The Supreme Court of the Democratic Socialist Republic of Sri Lanka

Heather Therese Mundy,
1, Baddegodahena Estate,
Weedagama,
Bandaragama.

Petitioner-Appellant

Vs

SC Appeal 58/2003
CA Application 688/2002

1. Central Environmental Authority,
Robert Gunawardena Mawatha,
Battaramulla.

2. The Road Development Authority,
"Sethsiripaya",
Battaramulla.

3. Rajitha Senaratne,
Minister of Lands,
80/5, 'Govijana Mandiraya',
Rajamalwatte Road,
Battaramulla.

4. C.Gamage,
Divisional Secretary,
District Secretariat,
Bandaragama.

Respondents-Respondents

1. Susila M.Dahanayake,
Ihalagoda,
Akmeemana.

2. A.A.Hema Mangalika,
'Athu Sevana' '
Ihalagoda,
Akmeemana.

3. P.M.Koralage,
Ihalagoda,
Akmeemana..

4. A.K.Maginona,
Ihalagoda,
Walahanduwa.

Petitioners-Appellants

vs
SC Appeal 59/2003
CA Application 1330/2002

1. G.A.A.L.Wijewickrama,
Divisional Secretary,
Akmeemana.

2. Rajitha Senaratne,
Minister of Land Development

3. Central Environmental Authority.

4, The Road Developmental Authority.

Respondents-Respondents

Arambawelage Weerapala,
211,Wattegewatte,
Ihalagoda.

And 37 others

Petitioners-Appellants

SC Appeal 60/2003
CA Application 1447/02

vs

1. G.A.A.L.Wijewickrama,
Divisional Secretary,
Akmeemana.

2. Rajitha Senaratne,
Minister of Land Development.

3. Central Environmental Authority.

4. The Road Development Authority.

Respondents-Respondents

BEFORE: Fernando,J,
Ismail, J, and
Wigneswaran, J.

COUNSEL: D.S. Wijesinghe, PC, with Dr Jayantha de Almeida Gunaratne,
M. Adamaly & K. Pinto Jayawardene for the Appellant in 58/2003,
M.A. Sumanthiran with M. Adamaly and Viran Corea for
the Appellants in 59/2003 and 60/2003, .
S.Aziz, PC, with Nalin Ladduwahetty for the Road Development
Authority in all three appeals.
Ms Bimba Tilakaratne, DSG, with M.R. Ameen, SC, for the
Central Environmental Authority, the Minister of Lands, and the
other Respondents in all three appeals.

ARGUED ON: 10th November 2003.

DECIDED ON: **20**th January 2004.

FERNANDO, J:

Many years ago the Government of Sri Lanka decided to construct the Southern Expressway ("the Expressway") in order to link Colombo and Matara. The parties to the three appeals now before' us agreed that the project itself is of national importance and benefit, but the Appellants complained in regard to the proposed route ("the Final Trace") of two sections of the Expressway, which adversely affected their lands. Four sets of petitioners filed writ applications in the Court of Appeal. Those applications were heard together, and one judgment was delivered on 30.5.2003 dismissing all four applications. Dissatisfied with that judgment, three sets of petitioners appealed to this Court having obtained special leave to appeal.

The Appellant in SC Appeal 58/2003 (CA Application 688/2002) complained about the Final Trace from Kahathuduwa to Diyagama (in the Bandaragama area). SC Appeal 59/2003 (CA Application 1330/2002) was filed by four Appellants, and SC Appeal 60/2003 (CA Application 1447/2002) was filed by 38 Appellants, all of whom complained about the Final Trace from Boralukade to Kokmaduwa (in the Akmeemana area). Those three appeals were taken up together.

Under and in terms of sections '23Y, 23Z and 23BB of the National Environment Act, No 47 of 1980 as amended by Act No 56 of 1988 ("the Act"), and the relevant regulations and orders made thereunder, the Expressway was a "prescribed project", for which the approval of the "project approving agency" was required, and an Environmental Impact Assessment Report ("EIAR") was an essential pre-condition to such approval. The Road Development Authority ("RDA") was the project proponent, and the Central Environmental Authority ("CEA") was the project approving agency. The- RDA submitted an EIAR, prepared by the University of Moratuwa, to theCEA.

