[2016] CCJ 1 (OJ)

IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No. OA 1 of 2013

Between

MAURICE TOMLINSON **Claimant**

And

THE STATE OF BELIZE **Defendant**

CCJ Application No. OA 2 of 2013

Between

MAURICE TOMLINSON **Claimant**

And

THE STATE OF TRINIDAD & TOBAGO **Defendant**

[Consolidated by Order of the Court dated 17th day of July 2013]

THE COURT,

composed of D Byron, President, R Nelson, A Saunders, J Wit, and W Anderson, Judges

having regard to the Originating Application filed by the Claimant on 14th May 2014, the Amended Originating Application filed by the Claimant on 30th July 2014, the Defence of the State of Belize filed on 26th June 2014, the Defence of the State of Trinidad and Tobago filed on 16th September 2014, the Written Submissions of the Claimant filed on 4th March 2015, the Written Submissions of the State of Belize filed on 4th March 2015, the Written Submissions of the State of Trinidad and Tobago filed on 4th March 2015, the Written Submissions of the Caribbean Community filed on 4th March 2015 and Reply on 11th March 2015, the Written Submissions of the Caribbean Forum for Liberation and Acceptance of Genders and Sexualities (CARIFLAGS) filed on 9th January 2015 and the public hearing held on 17th and 18th March 2015 at the Seat of the Court

and after considering the written submissions, the testimony at the trial and the oral submissions made on behalf of:

- the Claimant, by Mr Douglas Mendes SC, appearing with Mr. Westmin R.A. James and Mr. Imran Ali, Attorneys-at-Law;
- the State of Belize, by Ms Anika Jackson, Solicitor General, Mr Nigel Hawke,

appearing with Ms Samantha Matute, Attorneys-at-Law;

- the State of Trinidad and Tobago, by Mr Seenath Jairam SC, appearing with Mr Wayne D Sturge, Mr Gerald Ramdeen, Mr Kashka Hemans, Ms Deowattee Dilraj-Batoosingh and Ms Lesley Almarales, Attorneys-at-Law; and
- the Caribbean Community, by Dr Chantal Ononaiwu and Ms. Gladys Young, Attorneys-at-Law

on the 10th day of June 2016 delivers the following

JUDGMENT

Introduction

[1] This is an immigration case which requires this Court to pronounce upon the effect of national legislation that is alleged to be inconsistent with Community obligations on the free movement of CARICOM nationals. The starting point for formulating that pronouncement is necessarily the earlier immigration case of *Myrie v State of Barbados,*[1] decided by this Court on 4 October 2013, which established that all CARICOM nationals enjoy, subject to specific exceptions, a right of hassle free entry into all CARICOM Member States.

[2] Even before *Myrie* was decided, Mr Maurice Tomlinson, an attorney-at-law, who is a homosexual and an activist for the Lesbian, Gay, Bi-sexual, Transgender and Intersex (LGBTI) community within the CARICOM region, approached the Court with an application for special leave to bring a case against the States of Belize and Trinidad and Tobago. He claimed that these States had prejudiced him in the enjoyment of his Community right to enter these countries without hassle or harassment by maintaining an express prohibition on entry of homosexuals in their Immigration Acts. Belize and Trinidad and Tobago are the only two CARICOM States whose Immigration Acts mention homosexuals in the context of prohibited immigrants. At the time of his application Tomlinson based his right of entry on Article 46 of the Revised Treaty of Chaguaramas (RTC), which allows 'Skilled Community Nationals' to enter CARICOM Member States in order 'to seek employment.' This 'Skilled Nationals Regime' applies to a range of persons

[1] [2013] CCJ 3 (OJ); (2013) 83 WIR 104.

including, *inter alia*, University graduates. After *Myrie*, Tomlinson expanded his application to encompass the 2007 Decision of the Conference of Heads of Government of CARICOM (the 2007 Conference Decision). As clarified by *Myrie*, the 2007 Conference Decision conferred upon *all* CARICOM nationals, the right of entry into the territory of all Member States and the right to remain there for up to six months, subject, *inter alia*, to the condition that the national is not an 'undesirable person.' This right of entry is not contingent on whether the CARICOM national is regarded as 'skilled' or not.

[3] Tomlinson's complaint was not based on any factual refusal of entry or otherwise wrongful treatment by Belize or Trinidad and Tobago. Rather it centres on the allegation that the Immigration Acts of these States prohibit the entry of homosexuals. Tomlinson argues that the mere existence of these laws is sufficient to prejudice the enjoyment of his Community rights.

Jurisdiction

[4] By decision of 8 May 2014,[2] Tomlinson was granted special leave to argue his case before the Court on the merits. Special leave was granted because Tomlinson had fully complied with the requirements set out in Article 222 of the RTC as consistently interpreted by this Court. Article 222 allows persons, natural or juridical, of a Contracting Party to seek leave to bring a claim under the RTC once it is arguable that the RTC intended to confer a right or benefit on them directly, that they are being prejudiced in the enjoyment of that right or benefit; it is shown that the relevant Contracting Party has omitted or declined to bring their claim or has agreed that the affected persons can bring their own claim and the interest of justice requires the grant of leave.

[5] Given that Tomlinson's claim involves a dispute concerning the interpretation and the application of Community law, the Court has jurisdiction to hear and determine the matter in accordance with Article 211 of the RTC.

[2] *Tomlinson v the State of Belize* and *Tomlinson v the State of Trinidad and Tobago* [2014] CCJ 2 (OJ); (2014) 84 WIR 239.

