IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CICA (Civil) Appeal No 30 of 2021
(G 163 of 2019)

BETWEEN:

1. CROSBY COLLYMORE EBANKS
2. WILSON JOHNSON MENDOZA
3. MARIO ALBERTO GOMEZ

Appellants

AND

THE GOVERNOR OF THE CAYMAN ISLANDS
THE NATIONAL ROADS AUTHORITY
THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Respondents

BEFORE:

THE RT HON SIR JOHN GOLDRING, President
THE RT HON SIR ALAN MOSES, Justice of Appeal
THE RT HON SIR JACK BEATSON, Justice of Appeal

Appearances: **Mr Rupert Wheeler of KSG for the Appellants**
Mr Michael Smith, Senior Crown Counsel, Attorney General's Chambers for the Respondents

Heard: **1 September 2022 and 30 November 2022**

Draft judgment Circulated: **18 January 2023**

Judgment delivered: **31 March 2023**

JUDGMENT

Moses JA:

1. The Ministry of Commerce, Planning and Infrastructure (CPI) wished to create a new public road over what was historically called Lissa Lane which adjoins King Road in the North West Block of West Bay. Lissa Lane is a 12 foot wide private easement, in part pedestrian and in part

vehicular, over a number of parcels of privately owned land. The proposal is to widen the road for approximately 600 feet to a width of 24 feet.

2. The purpose is said to be to provide access to all adjoining landowners, to resolve what are described as "*land lock issues",* easement discrepancies, and utility access, and to increase the development potential of the adjoining land.

3. The proposal affected landowners over whose land the existing lane ran. The appellants are registered proprietors of three parcels of land and object to the proposal. Other such land owners are either neutral or in favour. They contended that they were deprived of full and fair access to the Grand Court to protect their property rights, guaranteed under the Bill of Rights. In a judgment delivered on 4th October 2021, the Hon. Justice Cheryll Richards QC rejected their Constitutional Petition. This is their appeal from her decision.

4. The powers and procedure which govern the proposal are contained in the *Roads Act (2005 Revision).* The statutory process starts, under section 3 (1), with the Governor's consideration of a recommendation by the Roads Authority that land is needed for the layout of a new public road. The details of any proposal must then be declared. Proposals compulsorily to take land for the layout of a new public road are required to be declared and published in accordance with section 3 (2) of that Act. The line and anticipated boundaries of the road, the land affected, and the plans must all be specified and identified. It is not suggested that there was any breach of the declaration or publication requirements.

5. After publication of a declaration, Section 6 confers power on the Governor (by section 2 the Governor in Cabinet) to take land for the proposed public road where he is satisfied that it is in the public interest:

> "*In any case where a declaration has been published under section 3(1), and where the Governor, upon recommendation by the Roads Authority, is satisfied that it is in the public interest to lay out, widen or divert a road over the portion of land to which the declaration relates, then, notwithstanding anything contained in any other law, and subject to the provisions of this Law which relate to the payment of compensation, the Governor may, on the expiration of fifteen days from the publication of the declaration, authorise the Roads Authority to enter upon the said portion of land and cause the said road or portion of road to be commenced or proceeded with without further notification."*

6. The rights of the landowners affected by the proposals to widen Lissa Lane are protected by section 15(1) of the Bill of Rights, Freedoms and Responsibilities contained in Part 1 of Schedule 1 of the Cayman Islands Constitution Order 2009. Section 15 (1) provides:

> "*Property*
> *15.(1) Government shall not interfere in the peaceful enjoyment of any person's property and shall not compulsorily take possession of any person's property, or compulsorily acquire an interest in or right over any person's property of any description, except in accordance with law and where—*
> *……*
> *(c) provision is made by a law applicable to that interference, taking of possession or acquisition —*
> *(i) for the prompt payment of adequate compensation; and*
> *(ii) securing to any person having an interest in or right over the property a right of access to the Grand Court, whether direct or on appeal from any other authority, for the determination of his or her interest or right, the legality of the interference with, taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he or she is entitled, and for the purpose of obtaining prompt payment of that compensation; and*
> *(iii) giving to any party to proceedings in the Grand Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction."*

7. In proceedings brought by some of the landowners by way of Constitutional Petition pursuant to section 26(1) of the Bill of Rights, the central argument was that there is no provision under Cayman law sufficient to secure their right of access to the Grand Court for the purposes identified in section 15(1)(c)(ii).