Section 33 of the Act defines an EIAR as:

> " ... a written analysis of the predicted environmental project and containing an environmental cost-benefit analysis ... and including a description of the project and includes a description of the avoidable and unavoidable adverse environmental effect of the proposed prescribed project; a description of alternatives to the activity which might be less harmful to the environment together with the reasons why such alternatives were rejected ..."

As the Court of Appeal observed, the purposes of Environmental Impact Assessment are:

> " ... to ensure that development options under consideration are environmentally sound and sustainable, and that the environmental consequences are recognized and readily taken into account early in the project design... This process fosters sound decision-making as it enables decision-makers to consider all relevant environmental consequences and afford affected persons an opportunity to voice their opinion. It fosters dialogue between decision-makers and involved parties, which is an essential pre-requisite of any development project for such project to have sustainability over a long period." [emphasis added]

The EIAR submitted by the RDA evaluated two alternative routes, referred to as the "Original Trace" and the "Combined Trace", and recommended the latter.

On 23.7.99 the CEA approved the Combined Trace subject to numerous conditions:

> "III. RDA should where necessary obtain fresh approval in terms of Regulation 17(i)(a) ... in respect of any alterations that are intended to be made to the project...
>
> IX. The UDA ... has identified the Weras Ganga / Bolgoda lake wetland as a major recreational area. It is recommended that the final trace should be moved on to the original RDA trace as specified in the EIAR to avoid traversing through these wetlands.
>
> X. Wetland Site Reports ... have already been prepared for Koggala and Madu Ganga wetlands. The proposed expressway should be sited in such a manner to avoid traversing through these wetlands.
>
> XI. The proposed expressway should be sited in such a manner as to minimize traversing through [other] wetlands...
>
> Fl. The final trace should be selected in such a way that it minimizes the relocation of people ...
>
> F4. When acquiring residential land and houses, alternative land should be provided together with sufficient compensation to enable families to build and move into new houses...
>
> F7. In payment of compensation for acquired land with structures, particularly dwelling houses, the minimum payment should be the market value.
>
> F8. Compensation for non-residential lands should be paid on the basis of the present market value ...
>
> F9. The payment of compensation should not be delayed and should be paid before moving into the alternative land.
>
> F10. Usable building materials of the acquired houses should be given to the owners and the value of such materials should not be taken into account in the payment of compensation...
>
> The developer shall comply with any additional conditions that may be communicated from time to time by the CEA during the execution of the project." [emphasis added]

Besides condition III, there were other statutory provisions relevant to alterations. Section 23EE provides:

> " Where any alterations are being made to any prescribed project for which approval had been granted ... the [proponent] who obtained such approval shall inform the appropriate project approving agency of such alterations ... and where necessary obtain fresh approval in respect of any alterations that are intended to be made to such prescribed project for which approval had already been granted."

Regulation 17 of the National Environmental (Procedure for approval of projects) Regulations No 1 of 1993 provides:

> (i) A project proponent shall inform the appropriate Project Approving Agency of --
> (a) any alteration to [an approved] prescribed project ...
>
> (ii) The project proponent shall where necessary obtain fresh approval in respect of any such alterations that are intended to be made to the project. The Project Approving Agency shall in consultation with the [CEA] determine the scope and Format of the supplemental report required to be submitted for such alterations."

The decision of the CEA was impugned in a writ application filed in the Court of Appeal (CA Application 981/99) which was dismissed on 20.11.2000, and special leave to appeal was refused on 22.6.2001.

Thereafter, in purported compliance with the terms and conditions of the CEA approval, the RDA prepared what has been described as the "Final Trace", in regard to which three distinct issues arose. First, whether the Final Trace was adopted in order to avoid environmental harm to the wetlands mentioned in conditions IX and X. This is not now in dispute. Second, whether the adoption of the Final Trace was procedurally flawed: the Appellants complained that they were denied an opportunity of being heard before such adoption, that the CEA was not informed of the Final Trace, that there was no supplementary EIAR, and that CEA approval was not obtained. Those allegations were not denied, and the Respondents (the RDA, the CEA, the Minister of Land, and the Divisional Secretaries) claimed that the 1999 CEA approval was sufficient to cover the Final Trace as well. Third, whether the Appellants (though unaffected by the Original Trace and the Combined Trace) were adversely affected by the Final Trace.