Factual Background

[6] The relevant facts of this case are undisputed. Tomlinson is a Community national from Jamaica. He is an attorney-at-law and a graduate of The University of the West Indies (UWI). He has never applied for, and consequently does not have, a certificate evidencing that he is recognized as a skilled Community national. Tomlinson is an LGBTI activist. In that latter capacity, he regularly travels throughout the Caribbean region seeking to eliminate stigma and discrimination based on sexual orientation. He has travelled to Belize on two occasions, the last being 17-21 July 2011. He visited Trinidad and Tobago on four occasions; his last visit occurring on 10-15 October 2011. On those occasions he never experienced any problem at the ports of entry. He was never asked by an immigration officer about his sexual orientation nor did he ever tell an immigration officer that he was a homosexual.

Free Movement under Community law

[7] At this juncture, it is useful to set out the provisions of Community law which are central to Tomlinson's case. The three relevant provisions of the RTC, namely Articles 7, 45 and 46, provide as follows:

> ***ARTICLE 7***
> ***Non-Discrimination***
>
> *1. Within the scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality only shall be prohibited.*
> *2. The Community Council shall, after consultation with the competent Organs, establish rules to prohibit any such discrimination.*
>
> ***ARTICLE 45***
> ***Movement of Community Nationals***
>
> *Member States commit themselves to the goal of free movement of their nationals within the Community.*
>
> ***ARTICLE 46***
> ***Movement of Skilled Community Nationals***
>
> *1. Without prejudice to the rights recognised and agreed to be accorded by Member States in Articles 32, 33, 37,38, and 40 among themselves and to Community nationals, Member States have agreed, and undertake as a first step towards achieving the goal set out in Article*

45, to accord to the following categories of Community nationals the right to seek employment in their jurisdictions:

(a) University graduates;
(b) media workers;
(c) sportspersons;
(d) artistes; and
(e) musicians,

recognised as such by the competent authorities of the receiving Member States.

2. Member States shall establish appropriate legislative, administrative and procedural arrangements to:

(a) facilitate the movement of skills within the contemplation of this Article;
(b) provide for the movement of Community nationals into and within their jurisdictions without harassment or the imposition of impediments …"

[8] Additionally, the 2007 Conference Decision[3] states that:

THE CONFERENCE

AGREED that *all CARICOM nationals should be entitled to an automatic stay of six months upon arrival in order to enhance their sense that they belong to, and can move in the Caribbean Community, subject to the rights of Member States to refuse undesirable persons entry and to prevent persons from becoming a charge on public funds.*

The National Immigration Laws

[9] It is also important that the relevant provisions of the Immigration Acts of Belize and Trinidad and Tobago be set forth.

[10] Section 5 of the Immigration Act of Belize[4] provides:

(1) Subject to section 2 (3), the following persons are prohibited immigrants-…

(e) any prostitute or homosexual or any person who may be living on or receiving or may have been living on or receiving the proceeds of prostitution or homosexual behaviour;

(2) Notwithstanding anything to the contrary contained in this Act, the Minister may exempt any person from the provisions of paragraphs (a) to (g) of subsection (1).

[3] Decision of the Conference of Heads of Government of the Caribbean Community taken at their Twenty-Eighth Meeting.
[4] CAP 156 of the Laws of Belize.

(4) Notwithstanding anything contained in this Act, the Minister may prohibit or permit the entry of any immigrant into Belize."

[11] Section 8 of the Immigration Act of Trinidad and Tobago[5] so far as is relevant provides that:

(1) Except as provided in subsection (2) entry into Trinidad and Tobago of the persons described in this subsection, other than citizens and, subject to section 7(2), residents, is prohibited, namely -

(e) prostitutes, homosexuals or persons living on the earnings of prostitutes or homosexuals, or persons reasonably suspected as coming to Trinidad and Tobago for these or any other immoral purposes.

(2) The Minister may authorise in writing under his hand or under the hand of a person designated by him entry into Trinidad and Tobago of persons passing through Trinidad and Tobago under guard to another country.

Tomlinson's case

[12] Tomlinson submits that on the occasions when he travelled to Belize and Trinidad and Tobago, he was not aware of their national immigration laws and, in particular, the designation of homosexuals as prohibited persons. He only discovered the relevant prohibitions after his visits. Since then, although he has been invited to visit these States, he has become hesitant to do so. Tomlinson argues that the existence of the immigration laws of these States restrains him from visiting them. Thus he is prejudiced not only in the enjoyment of his Community rights of free movement but also in his right not to be discriminated against on the ground of nationality only (*per* Article 7, RTC). He further argues that the continued presence on the statute books of legislation declaring him a prohibited immigrant is an assault on his dignity as a human being as it subjects him to a derogatory categorisation and imposes a stigma on him because of his sexual orientation.

[13] Based on the facts and his submissions, Tomlinson seeks the following relief and remedies against both States:

(a) a declaration that he has a right to enter these States;

[5] Chap 18:01 of the Laws of Trinidad and Tobago.

(b) a declaration that the provisions of the Immigration Acts of these States prevent his lawful entry into these States in violation of his right to freedom of movement and his right not to be discriminated against on the basis of his nationality only;

(c) an order that the Defendant States do effect the amendment of their Immigration Acts so as to remove homosexuals from any class of prohibited immigrants, within such time as this Court shall require;

(d) an order that pending such amendments, the Defendant states shall permit Tomlinson to enter their territories;

(e) damages for the violations claimed;

(f) costs; and

(g) such further or other relief as may be just.

