3 documents, the "first" EIA, a memo from the Internal Review Committee, and the approval form from the CEC Unit. The latter 2 documents are internal documents of the EMA.

48. Section 28(2) of the EM Act provides that **"the administrative record required under subsection (1) shall include a written description of the proposed action, the major environmental issues involved in the matter under consideration, copies of documents or other supporting materials which the Authority believes would assist the public in developing a reasonable understanding of those issues, and a statement of the Authority's reasons for the proposed action**." In this regard, with respect to the first EIA, I accept the submission by Senior Counsel for the EMA that it would not assist the public to include on the administrative record a document that the EMA said it would not rely on, that is to say, the "draft" or "first" EIA. If it is not to be relied on, then it could not possibly assist the public in developing a reasonable understanding of the relevant issues.

49. With respect to the internal documents, the court is of the view that it would not be in the best interest of good governance to require the public disclosure of documents which form part of the internal debate in arriving at a decision. It is

recognised of course that there is a move towards a fuller disclosure of advices received, instructions given and the like[11], it is felt that internal documents of the sort in this Application do not fall into that category.

50. In the circumstances, ground (ii) also has no realistic prospect of success.

51. With respect to ground (iii), there was no real evidence provided by FFOS that the consultation period was insufficient. In fact, it is conceded that the EMA allowed a period 3 days more than the minimum required by section 28. Senior Counsel for the FFOS submitted that by its very size, scope and complexity it was clear that it required more time. Even though this is an attractive argument, it cannot be accepted.

52. I am of the view that where it can be shown that the statutory minimum has been complied with, some positive evidence demonstrating how the time was insufficient must be provided, for example, if no comments were received, or a fortiori, if a request for further time had been made. In the instant case, the evidence is to the contrary. The EMA did receive comments from the public and no one asked for an extension of time to submit comments. In the circumstances, ground (iii) has no realistic prospect of success.

[11] See for example CA Civ P200 of 2014

53. With respect to ground (iv), clearly insofar as it relates to the consultation under the EIA, there is no prospect of success, as there was clearly public advertisement about the consultations. Further, with respect to the "pre-TOR" consultation, it is not the EMA that conducts that consultation under rule 5(2) of the CEC Rules, but rather, the applicant, so it could not be said that the EMA permitted only a selection of invitees to the consultation. Senior Counsel for FFOS sought to advance this ground on the basis of a duty on the EMA to supervise the pre-TOR consultations, but with respect, I do not see that from the wording of the ground. Had that been the intention, it surely would have read "permitted the Interested Party to invite only a selection…". In any event, the issue of the EMA's supervision of the pre-TOR consultation is covered in ground (v). In the circumstances, ground (iv) also has no realistic prospect of success.

54. With respect to ground (v), the complaint of the FFOS is that the EMA did not properly satisfy itself that the Ministry conducted proper consultations on the draft TOR and that as the Ministry did not conduct public consultations in assessing the draft TOR, then in light of the letter dated the 11th November 2016 where the draft TOR were annexed, which noted that rule 5(2) made provision for consultation with *inter alia* the public, then there could not have been proper supervision. Senior Counsel for the EMA submitted that the pre-TOR consultation was solely within the remit of the Ministry, and therefore it was not the place of

the EMA to get involved with that. Senior Counsel for FFOS submitted that as this was not something that had been dealt with before the local courts previously, leave ought to be granted to properly interpret the rule. He criticised the EMA for their interpretation of the rule saying that if it were correct, how would the EMA give protection.

55. To properly consider the prospect of success of this ground, it is to be noted that section 16 merely outlines the functions of the EMA, however, insofar as one of those functions is to monitor compliance, the issue of whether it properly supervised the pre-TOR consultation can be considered. It is important to understand the framework of rule 5 in context. Rule 5 deals with the preparation of the TOR for any EIA. It provides that the EMA will present an applicant with draft TOR, and then allow the applicant to consider the draft TOR, with such consultations as are appropriate. Within 28 days of the applicant being provided with the TOR, he must then return to the EMA say which if any of the TOR he wishes to be changed, and if any, why. After this, the EMA must consider these representations, and any other material put before it in finalising the TOR.

56. For the above, it is clear that the aim of any consultation undertaken by the applicant is geared toward assisting the applicant in properly considering the draft TOR. In the circumstances, it is my view that it is clear that the conduct of the consultation must be within the purview of the applicant. It would be bizarre in

the extreme if the EMA were to be in a position to mandate who an applicant was to consult with where one of the purposes of giving the applicant the opportunity to consult is to critically examine the draft TOR, prepared by the EMA, to see if they should be modified in any way. In the circumstances, ground (v) has no reasonable prospect of success.