In regard to the third issue, it was quite clear that in the Akmeemana area the Final Trace was some distance away from both the Original Trace and the Combined Trace, and that the lands of the Appellants in SC 59/2003 and SC 60/2003, which had not been affected by the Original Trace and the Combined Trace, were adversely affected by the Final Trace.

However, there was some doubt in regard to the Appellant in SC 58/2003. The Final Trace was admittedly very near the Original Trace, but did not coincide with it; and it did adversely affect the Appellant's residential property. It seemed uncertain whether that property was in any event affected by the Original Trace, Accordingly, at the conclusion of the oral hearing, we requested all Counsel to make written submissions on the question whether that Appellant's land lies on the Original Trace or adjacent to it.

On behalf of the Appellant it was submitted that:

> " ... the Original Trace was marked on the ground ... there was no such marking on the [Appellant's] property, ... thus evidencing that the Original Trace was not situated either on the [Appellant's] property or adjacent to it.

On behalf of the RDA it was contended that:

> " ... the [Appellant's] land ... lies on the Final Trace at a point which is no more than 50 metres from the path of the Original Trace, and not as far away as 600 metres as erroneously contended by the [Appellant] ... The distance between the Final Trace and the Original Trace in the relevant section is between 40 to 50 metres." [emphasis added]

The necessary inference was that the Original Trace and the Final Trace did not overlap; that there was a distance of 40 to 50 metres between them; and that in any event the Appellant's land was 50 metres away from the Original Trace.

The submissions made on behalf of the CEA, the Minister, and the Divisional Secretary of the area were not helpful:

> " The Original Trace is a 400 ft wide corridor ... the Final Trace that traverses through the residence of the [Appellant] is located within 120 ft - 150 ft of the centre line of the Original Trace. Thus the [Appellant's land] is located on the Original Trace." [emphasis added]

There is no dispute that the Appellant's land was situated on the Final Trace. The Appellant and the RDA - which was responsible for the preparation of the Final and Original Traces - agree that the Appellant's land was some distance away from the Original Trace. The inference drawn by the CEA that the Appellant's land is located on the Original Trace is not only contrary to the RDA's position, but is not a necessary or reasonable inference from the facts stated. Even if the Final Trace is located within 120 to 150 feet of the centre line of the Original Trace, it does not follow that the Appellant's land is located on the Original Trace - for it could well be situated on that section of the Final Trace which was outside the Original Trace.

I must note at this point that the Appellant had commenced construction of her residence with the required local authority approval in 1998. That approval was renewed in 1999 and 2000, and the house was completed in February 2001. It was only then, when she applied for her electricity connection, that she learnt that her residence would be affected by the Expressway.

I therefore accept the Appellant's version, confirmed by the RDA itself (and supported by the observations of the "Judicial Committee" to which I will refer shortly) that her land was unaffected by the Original Trace.

Notices under section 2 of the Land Acquisition Act were issued in respect of the lands of some of the Appellants in or about January 2001.

The Final Trace in respect of the Bandaragama area was ready in or about February 2001. The Appellant in SC 58/2003 complained to the Human Rights Commission on 3.4.2001 that her fundamental rights - of equality, under Article 12(1), and of occupation and residence, under Articles 14(l)(q) and (h) – had been infringed. While that matter was still pending, on learning that Land Acquisition proceedings were to commence, she filed her writ application in the Court of Appeal on 2.4.2002.

The Final Trace in respect of the Akmeemana area was completed only in December 2001. The Appellants in SC 59 & 60/2003 filed their writ applications in or about July or August 2002; some of them had previously complained to the Human Rights Commission.

The factual basis on which these appeals have to be decided is that the Appellants' lands were not adversely affected by the Original and/or Combined Traces; that the Final Trace was adopted by the RDA without notice to them, and without giving them an opportunity of being heard; that the CEA was not informed of the Final Trace, and its approval was not obtained; that no supplementary EIAR had been submitted; and that the Final Trace adversely affected all the Appellants.

The Appellant in SC 58/2003 prayed for *Certiorari* to quash the 1999 CEA approval insofar as it purported to approve a route not described in the EIAR, and for *Mandamus,* to direct the CEA to call for a supplementary EIAR from the RDA in accordance with the prescribed procedures. The other Appellants prayed for *Certiorari* to quash the section 2 notices, and pleaded that the alterations effected by the Final Trace were illegal, although they did not specifically pray for *Mandamus* to direct the CEA to call for a supplementary EIAR.