The Defence of the States

[14] Both States have disputed that Tomlinson has suffered any prejudice in the enjoyment of his Community rights. Both agree that Tomlinson has the right to enter their territories without hassle and to stay there up to six months. Neither State has argued that homosexuality constitutes a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' within the meaning of the 2007 Conference Decision. They both concede that homosexuality cannot, without more, categorise Tomlinson or any other CARICOM national as an 'undesirable person' within the meaning of that Decision.

[15] In fact, both States submit that whatever their immigration legislation may provide or be interpreted to mean, in practice they do not prohibit and never have prohibited CARICOM nationals from entering their country on the basis of their sexual orientation. In respect of Trinidad and Tobago, evidence was offered that Immigration Officers do not have the means to ascertain whether an individual is homosexual. Both States refer, *inter alia,* to the undisputed fact that Tomlinson has visited their countries several times without any problem. Both conclude that Tomlinson's claims must be refused and that he should be ordered to pay costs. Notwithstanding the areas of commonality, there is an important distinction in the line of defence adopted by the two States which is highlighted below.

Tomlinson's Reply

[16] Tomlinson does not deny that both States seem to have adopted a policy or practice which allows homosexuals to enter their territories. He nevertheless contends that he has been prejudiced in the enjoyment of his right to free movement as there is genuine legal uncertainty about what will happen when he seeks to enter either of these States. According to him, being a person formally prohibited under the national laws of Belize and Trinidad and Tobago, he would be breaking the law should he seek to enter these countries, thereby rendering him liable to prosecution. The relevant immigration officers would be under a legal duty to stop him at the border given that his sexual orientation is widely known. In fact, should the officers admit him into their country, knowing that he is a homosexual, they would wilfully violate their immigration laws. Therefore, Tomlinson is of the view that there is no proper legal guarantee that he will not be stopped at the border or, even worse, that he will not be prosecuted.

The Caribbean Community

[17] By order dated 15 December 2014, the Court granted leave to the Caribbean Community to maintain a watching brief and file submissions in this matter. CARICOM submits that the Court ought not to embark on a process of statutory interpretation of the relevant immigration laws but rather should confine itself to determining the extent to which these provisions comply with Community obligations. They contend that the mere existence of sections 5 and 8 of the Immigration Acts of Belize and Trinidad and Tobago, respectively, may not amount to prejudice within the meaning of the RTC. Rather in seeking to establish prejudice, due regard must be paid to State practice as well as the fact that under Article 240 of the RTC, compliance with Community obligations can take the form of either legislation or administrative measures. CARICOM also raises the issue of whether sections 5 and 8 of the respective Immigration Acts have been impliedly repealed by the CARICOM Acts of both States, in which case there would be no legal impediment to Tomlinson's entry. Their submissions provide helpful insight into the relevant provisions of the RTC and, in particular, the Skilled Nationals Regime.

CARIFLAGS

[18] By way of notice of application filed on 24 June 2014 CARIFLAGS sought leave of the Court to be joined in these proceedings as an intervener. This application was refused but in the interests of justice and pursuant to its inherent jurisdiction, the Court gave leave to CARIFLAGS, even though not a party to the proceedings, to file submissions, which order was complied with on 9 January 2015. In its written submissions, CARIFLAGS emphasises the mere existence of the impugned provisions of the Immigration Acts in question violates Tomlinson's rights as a CARICOM national. It submits that the position of Belize and Trinidad and Tobago that nothing less than actual refusal of entry would constitute prejudice, should be given short shrift. CARIFLAGS emphasises the broad ambit of the right to free movement as expressed by the Court in *Myrie* and notes that neither State has sought to argue that Tomlinson, by virtue of his sexual orientation, can fall within the exceptions therein contained. It also contends that the Immigration Acts of both States reverberate with discriminatory effect in that they refuse entry only to homosexuals who are CARICOM nationals or foreigners but no similar prohibition is applied to their own citizens. There is no basis upon which this clear disparity of treatment can be justified.

Homosexual CARICOM nationals and the right to free movement

[19] As established by this Court in *Myrie*, the 2007 Conference Decision created a binding obligation on the Member States to allow all CARICOM nationals hassle free entry and an automatic stay of six months upon arrival into their respective territories. This right is subject only to two exceptions: the right of Member States to refuse entry to 'undesirable persons' and their right to prevent persons from becoming a charge on public funds. The latter exception is of no particular relevance in this case and will therefore not be discussed.

[20] The obligations under the 2007 Conference Decision are binding on the Member States. They are mirrored by correlative or corresponding rights of CARICOM nationals who, under Community law, are legally entitled to enter the territories of these States without hassle or harassment and to stay there up to six months, unless shown that they 'present a genuine, present and sufficiently serious threat affecting

one of the fundamental interests of society.'[6] These correlative rights arise of necessity or by the mere operation of law (*ipso jure*). To the extent that these rights are sufficiently clear, precise and legally complete, they are capable of direct application, though subject to the relevant constitutional procedures of the Member States (*per* Article 240 of the RTC).

[21] As conceded by both States, homosexuals do not, as such, present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In essence, therefore, homosexual CARICOM nationals have a right to freedom of movement on the same terms as any other CARICOM national and both Belize and Trinidad and Tobago agree that this is so. This right is consonant with the development of human rights law in the twentieth century alluded to later in this judgment. In short, both States admit and affirm the existence of an international legal obligation in the form of the 2007 Conference Decision, which enures to the benefit of Tomlinson. The question is whether that obligation has been breached by the mere existence of the impugned provisions in their Immigration Acts.