8. The parties agreed four issues for the judge to determine (see Judgment [45]), the first two of which were framed as follows:

> *"Is the Roads Law incompatible with the right of the Petitioners to peaceful enjoyment of property as provided for by s.15 of the BoR in that it fails to provide a right of access to the Grand Court whether direct or on appeal from any other authority for the determination of the legality of the taking of possession of the Petitioner's lands?*
>
> *Has the right of the Petitioners to a fair trial as provided for by s.7 of the BoR been infringed by failing to permit them a right of access to the Grand Court whether direct or on appeal from any other authority for the determination of the legality of the taking of possession of the Petitioner's lands?"*

9. In relation to the first issue, the judge concluded that the right to bring proceedings under section 26 of the Bill of Rights, by way of Constitutional Petition, provided sufficient access to the Grand Court to satisfy the requirements of section 15(1) (see Judgment [134] (judicial review) and [133] (Constitutional Petition). In reliance on *R (Alconbury Developments & Ors. v. Secretary of State for the Environment, Transport and the Regions & Ors)* [2003] 2 AC 295, she also concluded that judicial review was an effective remedy [138].

10. In relation to the second, the judge laboured under serious difficulty to which she ought never to have been exposed. She recorded at [152]:

> "*In argument on this aspect, both sides were concerned to describe the events leading up to the making of the Declaration. There was some dispute as to what those events were. The Respondent provided no affidavit evidence but sought to rely on a chronology of events which was attached as a schedule to written submissions. This was in an effort to show that some consultation had been undertaken prior to the Declaration being made. In response to a specific inquiry from the Court as to whether the schedule was agreed, Counsel for the Petitioners responded that, "the precise chronology is not accepted. While it is not being said that it is wrong, it is not clear that it is fully correct*."

And at [199]:

> "*In the instant case, prior notice and information as to the precise boundary details were published as is required by the Roads Act. There does not appear to be a formal consultation scheme much less a detailed one as in the United Kingdom. However there appears to have been a broad scheme which gives an opportunity to affected persons to be heard. The Petitioners challenge the extent and limited nature of any consultation."*

11. She then reached the conclusion that what she called the "*broad scheme"* would be sufficiently subject to judicial control by way of judicial review to satisfy the requirements under section 7 of the Bill of Rights to a fair trial by an independent and impartial court. She was never given the details of the "*broad scheme*" nor how, if at all it was applied in the instant case.

12. Nor was this court. This court first heard this matter on 1 September 2022. It emerged during the course of that hearing that there had indeed been consultation and objection to the proposals following the publication of the Lissa Lane proposal. Yet there was no evidence of these important facts either before the judge or before this court. All that she had had were some brief, incomplete and inadequate references in the chronology to which the judge refers. In the result this court was compelled to adjourn the hearing for further evidence and argument to be filed and then, since the further evidence and written submissions raised important issues which

had not been and could not be properly canvassed at the first hearing, was driven to require a further hearing.

13. This is a position which ought never to have occurred. It ought to go without saying that determination of Constitutional Petitions, like decisions relating to applications for judicial review, depend on full and open disclosure and evidence as to all relevant facts, what was described at the dawn of the development of public law in the United Kingdom by Sir John Donaldson MR, as he then was, as the duty to conduct the process of judicial review with *"all the cards face upwards on the table*" *(R v Lancashire CC Ex p. Huddleston* [1986] 2 All ER 941 at 945). Although the duty was expressed in relation to public authorities who were likely to be in possession of most of the cards, the duty of candour is also part of a claimant's duty see e.g. *R (oao Mohammad Shahzad Khan)* [2016] EWCA Civ. 416.