What transpired in the Court of Appeal when the writ applications first came up for hearing on 8.10.2002 was recorded thus:

> " All parties agree that the ... Expressway Project is an absolute necessity. With that as an important indicator this Court makes order on the following terms as agreed by all parties
> .
> The 'Committee' to be appointed should consist of not less than 3 retired Judges nominated by this Court and the Committee should confer, discuss with the parties and their representatives, and submit a report to Court with regard to matters in dispute ... on the following issues:
>
> 1) Whether the deviations which form the subject-matter of these cases from Akmeemana including Niyagama, and Bandaragama including Gelanigama, are feasible, on a consideration of the National Environmental Act, its regulations and the economy of the project.
>
> 2) Whether such deviations are environmentally and socially the most desirable...
>
> The Petitioners in CA Applications 688/2002, 1322/2002, 1330/2002 and 1447/2002 will place all material led before the Human Rights Commission before the aforesaid Committee, and would withdraw the action before the Human Rights Commission at the conclusion of these cases."

Accordingly, three Judges were nominated, and the parties agreed to meet the expenses of the Committee.

Those three Judges (who were later referred to as the "Judicial Committee") visited the relevant areas and in their report dated_28.10.2002 set out their observations, recommendations and reasons in detail. The following extracts, besides those cited in the Court of Appeal judgment are relevant.

" [The incumbent priest of the Kohombadeniya Temple in Bandaragama] complained that ... the Final Trace traversed through the Temple resulting in several of the structures of the Temple and the Bo tree being destroyed ... that the boundary marks of the proposed [Expressway] have been planted within the Temple premises and that they had no intimation from anyone in authority in any form that a road was to be constructed over the Temple property. At that stage officers of the RDA ... indicated that a change has been made and that no structure of the Temple or the Bo tree would be affected and that only a strip of land within the Temple premises will be taken over. It has to be noted that this was the first intimation to one who has been affected by earlier plans finalized without his knowledge, that further changes are being contemplated even at this stage...

The residents of Gelanigama [including the Appellant in SC 58/2003] maintained that they have had no opportunity of making representations to the authorities. ... [and] that even the local authority ... seemed to have been unaware of the proposal to construct any such roadway through Gelanigama because [it] had continued to permit the construction of buildings within the said areas even in the year 2000...

The position of the Respondents is that any steps taken in pursuance of a condition set down in an order of approval made or given by an 'approving authority' ... would not come within the term 'alteration'...

[In regard to the Akmeemana area] the reasons given by the RDA for the shift or alteration are (a) to minimize damage to property, (b) to minimize bad effects on water resources, and (c) to minimize costs...

The complaint of the villagers [in the Akmeemana area] is that while there had been an Environment Impact study done as regards the Original Trace (and accordingly they had notice of the proposal and could have and did make their representations), there was no such notification as regards the Final Trace, thus depriving them of an opportunity of being heard. It was conceded that no feasibility study was done regarding the Final Trace, and that some portion of the deviation does fall outside the corridor studied for the preparation of the EIAR."

In its judgment the Court of Appeal addressed four issues, which were formulated as follows:

I. Whether the CEA approved the Combined Trace in the EIAR and whether the RDA attempted to deviate From the approved Combined Trace.

II. Whether the approval of the CEA was necessary for the Final Trace as it deviated from the Combined Trace.

III. Whether - where the wider public interest is at stake - the Court has the discretion in deciding whether to grant or refuse the remedy [by way of writ] even if the impugned decision affects certain individuals.

IV. Whether there had been "inordinate delay on the part of 'the Appellants in filing their writ applications.

I. In regard to issue I, the Court of Appeal held that the CEA approval did require the RDA to prepare the Final Trace so as to avoid the wetlands referred to in conditions IX and X, and I entirely agree with that conclusion.