National legislation and the breach of international treaty obligations

[22] Article 12 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts repeats the rule of customary international law that there is 'a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation…' Article 4 clarifies that an act of State may be constituted by conduct of the legislature, executive or the judiciary. Accordingly, in deciding whether a State has breached its international obligation, it is necessary to examine the relevant acts of the State, that is to say, the relevant State practice, to ascertain whether those acts are inconsistent with the international obligation of the State. In this regard, acts of the legislature constitute important indications of State practice and as such warrant close examination.

[6] ibid *Myrie* (n 1) [70].

[23] It is possible that an international obligation can be breached by the enactment of legislation that conflicts with what is required by that international obligation. Unlike the present case before the Court, the usual litigation has concerned the enactment of legislation *after* the creation of the international obligation. Where, for example, there is a specific treaty obligation to prohibit certain conduct or to enact a uniform law the mere enactment of a legislative measure with incompatible provisions may well constitute a breach.[7] However, although the point is not often canvassed in the literature, there may be cases where retention of a pre-treaty legislative measure containing provisions incompatible with the treaty obligation may also constitute a breach of the treaty. Clearly, the retention of such unmodified legislative provisions may provide evidence of State practice which is inconsistent with the international obligation of the State.

[24] It is not possible, however, to lay down any general rule in this regard. Furthermore the enactment or retention of seemingly conflicting legislation may not, in and of itself, amount to a breach of a State's international obligations. As noted by the International Court of Justice, much depends on whether and how the legislation is given effect: *LaGrand (Germany v United States of America), Judgment*.[8] This principle was recognized and accepted by this Court in *Myrie*,[9] when it was stated, in respect of provisions in the Barbados Immigration Act which were alleged to be in breach of the 2007 Conference Decision, that a 'violation of Community law is not so much caused by the existence of domestic laws that seemingly contradict it but by whether and how these laws are applied in practice...' Indeed, the violation may depend on whether and how the laws are applied or are likely to be applied in practice.

[25] The proper construction to be placed upon the legislation is an important indicator of 'whether and how' it will be applied and, therefore, whether it may constitute a breach of the State's obligation. The construction of a domestic statute in an international dispute is an issue of fact relating to the conduct of the legislature. In

[7] James Crawford (ed), *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 52.
[8] I.C.J. Reports 2001, p. 466 at [90] – [91].
[9] *Myrie* (n 1) [80].

Certain German Interests in Polish Upper Silesia, the Permanent Court of International Justice, observed:

> From the standpoint of International Law and of the Court which is its organ, national laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.[10]

[26] In making factual findings concerning the application of a State's domestic legislation, this Court, as an international tribunal, will naturally give considerable deference to the views of the State on the meaning of its own law. However, the Court accepts ultimate responsibility for determining the application of national law in relation to the State's international obligation. In this regard, this Court follows the practice adopted in other international tribunals. By way of example, in adjudicating on the rights and obligations flowing from an international trade agreement, the World Trade Organisation (WTO) has had occasion to examine the municipal laws of its Member States for consistency with the General Agreement on Tariffs and Trade (GATT). In *India – Patents (US)*[11] the Appellate Body made clear that an examination of the relevant aspects of Indian municipal law was essential to determining whether India had complied with its obligations under Article 70.8(a) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Similarly, in *United States – S 301-310 of the Trade Act of 1974*,[12] the Panel emphasized that its obligation was not to interpret US law 'as such' but merely to establish the meaning of that law as factual elements and then 'to check whether these factual elements constitute conduct by the US contrary to its WTO obligations.' The Panel made clear that it was 'not obliged to accept the interpretation presented by the US.'[13]

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[10] (1926) P.C.I.J. (ser. A) No. 7, p. 19 at [52].
[11] WTO, India - Patent Protection for Pharmaceutical and Agricultural Chemical Products - AB-1997-5 - Report of the Appellate Body (19 Dec 1997) WT/DS50/AB/R.
[12] WTO, United States – S 301 – 310 of the Trade Act of 1974 – Report of the Panel (22 Dec 1999) WT/DS152/R.
[13] ibid paras. 7.18, 7.19.

[27] Useful guidance on the ultimate responsibility of the international tribunal to determine the meaning of municipal law was provided by the International Court of Justice (ICJ) in *Elettronica Sicula S.p.A (ELSI) (United States of America v Italy).*[14] The ICJ stated that where the determination of a question of municipal law is essential to the court's decision, 'the Court will have to weigh the jurisprudence of the municipal courts, and "[i]f this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law".'[15]

[28] The identification of the responsibility for proof of the effect of domestic legislation is not controversial. In accordance with universally accepted rules of evidence, the burden of proving that the legislation is in breach of the State's obligations lies upon the claimant. As the WTO Appellate Body stated in *United States - Carbon Steel (India)*:[16]

> 157… a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.

[29] The following principles may be deduced from the jurisprudence adopted by international tribunals. First, there is no general rule that enactment of legislation which conflicts with a State's treaty obligation necessarily constitutes a breach of that obligation; much depends on the nature of the treaty obligation and on whether and how the legislation, however interpreted, is applied. Second, in construing the domestic legislation the international tribunal is not 'as such' interpreting national law; rather the tribunal is engaged in establishing the meaning of the national law

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[14] I.C.J. Reports [1989] 5.
[15] Quoting *Brazilian Loans,* P.C.I.J., Series A, Nos. 20/21, p. 124.
[16] WTO, United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India - AB-2014-7 - Report of the Appellate Body (8 Dec 2014) WT/DS436/AB/R.

as factual elements of state practice in order to check whether these factual elements constitute a breach by the State. Evidently, in evaluating the impact of these elements, other relevant aspects of State practice, such as administrative acts of the State, must also be taken into account. Third, in construing domestic law, the international tribunal will naturally give considerable deference to the views of domestic courts on the meaning of its own laws but may itself, in appropriate circumstances, select the interpretation that it considers most in conformity with the law.[17] Fourth, the burden of proving that the legislation breaches the State's obligation lies upon the Claimant.