57. With respect to ground (vi), Senior Counsel for FFOS submitted that because the project was one that was much wider than the 5000 metre phase for which the CEC was granted, then it was improper for the EMA to grant the CEC without considering the impact of the future phases of the project. In reply, Senior Counsel for the EMA submitted that it was not appropriate to consider the future phases of the project, as they had not yet been approved, and may never happen. Further, she submitted that cumulative effects referred to the actions which were taking place at the same time as the intended works. Further, she submitted that future phases led the highway away from the Aripo Savannas.

58. With respect to the last point, I am of the view that even though this is largely about the Aripo Savannas, if there was an error in the process which had nothing with the protection of the Aripo Savannas, it would still be susceptible to Judicial Review in these proceedings, once properly pleaded.

59. If it were that phase one could not have been considered a stand-alone project within itself, I would have been disposed toward finding that there was an arguable ground with a reasonable prospect of success. 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. To illustrate, in the example given to Senior Counsel for FFOS. If there were a project to build a causeway from Chaguaramas to Pointe-A-Pierre, and phase one carried it to the middle of the Gulf of Paria, then clearly, it would make no sense for the EMA to grant a CEC for phase one unless it understood the effects of phase 2. A causeway to the middle of the Gulf of Paria does no one any good. On the other hand, if phase one in our hypothetical situation ended in Port of Spain, then a CEC could be granted without consideration of the effects of phase 2, because phase 2 is for all material purposes independent of phase one. It is in effect a causeway from Port of Spain to Pointe-A-Pierre.

60. In the instant application it does not appear that this is a highway to nowhere, whose sole usefulness depends on the construction of the other phases in the larger project. In the circumstances, I am of the view that the EMA was not required to

consider the cumulative effects of the future phases, and as such, ground (vi) has no realistic prospect of success.

61. No argument was offered in favour of ground (vii), and I accordingly find that there is no realistic prospect of success on this ground.

62. With respect to ground (viii), Senior Counsel for FFOS submitted that the creation of such a fund was to enable the EMA to utilise it in appropriate circumstances, and that the instant application, where the issues were complex, was clearly a case where the EMA ought to have taken advantage of this provision to fund external experts to guide the process. This argument is clearly unsustainable. The regulations do not specify how the EMA is supposed to utilise the fund to procure expert assistance, which clearly leaves it to the discretion of the EMA. It is for them to decide whether or not external expertise is required, based on their own internal resources. It would be wrong for a court to start second guessing how the EMA makes this determination. In any event, no evidence was presented by FFOS in support of this ground. In the circumstances, ground (viii) has no reasonable prospect of success.

63. Ground (ix) is a repetition of ground (vi).

64. With respect to ground (x), Senior Counsel for FFOS submitted that the EMA ought not to have issued the CMC without the completion of the CEC, and that by

issuing a CEC with conditions, there was no opportunity for the public to comment on these conditions. In response, Senior Counsel for the EMA submitted that the EMA is clearly empowered to issue a CEC with whichever conditions it thought it was appropriate. Further, there is no requirement under section 28(2) for public consultation.

65. It is to be noted that even if the baseline study was required to be completed before the CEC was issued, this would have still have been after the period of public consultation. The first RAR was issued after the period for public comment was completed. Further, the fact that a CEC can be issued with conditions clearly indicates that it was envisioned that it would not be all aspects of an EIA would be carried through to determination prior to the issuing of the CEC. In the circumstances, ground (x) has no reasonable prospect of success.

66. With respect to ground (xi), great reliance was placed on the 2 internal documents from the EMA referred to above, the CEC Unit Approval and the Internal Review Committee report. The essence of these 2 documents was that the members of the 2 groups were very concerned with what they considered to be the directive of the Managing Director that a CEC be issued without there first being resolution of what they felt were unresolved issues in the EIA. They held the view that a further RAR should be issued and once that was satisfactorily dealt with then the CEC could be issued.

67. Senior Counsel for the EMA objected to the use of the documents in light of the way they found their way into the hands of FFOS. Reliance was placed on ***NH International v UDeCOTT*** both at first instance and in the court of appeal. In both judgements, the court deprecated the actions of the Applicant in obtaining the documents without disclosing how, and secondly by giving the impression in the way the affidavit was worded, that the documents had been obtained from the Respondent. The courts both expressed the view that if such conduct was allowed, persons would engage in less than honourable means to obtain information from bodies.