II. Turning to issue II, the Court of Appeal observed:

> " It is true that at the time the EIAR was prepared, the Final Trace was not envisaged. However ... the Final Trace was not an alteration that would come under Regulation 17(i)(a) and section 23EE [of the Act]." [emphasis added]

However, the Court went on to add:

> " In support of this contention the attention of Court is drawn to the report of the Judicial Committee ... [which] states:
>
> The word 'alteration' cannot and must not be construed to encompass only changes that are made voluntarily by a project proponent. Alterations made in pursuance of a direction made by one in authority too need subsequent examination and affirmation. The need for such approval after the event is more so in the case of changes effected as required by an official authority. The sanctioning authority needs to be assured that such directions have been strictly complied with as required by the said authority. The alterations effected in this case are in fact changes of a substantial nature and extent. They need to be approved afresh...
>
> On a consideration of the foregoing the view we take is that the deviations, both at Bandaragama and at Akmeemana, can only be considered feasible and desirable if the procedure set. out in the [Act] and Regulation 17 relating to 'alterations' are complied with, and the petitioners and the other residents of the villages, including Gelanigama and Niyagama, affected by the said deviations are afforded an opportunity of making representations in respect of the Final Trace and also the approach roads." [emphasis added]

The Court of Appeal nevertheless concluded that the deviations did not amount to alterations, giving several reasons, the first being:

> " ... the question arises as to what is meant by an alteration. It possibly could not mean that every alteration needs a supplementary Environmental Assessment Report. For example Environmental Impact Assessment recognizes certain areas that need further study and one such area refers to sections of the highway that need to be elevated. Such decision could be decided when the project is in operation. Could it be argued that for each such alteration an EIA is required as it is not encompassed in the EIAR? The ... approval ... states that 'the developer shall comply with any additional conditions that may be communicated from time to time by the CEA during the execution of the project'. Is it logical to infer that any condition which differs from the assessments and evaluations in the EIAR requires approval?'

It is sufficient to observe that those two situations are completely distinguishable from the present. The elevation of the highway and additional conditions imposed on the developer will not affect anyone else's land. In the present case, the deviations from the approved Trace certainly did. In any event, from the fact that additional conditions imposed by the CEA itself require no further CEA approval it cannot be inferred that deviations determined unilaterally by the project proponent or developer require no approval.

A second reason given by the Court of Appeal was that condition VII of the CEA approval imposed a duty on "the RDA to inform the CEA of any environmental impacts which were not anticipated at that stage", and observed that in "a project of this magnitude it is bound to encounter diverse situations as it progresses, as it is humanly not possible, despite expertise, to encompass all kinds of environmental impacts that would arise once the project is implemented". This situation, too, is distinguishable. The alteration of the route of the Expressway before the project commenced is entirely different to measures necessitated by unforeseen circumstances arising after commencement - although natural justice may nevertheless require notice and hearing.

The Court of Appeal also dealt with the Appellants' contentions that the Final Trace was not within the corridor studied in the EIAR:

> " But the EIAR makes several references to the Bandaragama Divisional Secretariat of which both Weedagama and Gelanigama are included ... The EIAR specifically states that a systematic sampling procedure was not followed in selecting households for interviews. An attempt was made to get a cross section ... Therefore the specific areas in which the [Appellant/s] are resident may not have been covered by the EIAR... Nevertheless, most of the areas in which the [Appellant/s] claim to be resident were specifically studied during the Environmental Impact Assessment..." [emphasis added]

The Appellants' principal grievance is that they were denied the right to be heard in regard to the Final Trace - which the Judicial Committee confirmed. The fact that some of their neighbours might have been heard, at some previous stage, does not excuse the denial of their right to be heard, and that aspect the Court of Appeal failed to consider.

Finally, the Court of Appeal concluded that:

> " ... the CEA granted approval ... provided that the conditions stated therein were adhered to. In the present situation the deviation was made according to the conditions provided in the [CEA] approval."

Later in this judgment I will deal with the questions whether the deviations amounted to "alterations", whether they were covered by the 1999 CEA approval, and whether in any event the Appellants had a right to notice and to be heard.