14. It remains incomprehensible how those representing the Petitioners in this case can have thought it right to make no reference to the sequence of events, in evidence, or for the Respondent, who apparently thought it too late to do so, not to disclose the documents relating to the process undertaken following publication of the proposal. The result was that the judge was left in ignorance of the true position and time was seriously wasted. Nothing relevant should be kept back from the Grand Court; to be less than full and frank impedes its task in upholding the Constitution and the rule of law on these islands.

15. There is a strong argument for saying that the appellants should not have been allowed to raise any argument on appeal relating to facts which were not properly disclosed to the judge at first instance. We have allowed the appellants to advance a case relating to the inadequacies of the process of consultation that was followed and as to the lack of transparency in that process. But we shall have more to say in relation to costs.

16. This Court is now in the position that the judge and we should have been at the outset to relate the facts as to what happened following publication of the proposal.

17. The procedure is set out in the former Senior Policy Officer at the Ministry of Planning, Agriculture, Housing and Infrastructure, Charles Brown's, first affidavit.

18. By letter dated 2nd July 2019 residents were informed of the proposal to transform Lissa Lane into a 24 foot-wide public road. Comments were invited within five days.

19. On 13 July 2019 four landowners wrote to object in the form of a petition. Reasons for objection were set out in an email dated 15 July. There was a further letter of objection from Mr Gomez dated 24 July 2019. There were also letters of support from two landowners, though one of them suggested a somewhat narrower road.

20. In addition to the receipt of objections and support, there were meetings on 19th July 2019; they were "one on one" interviews [15]. The record of the meetings gives a detailed account of the concerns of those landowners who objected. Mr Adam, a landowner who was in favour and with whom it appears Mr Mendoza was in dispute was also interviewed later in the same day. Other landowners were interviewed on 23rd and 24th July 2019.

21. On 2nd August 2019, a memorandum was sent by the Chief Officer of the Ministry of Commerce, Planning and Infrastructure, Mr Alan Jones, to the Acting Managing Director of the NRA. This enclosed a full consultation report, with details of the proposal, discussion of the impact on the owners, summaries of objections and support and consideration of alternative routes. The report annexed the emails and letters which responded to the initial information on 2nd July and the detailed record of interviews to which I have already referred.

22. When the Cabinet considered the proposal, the memorandum and all the annexes were before it (see affidavit [20]).

23. After the decision was made and the compulsory taking of the land declaration gazetted on 23 August 2019, the procedure for compensation was initiated. That procedure is not relevant to the case.

24. In his third affidavit, which does not contain any explanation as to why no reference to this process was made, Mr Mendoza accepts the account of the process given by Mr Brown but complains that a further email dated 17th July pointing out that the driveway entrance would be destroyed by the new road and an email of 22nd July requesting change of the route and recording a past history of complaints to the police were not mentioned in the consultation report.

25. The appellants' first argument turns on the meaning of *"a law applicable to that interference*" in the full-out words of section 15(1)(c)(ii). They require, so Mr Wheeler on their behalf

submits, a single piece of legislation contained within the Roads Act itself to make provision for those matters identified within that section i.e. a single provision which provides access to the Grand Court to determine the right or interest in issue and the legality of the compulsory taking of parts of the appellants' properties, as well as determination of the amount of compensation and its prompt payment.

26. It is, so Mr Wheeler, on their behalf argues, of note that the Roads Act itself makes provision for the assessment of compensation (section 7), the right to compensation with a procedure for claiming, negotiating and computing its amount (sections 8-12) and detailed rules for the assessment and payment of compensation by a Committee pursuant to sections 7 and 12 with requirements for a public hearing (Clause 2(2) of the Schedule), evidence on oath (Clause 2(5)), and summoning of witnesses 3(1)). Yet there is no provision for the determination by such procedure of the logically prior and, arguably more important issues of whether the appellants' rights to their property should be removed in the interests of widening a road.