<u>Is the existence of the Immigration Acts a Breach of the Right of Free Movement</u>?

The State of Belize

[30] Section 5(1)(e) of the Immigration Act classifies prostitutes, homosexuals or any person who has been living on or receiving the proceedings of prostitution or homosexual activity as prohibited immigrants. The question to be resolved is whether the phrase 'living on or receiving the proceeds of prostitution or homosexual behaviour' qualifies the meaning of "prostitutes" and "homosexuals".

[31] Belize's main submission is that section 5(1)(e) of its Immigration Act is to be interpreted as targeting those persons *who may be living on or receiving or may have been living on or receiving the proceeds of prostitution or homosexual behaviour*. As such only homosexuals who benefit from prostitution or homosexual behaviour are prohibited immigrants caught by the section. Belize contends that it is for this reason the section has never been applied to Tomlinson or other homosexuals who do not fall within that category. However, even if this interpretation were not correct, Belize submits it would, and does, abstain from applying the provision 'strictly.' It is clear that, if Belize's main submission is correct, Tomlinson cannot successfully claim that he has been prejudiced by the law or practice of that State as no one suggests that he benefits from the proceeds of homosexual activity.

[17] *Elettronica* (n 14).

[32] Tomlinson contends that Belize's construction of section 5(1)(e) does not accord with the natural and ordinary meaning of the words used. Much emphasis is placed on the use of the disjunctive 'or' in the section. Tomlinson contends that as drafted, section 5(1)(e), was clearly intended to create three categories of prohibited immigrants:

(i) prostitutes;

(ii) homosexuals; or

(iii) any person who may be living on or receiving or may have been living on or receiving the proceeds of prostitution or homosexual behaviour.

[33] The meaning and scope of national laws must first and foremost be assessed in the light of the interpretation given to them by national courts or, in its absence, legal doctrine. It is to be noted that Tomlinson bears the burden of proving that the Immigration Act is incompatible with the 2007 Conference Decision. Unfortunately, no national judicial decisions or other legal authorities have been referred to by Tomlinson in support of his submission that section 5(1)(e) of the Immigration Act of Belize is inconsistent with the 2007 Conference Decision. Nor have any arguments been presented to the Court based on the legislative history of the Immigration Act or other parliamentary materials which suggest that the courts in Belize, if called upon to interpret the provision concerned, would not do so liberally or broadly, or at the least in the light of the wording and the purpose of the 2007 Conference Decision as construed by this Court in *Myrie*.

[34] While it is true that a literal construction of section 5(1)(e) of the Belize Immigration Act, seems to favour the interpretation contended for by Tomlinson the Court has no hesitation in stating that the interpretation suggested by Belize is the more plausible one. The wording and the context of the provision strongly suggests that the immigrants under this subsection are prohibited because, regardless of their sexual orientation, they are seeking financial gain either by offering sexual services themselves or by profiting from those performed by others. It is to be noted that the State's construction of this provision is clearly supported

by the actual practice of its administrative and executive arms as outlined in the testimony of Ms Marin, the Director of Immigration (Ag.) of Belize.

[35] Belize's construction of section 5 of its Immigration Act is obviously not limited to CARICOM nationals but generally prevents any homosexual who does not profit financially from homosexual acts, whatever nationality he or she might have, from being categorised as a prohibited immigrant. This broader approach seems to be in harmony with the Preamble and section 3(e) of the Belize Constitution, which guarantees *every person* in Belize the right to recognition of his human dignity, and with similar provisions in international instruments, such as the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man.

[36] Further, when considering section 5(1)(e) of the Immigration Act in the light of Belize's obligations under Community law, section 64(1) of Belize's Interpretation Act[18] must be noted. Section 64(1) clearly prescribes that in ascertaining the meaning of any provision of an Act, regard must be had to, *inter alia*, 'any provision of the Caribbean Community Treaty and any Community instrument issued under the Treaty, where relevant.' That Treaty, of course, is the RTC and the 2007 Conference Decision clearly qualifies as an instrument issued thereunder. The RTC has been incorporated into domestic law by the Caribbean Community Act, 2004.[19] In fact, section 3(2) of the Caribbean Community Act specifically references section 64(1). It should further be noted that section 65 of the Interpretation Act, in providing guidance on the approach to statutory interpretation, makes express reference to the principle that where more than one construction of a legislative provision is reasonably possible, the construction which is consistent with the international obligations of the Government of Belize is the preferred choice.

[37] The Court reminds itself that its role in the Original Jurisdiction differs from its role in the Appellate Jurisdiction. At the same time, however, the Court cannot ignore

[18] CAP 1 of the Laws of Belize.
[19] CAP 17 of the Laws of Belize.

the fact that it is the final appellate court for Belize. Accordingly, when the Court pronounces on the meaning, interpretation or application of a provision of the national law of Belize that pronouncement is authoritative even when it sits in its original jurisdiction.

[38] In sum the Court remains unconvinced that, based on either interpretation of the section contended for by the parties, it can be said that Tomlinson has been, may or will be, prejudiced by the existence of the Immigration Act of Belize. Tomlinson's case against Belize must therefore fail.