III. The Court of Appeal referred to *Goa Foundation v Konkan Railway Corporation,* AIR 1992 Bombay 471, where it was held that a public project (a railway line) of great magnitude undertaken for meeting the aspirations of a section of the people cannot be defeated on account of "extremely negligible" damage to a few persons; cited *R v Gateshead Metropolitan Borough Council, ex p Nichol,* (1988) 87 LGR 435, and Clive Lewis on *Judicial Remedies in Public Law* (2nd. ed, 2000, pp 347-349), to the effect that "the interest of the applicant had to be measured against the needs of good administration which include need for speed, finality in decision-making and the public interest"; and held that:

> "the court should be cautious when exercising the discretionary remedy of writ jurisdiction where a project of public importance had already commenced and resources have been committed towards its implementation and the feasibility of quashing a decision leading to unbudgeted expenditure"

The Court referred to the facts that other residents in the relevant areas had consented to relocation, that proceedings under the Land Acquisition Act had commenced, that tender documents had already been prepared, that additional costs would have to be incurred in re-designing the Final Trace, that consultants would have to be appointed, that the Environmental Impact evaluation process would have to be re-commenced, and that at the end of that process there was a likelihood of further litigation by persons who would be affected by the CEA's final decision.

Another matter, relevant to the exercise of discretion, surfaced in the course of the hearing before this Court, namely the generous terms and conditions as to compensation. According to the Respondents, some of the features of the compensation package were that all affected persons were entitled to the market value of their property (Rs 130,000 to Rs 175,000 per acre having being paid for paddy lands, and Rs 5,000 to 20,000 per perch for residential land), replacement cost of buildings and structures, payment of compensation before possession is taken, a 25% increase if vacant possession is given before the date on which possession is required for the Expressway, and an additional sum of *Rs* 50,000 as a contribution towards rent until alternative premises are found.

The Court of Appeal concluded:

> " ...Courts have to balance the right to development: and the right to environmental protection. While development activity is necessary and inevitable for the sustainable development of a nation, unfortunately it impacts and affects the rights of private individuals, but such is the inevitable sad sacrifice that has to be made for the progress of a nation. Unhappily there is no public recognition of such sacrifice which is made for the benefit of the larger public interest which would be better served by such development. The Courts can only minimize and contain as much as possible the effect to such rights...
>
> The judgment delivered by Justice Weeramantry in the case of *Hungary v Slovakia* ... provides a detailed discussion about the concept of sustainable development and its relevance in the modern commercially advancing society ... Another important aspect referred to by Justice Weeramantry ... is the principle of trusteeship of earth resources, in other words the concept of 'public trust' ... a doctrine which has been carefully followed as invaluable by Indian Judges in several landmark judgments ..." [emphasis added]

The Court dismissed the writ applications, in the exercise of its discretionary powers, holding that:

> " [When balancing the competing interests] the conclusion necessarily has to be made in favour of the larger interests of the community who would benefit immensely by the construction of the proposed expressway ... the adoption of the Combined Trace would undoubtedly result in irreversible damage to the eco-system in the Bolgoda Wetland area. Therefore the only option is to adopt the Final Trace which ... will result only in the displacement of affected people in that area ... the obligation to the society as a whole must predominate over the obligation to a group of individuals, who are so unfortunately affected by the construction of the expressway. " [emphasis added]

Although the Court of Appeal referred to "rights" and "obligations", and to the Court's power to "minimize" the effect on such rights, it nevertheless took the view that there was only one option, and did not consider whether any other relief should be granted to the Appellants in respect of the breach of their rights. I will revert to that question later.

IV. The Court of Appeal also referred to the "inordinate delay" on the part of the Appellants in filing their writ applications:

> " Petitioner/s in CA Applications 688/02 and 1322/02 stated that they became aware that they would be affected by the Southern Expressway in early 2001. The reason alleged for the delay was that they made applications before the Human Rights Commission. However, it must be noted that the proper remedy would have been the invocation of the writ jurisdiction of this court as it is clear ... that the delay in filing the application would cause considerable prejudice to the Respondent: and third parties who are directly or indirectly affected if the proposed Final Trace was to be changed." [emphasis added]

Although the issue of the alleged infringement of fundamental rights was clearly before the Court - even on 8.10.2002 - the Court of Appeal did not consider that issue, its impact on the writ jurisdiction, and the applicability of Article 126(3), which too I will deal with.