27. This is in stark contrast to other specific legislative schemes to be found in Cayman Islands' legislation, in which provision is made for determining interests and the legality of interference with those interests. For example, under the Land Acquisition Act (1995 Revision), where the acquisition of land is needed for a public purpose (section 6) provision is made for an enquiry and award to be made by a magistrate (sections 9 and 11), for summoning witnesses (section 13) and for references of an unaccepted award to the Court (section 17). Similar provisions are to be found in cases of boundary disputes under the Registered Land Act (2018 Revision) and disputed interests in land under the Land Adjudication Act (1997 Revision). Similarly, the Development and Planning Act (2021 Revision) contains provisions for a limited right of appeal to a Tribunal against decisions of the Central Planning Authority and thence to the Grand Court, on the grounds that the decision is erroneous in law, unreasonable, contrary to the principles of natural justice or at variance with a relevant development plan (section 48 (1) and (4)).

28. It is clear that the Roads Act has been identified by the legislature as being distinct from other circumstances where a landowner's property rights are at risk of interference. Unlike those other statutory provisions, if a law is to be found for securing the right of access to the Grand Court for the purposes identified in section 15(1)(c)(ii) it must be found elsewhere and not in the Roads Act itself.

29. That that is so is said by the appellants to be inconsistent with section 15. They contend that the access to the Grand Court which section 15 requires must be found within the Roads Act itself.

30. There is no requirement that access to the Grand Court should be secured by a single provision found within the Roads Act itself. There is no need to apply section 4 of the Interpretation Act (1995 Revision) which provides that the single includes the plural unless the context otherwise requires. The statutory question is whether there is a law which satisfies the requirements specified within section 15(1)(c). The answer is to be determined by analysis of the access to the Grand Court for which the Bill of Rights makes provision.

31. The essential question, therefore, is whether the right to bring a Constitutional Petition under section 26 (or judicial review) secures such right of access to the Grand Court to determine a property owner's right or interest and the legality of the taking of possession, as will satisfy section 15.

32. Section 26 provides:

> **"***Enforcement of rights and freedoms*
> 26. (1) *Any person may apply to the Grand Court to claim that government has breached or threatened his or her rights and freedoms under the Bill of Rights and the Grand Court shall determine such an application fairly and within a reasonable time.*"

33. Such an application (a Constitutional Petition) may assert a breach of other provisions within the Bill of Rights:

By Section 19 of the Bill of Rights:

> *a. Lawful administrative action*
> *b.19. (1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.*
> *(2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.*
>
> *Duty of public officials*
>
> *24. It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is required or authorised to do so by primary legislation, in which case the legislation shall be declared incompatible with the Bill of Rights and the nature of that incompatibility shall be specified."*

The Governor in Cabinet is a "*public official"* (see Section 28 (d) of the Bill of Rights).

34. A Constitutional Petition or judicial review can only satisfy section 15 if section 7 of the Bill of Rights itself satisfies section 15. Section 7 provides:

> "*Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time."*

35. Mr Wheeler, on behalf of the appellants, contended that neither a Constitutional Petition brought under section 26 of the Bill of Rights nor judicial review could satisfy the requirements of section 15 because no provision existed for a public and independent fact-finding exercise in the law of the Cayman Islands at what he called "*first instance*". He contrasted the position in the Islands with hearings before Planning Inspectors in the United Kingdom.

36. He contended that absent such a process section 7 itself must be read as requiring a decision by the Grand Court as to the facts and the merits of the decision. Because there is no procedure for determining facts in a "quasi-judicial" process by independent fact finders and because the Grand Court does not do so, neither a Constitutional Petition nor judicial review were capable of vindicating a property owner's rights of access to the Grand Court under section 15 and to a fair trial under section 7.

37. It was agreed that any consideration of the extent to which section 7 could satisfy the requirements of section 15 should be governed by the principles which apply in relation to article 6 in cases where it is sought to vindicate property rights arising article 1 of the First Protocol to the European Convention on Human Rights. Article 6 is similar but not identical to section 7 of the Bill of Rights; article 6 (1) provides:

> "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*."