The State of Trinidad and Tobago

[39] There are three important distinctions regarding the case against Trinidad and Tobago. First, the wording of section 8(1)(e) of the Immigration Act is materially different. Section 8(1)(e) prohibits the entry of prostitutes, homosexuals, persons living on the earnings of prostitutes or homosexuals or persons reasonably suspected of seeking entry for these or other immoral purposes. Second, the State concedes that the section classifies homosexuals as 'prohibited persons' and therefore on its face prohibits Tomlinson's entry. Third, this Court is not the final appellate court for Trinidad and Tobago and therefore cannot be as definitive in its remarks concerning interpretation of the national law of Trinidad and Tobago.

[40] However, the defence of both States is similar regarding the issue of whether Tomlinson has been prejudiced in the enjoyment of his rights under the RTC. Like Belize, Trinidad and Tobago also argues that Tomlinson has never been and could never have been prejudiced in the enjoyment of his right to definitive entry as the State authorities, by way of administrative arrangement or practice, do not apply the prohibition contained in section 8(1)(e) to CARICOM nationals who are homosexual.

[41] The Court has previously rejected the argument by Tomlinson that the use of the disjunctive 'or' was intended to create distinct categories of prohibited immigrants. However, the essential difference in the actual wording in the Immigration Acts of

both States cannot be overlooked. Based on its clear wording, section 8(1)(e) identifies as a separate category, persons living on the earnings of *prostitutes or homosexuals,* (which would not include prostitutes or homosexuals) *as opposed to those living on* the proceeds of *prostitution or homosexual behaviour* (which could include prostitutes or homosexuals).

[42] The Court further notes that the concession made by the State is not premised on any judicial pronouncements of the domestic courts of Trinidad and Tobago. No evidence was produced of any judicial determination of the courts of Trinidad and Tobago as to the meaning of any aspect of section 8(1)(e) of the Immigration Act and there is therefore no absolute guarantee that the domestic courts would arrive at that interpretation of section 8(1)(e) accepted by the State. In any case, as the jurisprudence of international tribunals makes clear, it is the responsibility of this Court to decide on the meaning of municipal law, as factual elements of the practice of the State, although in making such decision, considerable deference will be given to the views of the State.

[43] Thus, having noted and given due consideration to the position of Trinidad and Tobago, based as it is on the wording of Section 8(1)(e), the Court nonetheless reminds itself that in common law jurisdictions such as Trinidad and Tobago, there is a sacrosanct rule that statutory provisions should if at all possible be interpreted as compliant with the State's treaty obligation rather than in breach of those obligations: *Salomon v Commissioners of Customs and Excise*.[20] This rule applies in relation to statutes (such as the Immigration Act here) which were not passed to implement the treaty obligations of the State: *Dietrich v R*.[21] In other words, the rule of construction is not confined only to statutes which are directed at implementation of an international convention but is directed at all statutes, as a general canon of statutory interpretation.[22] As this Court stated in *Myrie*, in respect of the Barbadian Immigration Act which was not enacted to implement the RTC obligations, the domestic courts 'are constrained to interpret domestic laws so as, if

[20] [1967] 2 Q.B. 116.
[21] [1992] HCA 57; (1992) 177 CLR 292.
[22] Glen Cranwell,'Treaties and the Interpretation of Statutes: Two Recent Examples in the Migration Context' [2003] 39 AIAL Forum 49.

possible, to render them consistent with international treaties such as the RTC.'[23] Whether such an interpretation is possible within their jurisdiction ultimately has to be decided by the domestic courts themselves.

[44] In this respect, it is relevant to point out that there are human rights materials that could support the domestic court of Trinidad and Tobago in taking a more liberal approach to the interpretation of section 8(1)(e) than the one advanced by Tomlinson and conceded by the State. The Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man are among the important international instruments that recognize the human dignity of every person. Sexual orientation is protected from discrimination (Article 2) and protected by the guarantee of equality before the law (Article 26) in the International Covenant on Civil and Political Rights (1966): *Toonen v Australia*.[24] International human rights which have crystallized into customary international law form part of the common law of Trinidad and Tobago.

[45] Further, this human rights approach may be seen as being in keeping with the Preamble of the 1976 Constitution of Trinidad and Tobago in its affirmation that 'the Nation of Trinidad and Tobago is founded upon principles that acknowledge … the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator.' Section 4 of that Constitution then recognizes and declares fundamental human rights and freedoms, among them the right of the individual to equality before the law and protection of the law, and the right of the individual to respect for his private and family life. There is, also, other relevant evidence of legislative state practice. In 2004, Trinidad and Tobago amended its Extradition (Commonwealth and Foreign Territories) Act, 1985, introducing a prohibition to extradite persons who might be discriminated against on the basis of gender and *sexual orientation*. Also, in 2011, a Data Protection Act[25] was adopted, a part of which has entered into force.[26] The object of this Act was to ensure that protection is afforded to an individual's right to

[23] *Myrie* (n 1) [80].
[24] Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994).
[25] Chap. 22:04 of the Laws of Trinidad and Tobago.
[26] Legal Notice No. 2 of 2012.

privacy and the right to maintain 'sensitive personal information' as private and personal, including information on a person's *sexual orientation or sexual life.*