Before dealing with the Court of Appeal judgment, it is necessary to consider the scope of the writ jurisdiction - the basis and the grounds on which executive acts and decisions may be reviewed, as well as the Court's power and discretion in regard to relief - in the light of several Constitutional provisions. Historically the writ jurisdiction had limitations, arising from its linkage to the English "prerogative" writs in regard to which it has been observed:

> " ... the development of administrative law remedies in the common law sphere proceeded piecemeal from a variety of historical antecedents and, unto well into the [twentieth] century, without any recognition of the character and needs of administrative justice as a separate legal discipline. In fact, the main traditional remedies are classed as 'extraordinary remedies'..." (Friedmann, *Law in a Changing Society,* 1959, p 403)

The jurisdiction conferred by Article 140, however, is not confined to "prerogative" writs, or "extraordinary remedies", but extends - "subject to the provisions of the Constitution" - to "orders in the nature of" writs of *Certiorari,* etc. Taken in the context of our Constitutional principles and provisions, these "orders" constitute one of the principal safeguards against excess and abuse of executive power: mandating the judiciary to defend the Sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any deference due to the Crown and its agents. Further, this Court itself has long recognized and applied the "public trust" doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes (see *de Silva v Atukorale,* [1993] 1 SriLR 283, 296-297; *Jayawardene v Wijayatilake,* [2001] 1 SriLR 132, 149, 159; *Bandara v Premachandra,* [1994] 1 SriLR 301, 312); and that doctrine extends to national and natural resources (such as the air-waves, *Fernando v SLBC,* [1996] 1 SriLR 157, 172, and mineral deposits, *Bulankulame v Secretary Ministry of Industrial Development,* [2000] 3 SriLR 243, 256-257). Besides, executive power is also necessarily subject to the fundamental rights in general, and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law. For the purposes of the appeals now under consideration, the "protection of the law" would include the right to notice and to be heard. Administrative acts and decisions contrary to the "public trust" doctrine and/or violative of fundamental rights would be in excess or abuse of power, and therefore void or voidable. The link

between the writ jurisdiction and fundamental rights is also apparent from Article 126(3) - see *Perera v Edirisinghe,* [1995] 1 SriLR 148, 156 - which contemplates that evidence of an infringement of fundamental rights may properly arise in the course of hearing a writ application, whereupon such application must be referred to this Court which may grant such relief or make such directions as it may deem just and equitable. Thus, although this Court would still be exercising the writ jurisdiction, its powers of review and relief would not be confined to the old "prerogative" writs. These Constitutional principles and provisions have shrunk the area of administrative discretion and immunity, and have correspondingly expanded the nature and scope of the public duties amenable to *Mandamus* and the categories of wrongful acts and decisions subject to *Certiorari* and *Prohibition,* as well as the scope of judicial review and relief.

It is in that background that I now turn to a consideration of the Act and the CEA's power to grant approval, the rights of the Appellants to notice and to be heard in regard to "deviations", and the power and the discretion of this Court in regard to the grant of relief.

Did the deviations at Bandaragama and Akmeemana constitute "alterations" within the meaning of section 23EE of the Act, Regulation 17(i)(a), and condition III? It is unnecessary to decide whether minor changes not adversely affecting anyone, changes necessitated by unforeseen circumstances after the commencement of a project, etc, amount to "alterations". Here the changes were substantial, as the Judicial Committee too found; they adversely affected the Appellants and their property rights; they were changes in respect of the route of the Expressway, and the route was a principal component of the project; and they were changes proposed before the commencement of the project. The purposes of Environmental Impact Assessment - as explained by the Court of Appeal itself - would not be achieved if, contrary to the ordinary meaning of the word, such changes are treated as not being alterations. Indeed, those purposes would be defeated if the project proponent itself - the potential infringer - was allowed to decide whether such changes were environmentally objectionable or not, without reference to the CEA. I hold that the deviations were "alterations".

Were the Appellants, as persons affected, entitled to notice and to be heard; was notification to and approval by the CEA necessary; and was a supplementary EIAR necessary? There is nothing in the Act or the Regulations which purported to exclude the principles of natural justice, and the Appellants were entitled to notice and to be heard before the RDA adopted the Final Trace; the Appellants' fundamental right to equal treatment and to the equal protection of the law also entitled them to notice and a hearing. Section 23EE and Regulation 17(i)(a) further required the RDA to notify the CEA and obtain CEA approval; and so did condition III. A "supplemental report" in terms of Regulation 17(ii) was necessary.