68. Senior Counsel for FFOS submitted that the case was distinguishable on 2 bases. Firstly, there was an explanation as to how he obtained the documents, and secondly, there was no question of any sleight of hand in stating how it came into their possession.

69. While I am aware how easy it is for anyone to say that documents have been placed in "their mailbox", I agree that the instant case is distinguishable from the ***NH International*** case. In the circumstances, I am minded to consider the 2 documents.

70. Considering the documents in question, the Claimant contends that the objection was so vehement, that if the Managing Director, the decision maker in the matter,

wished to depart from the advice, he ought to have engaged the process which the former Managing Director, Mr Joth Singh. With respect to the technical team, he deposed that to override the view of the technical team, it would be required to meet with them, to try to find common ground, and then take the issue to the board.

71. As noted above, the EMA has the power to issue a CEC with such conditions as they think fit, which would have to be complied with prior to and throughout the life of the project. As Senior Counsel for the EMA noted, the EIA need not be perfect.

72. With the greatest of respect to the former Managing Director, the language which he uses as the decision maker and process which he advocates, is bordering dangerously on unlawfully delegating the actual decision making process to the technical team. As Senior Counsel for the EMA submitted, it is for the decision maker to make the decision. What it is important for the Decision maker to do with respect to the report of the technical team is to give it due consideration when reaching his decision. It is clear that he did give it consideration, but still at the end disagreed with their views, as he was entitled to do. In the circumstances, ground (xi) has no reasonable prospect for success.

73. With respect to ground (xii), the basis claimed for the defect in the TOR was the lack of public consultation during the pre-TOR stage. With respect to the EIA, it is the fact that many of the issues in the RAR were not sufficiently addressed. These issues have been dealt with earlier, with the finding that the TOR was not deficient for the lack of the public consultation in the pre-TOR stage, and secondly, an EIA need not be perfect, and may be subject to conditions to deal with any concerns. In the circumstances, ground (xii) has no reasonable ground for success.

74. With respect to ground (xiii), it is clear from the conditions in the CEC, the buffer zone required, the baseline study, that the EMA did take the The Environmentally Sensitive Area (Aripo Savannas Strict Nature Reserve) Notice 2007 into consideration. It may not have been to the liking of FFOS, but it was considered. In the circumstances, ground (xiii) has no realistic prospect of success.

75. With respect to the final ground, the EMA claims that the buffer zone recommended by CANARI, which they (CANARI) accept has no legal designation, was not accepted by the EMA. To rebut this evidence, FFOS relies on the affidavit of Joth Singh, who says that in fact, the EMA did accept the recommendation of CANARI, but does not recall any recommendation for a buffer zone as outlined in the present CEC. Neither party has produced any evidence to support their respective contention.

76. Senior Counsel for FFOS contends that this contradiction in facts, and issue as to whether there has been a breach of its own policy, leave ought to be granted to have that ground fully ventilated.

77. To properly understand this ground, one needs to understand the context in which it is placed within the CANARI report. The 500 metre buffer zone is established to help prevent the further isolation of the Aripo Savannas, which is threatened given the (at the time) proposed developments in the area, one of which was this phase of the highway.

78. In the report, mention is made of a proposed highway, whose route would run in an almost identical path to the current proposed route[12]. Interestingly enough, the CANARI report does not recommend that the highway be diverted around the 500 metre buffer zone, although it does recognise that the highway could have an impact on the Aripo Savannas. Instead, what it recommends is that there should be a comprehensive EIA done before any approval to construct is given.

79. The upshot of this is that CANARI recognised that even with a 500 metre buffer, there was the possibility that a highway would be constructed through this zone with a buffer zone of about 100 metres. In the circumstances, even if the evidence of Mr Singh is accepted in its entirety, and the EMA did adopt all of the

[12] CANARI Management plan p. 34

recommendations of the CANARI report, it would still be open to the EMA, under this policy, to grant the Ministry the CEC in the terms in which it did. In the circumstances, ground (xiv) has no reasonable prospect of success.

Conclusion

80. In light of the analysis above, I am constrained to dismiss the application for leave to apply for Judicial Review both on the basis of delay, and on the merits of the application. I will hear the parties on the issue of costs.

Dated the 6th February 2018

Kevin Ramcharan
Judge