[46] This Court reminds itself that it is not the final appellate court for Trinidad and Tobago and therefore cannot authoritatively pronounce on what interpretation the domestic courts might adopt. However, even assuming that the interpretation contended for by Tomlinson and conceded by the State was accepted, it is incumbent upon the Court to consider the further evidence of State practice in determining the international liability of Trinidad and Tobago. Ultimately, it is in the *practical application* of the legislation that such liability is grounded. As this Court stated in *Myrie*: 'A violation of Community law is not so much caused by the existence of domestic laws that seemingly contradict it *but by whether and how these laws are applied in practice...*'[27]

[47] An initial point of some importance is that the Caribbean Community Act,[28] gives the RTC the force of law in Trinidad and Tobago. Enactment of this Act means that Article 9 (and also Articles 45, 46 and 240) of the RTC are part of the domestic law of Trinidad and Tobago. The incorporation of Article 9 means that national courts are required 'to do whatever lies within their jurisdiction, having regard to the whole body of rules of national law, to ensure that the [2007 Decision] is fully effective'; the principle of interpretation in conformity with Community law, as stated by the ECJ in *Pfeiffer*.[29] Moreover, the term 'appropriate measures' in Article 9 of the RTC requires similarly that the executive and legislative arms of the State take all necessary measures within the limits of their constitutional authority to ensure the carrying out of Community obligations resulting from a decision taken by the Conference of Heads of Government (or another Organ or Body).

[48] Accordingly, the Court is driven to consider the totality of relevant State practice. It becomes clear that there are specific statutory provisions in Trinidad and Tobago, which, as acts of the Legislature, encourage or suggest, at the very least, an

[27] *Myrie* (n 1) [80].
[28] Chap. 81:11of the Laws of Trinidad and Tobago.
[29] *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*: C-397/01 to C-403/01 [2004] ECRI–8835, [2005] IRLR 137.

application of section 8(1)(e) that is consistent with the 2007 Conference Decision made under the RTC. Two related provisions are especially noteworthy. The provision in section 8 of the Caribbean Community Act that 'in the event of any inconsistencies between the provisions of this Act and the *operation* of any other law, the provisions of this Act shall prevail to the extent of the inconsistency' is of primary importance. Whatever may be the effect of section 8 of the Caribbean Community Act on subsequent legislation, where constitutional issues could perhaps arise on the basis of Article 240 of the RTC, there can be no doubt that prior legislation, such as the Immigration Act, comes within the statutory requirement for application consistent with the RTC. Arguably, this is precisely what the immigration officials of Trinidad and Tobago have done and have committed to do in relation to section 8(1)(e) of the Immigration Act in so far as it may be said to apply to Tomlinson. This legislative directive to the Immigration Officers, as further detailed below in [54], virtually provides a complete answer to Tomlinson's concerns.

[49] But there is more. Article 46 of the RTC specifically provides that Member States agree to accord certain categories of Community nationals the right to seek employment in their jurisdictions. These categories include university graduates recognised as such by the competent authorities of the receiving Member States. By virtue of being a UWI graduate, Tomlinson is entitled (notwithstanding that he is a homosexual) to enter Trinidad and Tobago to seek employment. Admittedly, this is a right in the RTC but it must be remembered that the RTC has been incorporated into the laws of Trinidad and Tobago. Furthermore, this right to enter Trinidad and Tobago to seek employment is consolidated in section 3 of the Immigration (Caribbean Community Skilled Nationals) Act[30] (the Skilled Nationals Act) which requires an immigration officer to permit entry into Trinidad and Tobago of skilled CARICOM nationals who present a skills certificate, 'notwithstanding any other written law.' By virtue of being a UWI graduate, Tomlinson is entitled to a skills certificate (although he has yet to apply for one):

[30] Chapter 18:03 of the Laws of Trinidad and Tobago. See also the November 2004 and 2005 Conference Decisions of the CARICOM Heads of Government which further elaborate on the rights granted to CARICOM Skilled Nationals.

section 8 of the Skilled Nationals Act. If Tomlinson enjoys a legal right of entry under the Skilled Nationals Act (notwithstanding that he is a homosexual) it seems incongruous that he could legally be denied entry under section 8(1)(e) of the Immigration Act on the basis that he is a homosexual.

[50] In addition to these legislative measures, the actual practice or policy of the Immigration Division of Trinidad and Tobago must be considered. At the hearing, evidence was given by Mr Gerry Downes, Acting Chief Immigration Officer, who reiterated and confirmed the following parts of his witness statement:

> *Admission into Trinidad and Tobago is governed principally by the Immigration Act Chap 18:01 and its Regulations and the Immigration (Caribbean Community Skilled Nationals) Act Chap 18:03. At a port of entry, a prospective entrant seeking lawful entry into Trinidad and Tobago must interface with an Immigration Officer. A key responsibility of an Immigration Officer is to determine if that prospective entrant may lawfully be permitted entry into the country. In order to make this determination an Immigration Officer is required to assess the prospective entrant by among other things scrutinizing the travel documents presented and where necessary questioning the prospective entrant.*
>
> *New Immigration Officers are exposed to a 5 week classroom induction training programme. Their training familiarizes them with the application of section 8 of the Immigration Act. Nowhere during the training period or at any time is an Immigration Officer trained to identify homosexuals for the purposes of section 8 (1) of the Immigration Act.*
>
> *The Immigration Officers do not enquire as to the sexual orientation of a prospective entrant. There are inherent practical challenges in making a determination of the sexual orientation of a person entering the country and for this reason there is not now any standard operating procedures or policies geared towards identifying someone who is homosexual and attempting to enter our borders.*
>
> *If an individual shows proof that he is a homosexual, then the officer may take the issue to a secondary officer. An Immigration Officer IV is in charge of an entire port of entry. An Immigration Officer III is in charge of a shift. If an Immigration Officer I encounters a situation where grounds for refusal exist, he refers it to an Immigration Officer II and it continues to escalate to the Immigration Officer IV, who is the special enquiry officer at the particular port. If the person seeking entry is denied entry by an Immigration Officer I-III, then such person can appeal to the Immigration Officer IV under section 21. If the person seeking entry is dissatisfied with the decision made by this special enquiry officer, then that person has the option of appealing to the Minister of National Security under section 27.*