Did the 1999 CEA approval constitute "approval in advance" of the alterations? The 1999 approval was based on a consideration of two Traces and the Final Trace was not in contemplation. The preceding Environmental Impact Assessment procedure did not involve the Appellants. Having regard to the purposes and procedure, as explained by the Court of Appeal, the CEA was obliged to

consider the Final Trace in substantially the same way as those two Traces. That was a power and a duty which the CEA held subject to a public trust, to be exercised for the benefit of the public, including affected individuals. The CEA was not empowered to delegate that power and duty to any other body, and least of all to the project proponent itself - for that would make the project proponent the sole and final judge in its own cause. The 1999 CEA approval did not constitute, and cannot be construed as constituting, an absolute, uncontrolled and irrevocable delegation to the RDA to determine the Final Trace. In any event, whether it was the CEA or the RDA which had the power to decide, the Appellants were denied their rights to notice and to be heard. I must add that, in any event, condition IX required the Final Trace to be moved on to the Original Trace, and not just near the Original Trace, and thus the location of the Final Trace was contrary to the CEA approval.

If the deviations did not constitute "alterations" were the Appellants nevertheless entitled to notice and to be heard? Even if the deviations were not alterations, the Appellants were adversely affected thereby and were therefore entitled to a hearing, under the *audi alteram partem* rule as well as Article 12(1).

Did the Court of Appeal err in holding that some of the Appellants were guilty of inordinate delay? That finding was based on the view that a writ application was the "proper" remedy, and that recourse to the Human Rights Commission was not. Not only was a complaint to the Human Rights Commission - particularly, alleging the infringement of Article 12 - lawful and proper, but it was also a proper attempt to exhaust alternative remedies, and the Appellants could hardly be blamed for the Commission's delays.

Did the Court of Appeal err in refusing relief in the exercise of its discretion? Although the Court of Appeal seemed to agree that the rights of the Appellants had been infringed, that their sacrifice had not been duly recognized, and that the Court should minimize as much as possible the effect on their rights, nevertheless it felt obliged to choose between two options only: to grant relief or to dismiss the applications. The Court did not take note of the impact of the fundamental rights on its writ jurisdiction. While the circumstances were such that the Court could reasonably have concluded that, on balance, the Final Trace should be left undisturbed, one of the major considerations was cost - as well as delay, which also involved cost. If a judicial discretion was exercised in favour of the State, *inter alia,* to save costs, it was only equitable that the Appellants should have been compensated for the injury to their rights. Had the matter been referred to this Court under Article 126(3), the Appellants would have been held entitled to compensation in lieu of further Environmental Impact Assessment procedures. That jurisdiction is an equitable one, and since *equity regards as done that which ought to have been done,* the matter must now be dealt with as if it had been duly referred to this Court. If it is permissible in the exercise of a judicial discretion to require a humble villager to forego his right to a fair procedure before he is compelled to sacrifice a modest plot of land and a little hut because they are of "extremely negligible" value in relation to a multi-billion rupee national project, it is nevertheless not equitable to disregard totally the infringement of his rights: the smaller the value of his property, the greater his right to compensation.

I hold that the deviations proposed by the RDA were alterations requiring CEA approval after compliance with the prescribed procedures and the principles of natural justice; that despite the lack of such approval, the refusal of relief by way of writ, in the exercise of the Court's discretion was justified; but that the Appellants ought to have been compensated for the infringement of their rights under Article 12(1) and the principles of natural justice. To that extent, the appeals are allowed, and the order of the Court of Appeal is varied.

I therefore grant and issue an order in the nature of a writ of *Mandamus* directing the CEA to require the RDA to pay, and directing the RDA to pay, each of the Appellants compensation in a sum of Rs 75,000/-. That will be in addition to the compensation payable by the State under the Land Acquisition Act, and in terms of the CEA approval and the compensation package referred to by the Respondents in their written submissions. To preclude further delays, misunderstandings and allegations of victimization, I further direct that the Appellants shall have the right to accept such compensation and to hand over possession of their lands without prejudice to their rights of appeal in respect of the quantum of compensation.

In respect of costs, I direct the RDA to pay the Appellant(s) in each appeal one set of costs in a sum of Rs 50.000/- (aggregating to Rs 150,000/- for the three appeals) and to reimburse them in respect of all sums paid towards the costs, expenses and fees of the Judicial Committee.

JUDGE OF THE SUPREME COURT

Ismail, J:

I agree

JUDGE OF THE SUPREME COURT

Wigneswaran , J:

I agree

JUDGE OF THE SUPREME COURT