38. The argument and the judge's conclusion turned, to a major extent, on analysis of *Alconbury.* But in order to understand which of the principles explained in that case apply it is necessary to identify the type of case in issue in the instant appeal. The importance of such identification was explained in the later case of *R* (*Wright) v Secretary of State for Health* [2009] 1 A.C. 739, in which Baroness Hale explained at [23]:

> *"It is a well-known principle that decisions which determine civil rights and obligations may be made by the administrative authorities, provided that there*

> *is then access to an independent and impartial tribunal which exercises "full jurisdiction" [...]. What amounts to "full jurisdiction" varies according to the nature of the decision being made. It does not always require access to a court or tribunal even for the determination of disputed issues of fact. Much depends upon the subject matter of the decision and the quality of the initial decision-making process. If there is a "classic exercise of administrative discretion", even though determinative of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, then judicial review may be adequate to supply the necessary access to a court, even if there is no jurisdiction to examine the factual merits of the case. The planning system is a classic example (Alconbury); so too, it has been held, is the allocation of "suitable" housing to the homeless (Runa Begum); but allowing councillors to decide whether there was a good excuse for a late claim to housing benefit was not: Tsfayo v United Kingdom (2006) 48 EHRR 457."*

39. It is, for the purposes of the instant case, not sufficient to place *Alconbury* in the category of a "*planning case*" and seek to rely on principles and dicta within the speeches in that case as being applicable to every type of case where administrative decisions interfere with the enjoyment of property rights. It is necessary to enquire as to the extent to which facts have to be determined in the process of reaching an administrative decision, such as the decision to construct a public road on the site of Lissa Lane.

40. In *Alconbury* the question was whether the limited nature of judicial review was sufficient to satisfy the requirements of article 6. The House of Lords drew a distinction between decisions as to the public interest (policy decisions) and a determination of a right. Lord Hoffmann explained:

> "*But a decision as to the public interest (what I shall call for short a "policy decision") is quite different from a determination of right. The administrator may have a duty, in accordance with the rule of law, to behave fairly ("quasi-judicially") in the decision-making procedure. But the decision itself is not a judicial or quasi-judicial act. It does not involve deciding between the rights or interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires*." [74]

41. All the planning decisions in issue in *Alconbury* were policy decisions, including the highways improvement scheme which involved the compulsory purchase of land. In all of the cases, judicial review, despite its limited nature was sufficient to satisfy article 6. Policy decisions "*within the limits imposed by the principles of judicial review are a matter for democratically accountable institutions and not for the courts*" (Lord Hoffmann [76])

42. Article 6 requires that those who have jurisdiction to make a decision affecting rights either themselves comply with Article 6 or that they be subject to subsequent control by a judicial body with "*full jurisdiction*" (*Albert and Le Compte v Belgium* (1983) 5 EHRR 533, cited in *Alconbury* at [87]). Full jurisdiction does not mean jurisdiction to decide on the merits of the issue but *"full jurisdiction to deal with the case as the nature of the decision requires*"[87]. If the decision in question is a policy decision, the courts do not need to review its merits, they must have "*regard…to the respect which must be accorded to decisions taken by the administrative authorities on the ground of expediency and to the nature of the complaints made by the Zumtobel partnership*" (the *Zumtobel* principle per Lord Hoffmann at [88]).

43. The House of Lords reversed a decision of the Divisional Court because, as Lord Hoffmann put it, it had "*seriously misunderstood*" the decision of the European Court of Human Rights in *Bryan v United Kingdom* (1995) 21 EHRR 342 and had failed to identify the distinction between policy decisions which involve no finding or evaluation of disputed fact and those which do. Only in the latter type of decision are safeguards necessary. The distinction is made clear in Lord Hoffmann's analysis of *Bryan*. In that case there had been two grounds of appeal, only one of which was pursued in the High Court. The first, ground (a) related only to planning policy and therefore the Zumtobel principle applied and the court should respect decisions taken on the grounds of expediency. The second ground (b) concerned the planning inspector's findings as to whether there had been a breach of planning control (see Lord Hoffmann at [101]). As to that, the inspector acted in a quasi-judicial capacity in accordance with prescribed procedures [108]. Lord Hoffmann explained how the distinction informed the requirements of Article 6:

> "*On matters of policy, the inspector was no more independent than the Secretary of State himself. But this was a matter on which independence was unnecessary—indeed, on democratic principles, undesirable—and in which the power of judicial review, paying full respect to the views of the inspector or Secretary of State on questions of policy or expediency, was sufficient to satisfy article 6(1). On the other hand, in deciding the questions of primary fact or fact and degree which arose in enforcement notice appeals, the inspector was no mere bureaucrat.*
>
> *He was an expert tribunal acting in a quasi-judicial manner and therefore sufficiently independent to make it unnecessary that the High Court should have a broad jurisdiction to review his decisions on questions of fact."* [110]

44. In *Bryan* the EuCrtHR applied the *Zumtobel* principle to ground (a) because it was purely a challenge to planning policy [113]. Whereas in relation to ground (b) where the Inspector had to decide and evaluate facts to determine whether there had been a breach of planning control,

there were safeguards in the very nature of the quasi-judicial capacity in which the inspector acted in accordance with a prescribed system for the hearing of evidence and determination of fact. Once the inspector had made a decision, the High Court had jurisdiction to decide whether his findings were perverse or irrational. The Strasbourg court concluded that that satisfied article 6. [115]. In cases involving the finding and evaluation of fact the independent position of the inspector with control, thereafter by the court of the fact-finding procedure by judicial review satisfies the requirements of article 6. [128].

45. Lord Hoffmann explained the effect of the distinction at [117]:

> "*If, therefore, the question is one of policy or expediency, the "safeguards" are irrelevant. No one expects the inspector to be independent or impartial in applying the Secretary of State's policy and this was the reason why the court said that he was not for all purposes an independent or impartial tribunal. In this respect his position is no different from that of the Secretary of State himself. The reason why judicial review is sufficient in both cases to satisfy article 6 has nothing to do with the "safeguards" but depends upon the Zumtobel principle of respect for the decision of an administrative authority on questions of expediency. It is only when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control, that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal*."

And at [122]:

> "*My Lords, I conclude from this examination of the European cases on our planning law that, despite some understandable doubts on the part of some members of the Commission about the propriety of having the question of whether there has been a breach of planning control determined by anyone other than an independent and impartial tribunal, even this aspect of our planning system has survived scrutiny. As for decisions on questions of policy or expediency such as arise in these appeals, whether made by an inspector or the Secretary of State, there has never been a single voice in the Commission or the European court to suggest that our provisions for judicial review are inadequate to satisfy article 6."*

46. The underlying error in Mr Wheeler's submissions in relation to both his Grounds of Appeal lies in his elision of these two types of case.

47. At the renewed hearing he advanced a number of facts which he said needed to be determined by a quasi-judicial process of fact determination. He said facts needed to be found as to current and future needs and uses of each parcel and the surrounding area, the land's development potential, the effect of the proposal, the effect on utilities, the environmental impact, safety

problems due to increased traffic, and the benefit of the alternative proposal of an easement in favour of some of the parcels.

48. Every one of these considerations looked to the issue of likely impact in the future. None of them required any finding as to disputed facts; they required an evaluation as a matter of policy, balancing advantages against disadvantages in the public interest. In any event a number of these considerations were not raised at the time and cannot, therefore, be raised now.

49. Accordingly, the decision in the instant case did not turn on any finding or evaluation of disputed fact. It was not similar to the determination of disputed factual questions relevant, for example, to allegations of breach of planning control. The decision as to whether to create a public road on Lissa lane and to widen it was purely to be guided by questions of expediency. The objections related to the question as to whether it was in the public interest to take private land for that purpose. Private property interests had to be balanced against the public interest. Striking the balance required a policy judgment and did not turn on disputed fact.

50. In those circumstances, as Lord Hoffmann pointed out at [117], no question of safeguards arose. Mr Wheeler attacks the conclusion of the judge that *"safeguards are not relevant where the question is one of policy or expediency*" [191]. She said:

> "*As I understand what is being said in the cases it is that one has to consider the nature of the subject matter in issue to determine the adequacy or not of what is said to satisfy Article 6. The answer may not be the same from case to case. In the instant case, the Road Notices published on behalf of Cabinet evidence clear policy decisions said to have been taken in the public interest. They involve the widening of a road for the benefit of the public. They therefore fall into the ambit of decisions made on the basis of expediency. They are decisions made in a democratic society for which the executive is answerable to the public on behalf of whom they purport to be acting."*[196]

51. In my view, the Judge correctly drew the distinction the appellants have failed to draw and placed the impugned decision in its correct category of one which turned on expediency in the public interest.

52. It seems to me, therefore, that the judge was correct in concluding that the requirements of section 15 of the Bill of Rights were satisfied because either by Constitutional Petition or by judicial review the appellants were secured access to the Grand Court to determine the legality of the taking of possession of their properties. Where the decision was one which turned on

policy considerations, a hearing of the Constitutional Petition or by way of judicial review satisfied the requirements of section 7.

53. There was, for this reason, no requirement for a statutory scheme of the type canvassed by the appellants under Ground 1 nor did the procedure adopted in this case breach the requirement to a fair and public hearing as contended under Ground 2. None of the safeguards necessary where the decision-making process takes on the character of a quasi-judicial proceeding were required because the decision made in this case did not require any determination of disputed fact.

54. I should add that if there was evidence that the process of inviting, marshalling and considering objections demonstrated unfairness then the owners of the parcels of land could have relied on sections 19 and 24 of the Bill of Rights. Where a decision which affects property rights under the Roads Act does require the determination of fact then that determination must be fair and objectively justified. Section 19 and section 24 should ensure that that standard is achieved. But I should emphasise that that is not this case.

The Procedure for Making Commenting on a Proposal: the Need for Transparency.

55. There does remain, however one other issue raised by the appellants under the umbrella of Ground 2. It is an issue which, in the light of the evidence now disclosed is of more substance than appeared in the initial written arguments.

56. Mr Brown describes the procedure adopted following a decision to propose a new road. Landowners are contacted in writing with the proposal attached and asked to provide comments whether of objection or support; where there are significant concerns or objections a meeting is "*typically*" held to see if those concerns may be resolved; a Cabinet paper is drafted which includes the landowners' views and which makes a recommendation.

57. Mr Brown says that the Lissa Lane proposal was the first occasion where a formal written communication was made to all affected landowners, although this procedure has subsequently been followed.

58. The problem with this procedure is that it was not set out anywhere in a public document easily accessible to any property owner who may be affected by a proposal to build a new road or to others who might wish to comment. The extent to which the procedure remained undisclosed and unpublicised is demonstrated by this case. When it was launched no-one seems to have

observed or commented on the lack of any evidence of whether the procedure for consultation had been adopted or not.

59. Under section 15(1) of the Bill of Rights interference with peaceful enjoyment of property and the taking of property must be "*in accordance with the law*". A failure to formulate, and promulgate a procedure for enabling landowners or others to comment on and object to a proposal is not "in accordance with the law". The law to which section 15 refers must be "*accessible*" and "*foreseeable"* (*Al-Nashif v Bulgaria* 36 EHRR 37 [119]).

60. There must be a transparent statement of the procedure to be adopted in cases which fall within section 15 of the Bill of Rights and the Roads Act. As Lord Dyson JSC said *in R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 [2012] 1 AC 245 [34]-[36] :

> *"[34] The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.*
> *[35] The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see In re Findlay [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In R (Anufrijeva) v Secretary of State for the Home Department [2004] 1 AC 604, para 26 Lord Steyn said:*
>
> > "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice."
>
> *[36] Precisely the same is true of a detention policy. Notice is required so that the individual knows the criteria that are being applied and is able to challenge an adverse decision. I would endorse the statement made by Stanley Burnton J in R (Salih) v Secretary of State for the Home Department [2003] EWHC 2273 at [52] that it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute. At para 72 of the judgment of the Court of Appeal in the present case, this statement was distinguished on the basis that it was made in the quite different context of the Secretary of State's decision to withhold from the individuals concerned an internal policy relating to a statutory scheme designed for their benefit. This is not a satisfactory ground of distinction. The terms of a scheme which imposes penalties or other detriments are at least as important as one which confers benefits. As Mr Fordham puts it: why should it be impermissible to keep secret a policy of compensating those who have*

been unlawfully detained, but permissible to keep secret a policy which prescribes the criteria for their detention in the first place?"

61. Green J explained the principles of transparency and good administration in *R (oao) Justice for Health Ltd) v SOS for Health* [2016] EWHC 2338 (Admin) [141]:

> "*I turn now to the law. The principle of transparency has evolved out of Strasbourg jurisprudence but it is now well established as a common law principle. It is said to amount to a component of the "rule of law" and the principle of "legal certainty". In Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 363 at [68] Lord Justice Laws stated that it was a "requirement of good administration" (to which the courts would give effect) that "public bodies ought to deal straightforwardly and consistently with the public". The principle serves a number of important purposes. A law or policy should be sufficiently clear to enable those affected by it to regulate their conduct i.e. to avoid being misled. Such a law or policy should also be sufficiently clear so as to obviate the risk that a public authority can act in an arbitrary way which interferes with fundamental rights of an individual. Clear notice of a policy or decision is also required so that the individual knows the criteria that are being applied and is able to both make meaningful representations to the decision maker before the decision is taken and subsequently to challenge an adverse decision (for instance by showing that the reasons include irrelevant matters). Where the principle applies it might require the publication of the policy that a decision maker is exercising; it might require that the policy be spelled out in greater detail so that the limits of a discretion may be demarcated; it might require the decision-maker to be more specific as to when he/she will or will not act."*

62. These principles were applied in the Cayman Islands, in relation to the deportation of an immigrant, by the President in *Chief Immigration Officer v Ellington* CICA 15 of 2020 [71] and by Walters J (ag) in *Dominguez v IAT* GC 140 of 2021 [109].

63. They apply with equal force to interference with and the taking of property for the construction of public roads on the Islands. It is plain that those principles were not followed in this case. The policy adopted by the Ministry as to how to deal with objections should have been published so that objectors would know well in advance how any objection would be considered and dealt with. The procedure for consultation should have been notified so that all who objected to the proposals should know how they should make objection when and how those objections would be received and considered prior to a final decision being made.

64. The evidence is clear that the procedure was followed in this case and the appellants had a proper opportunity to make their objections. There is no evidence that they were not fairly and properly considered.

Relief

65. The question then arises as to what relief should be granted in light of this failure. If the court is satisfied that the Ministry will promulgate its policy and procedure, it may be there would be no need of any declaratory relief.

66. In light of the conclusion that no injustice or unfairness has arisen in this case, it is plain that it would not be right to quash this particular decision. But it is important that any future proposal under the Roads Act is "*in accordance with the law*" so as to comply with section 15 of the Bill of Rights. Mr Smith was unable to give the court any assurance let alone undertaking that the policy described by Mr Brown would forthwith be published, as it should be. In those circumstances, declaratory relief is necessary.

67. I would make a declaration that the failure of the Ministry of Planning, Agriculture, Housing and Infrastructure to publish and publicise its process of consultation where a Declaration of Intent is gazetted pursuant to section 3 of the Roads Act (2005 Revision), as described by the former Senior Policy Officer of the Ministry at paragraph 8 of his affidavit dated 9 September 2022 did not comply with the requirement under section 15(1) that any proposed interference with the peaceful enjoyment of property or the taking of property must be in accordance with law.

68. To that limited extent I would allow this appeal. I would add that any order the court makes as to costs both here and below is likely to reflect my comments on the conduct of this case which led to a second hearing which ought to have been unnecessary.

Beatson JA

69. I agree.

Goldring President

70. I also agree. I would only underline what is said in Paragraphs 13 and 14 of Moses JA's judgment.