> *Persons prohibited from entry into Trinidad and Tobago under section 8 (1) of the Immigration Act may be allowed entry into the country under section 10 (1). Also, if a person successfully appeals his rejection, that person would be allowed entry. The Immigration Division does not have the capability to screen people for entry on the basis of sexual orientation and the Immigration Division does not do so*.

[51] The Court notes that best practice requires that these practices and policies be stated in official documents that have been made available to the public. The Memorandum of October 23, 2008 from the Chief Immigration Officer to all immigration officers pertaining to 'Admission of Nationals of CARICOM Member States' was not published. It is nonetheless of significant importance. This Memorandum provides that:

> With immediate effect, nationals of CARICOM member states seeking entry for Vacation or Business are to be admitted for a period of six months, *provided that all Immigration requirements are satisfied*, and that the person seeking entry is not likely to become a charge on public funds during his stay in Trinidad and Tobago...

[52] Under cross-examination, Mr Downes admitted that this memorandum is the only document containing a written policy regarding CARICOM nationals. He also admitted that there was no written policy on how to deal with homosexual immigrants. Pressed to give a further explanation of the phrase 'provided that all immigration requirements are satisfied' he first said that this only meant that one should have a valid travel document. He then stated that he did not think that the entire section 8 was to be ignored, just the part about homosexuals, although there was no written document or instruction saying so.

[53] Tomlinson makes the point that, although there may well be a practice of not prohibiting entry into Trinidad and Tobago of CARICOM nationals who are homosexuals, in the absence of a published written document or instruction to this effect, that there is genuine legal uncertainty about what will happen if he, a well-known homosexual, presents at immigration in Trinidad and Tobago. He suggests that this uncertainty is heightened by the fact that practices and policies may change over time. More importantly, Immigration Officers are under a duty to apply the

laws and should they deliberately refuse to so do, they would be in breach of their duty and thus liable to prosecution or disciplinary action.

[54] The legal obligation on Immigration Officers to ensure that the operation of the Immigration Act is consistent with the RTC as incorporated in Trinidad and Tobago law is certainly relevant here. Also highly relevant is Tomlinson's right to enter Trinidad and Tobago to seek employment pursuant to section 3 of the Skilled Nationals Act. This Court has already observed that Article 9 of the RTC imposes a duty on the State, including its executive arm, to take measures necessary to comply with Community obligations. It is also the clear intention of the RTC, as exemplified by Articles 211 and 214 (which have also been domestically enacted) to create a system of Community law that is uniform throughout the whole of the Community and its Member States. In light of these matters, the Court considers that it would be fanciful to expect that national courts would hold that immigration officers who admit known homosexuals from other Community States into Trinidad and Tobago would be in breach of duty so as to justify prosecution or the taking of disciplinary measures against them. It is noteworthy in this respect that there is no evidence nor has it been suggested that Trinidad and Tobago has as official policy a homophobic approach to foreigners (or anyone else, for that matter). Indeed, the legislative initiatives mentioned earlier at [45] point to the contrary.

[55] In these circumstances, the Court must conclude that Tomlinson has not shown that he has 'been prejudiced in respect of the enjoyment of [his] right' to the extent required under the RTC in order to demonstrate a breach by Trinidad and Tobago. The Court therefore finds that Tomlinson's case against Trinidad and Tobago also fails.

[56] Having reached this conclusion, the Court wishes to state that it is not to be taken as condoning the indefinite retention on the statute book of a national law which in appearance seems to conflict with obligations under Community law. Member States should ensure that national laws, subsidiary legislation and administrative practices are transparent in their support of the free movement of all CARICOM nationals. This is a necessary aspect of the rule of law, which, as the Court has

indicated, is the basic notion underlying the Caribbean Community.[31] In principle, national legislation should expressly be harmonized with Community law. Any permanent or indefinite discord between administrative practices and the literal reading of legislation is undesirable as the rule of law requires clarity and certainty especially for nationals of other Member States who are to be guided by such legislation and practice.

[57] Before concluding this judgment, there are two issues that have been raised and argued by Tomlinson that must be briefly addressed: the right not to be discriminated against on the ground of nationality only and the position of homosexual Skilled Community Nationals.

Are CARICOM homosexual immigrants discriminated against on the basis of nationality alone?

[58] The Court notes that homosexuality is not, as such, prohibited in Trinidad and Tobago. Tomlinson raised the point that the Immigration Act does not prohibit Trinidadian homosexuals from entering the country (even if they were known to be engaged in homosexual prostitution or likely to become a charge on the public funds), whereas homosexuals from other States are prohibited entry. Therefore, so the argument goes, the only difference between homosexuals who are prohibited and those who are not lies in the fact of their nationality only, which constitutes discrimination within the meaning of Article 7 of the RTC.

[59] However, the argument ignores the fact that in immigration issues a legitimate distinction can be drawn between nationals and non-nationals. It is a general principle of international law that nationals cannot be refused entry by their own State, whereas the State can refuse entry to non-nationals. The regime created by Article 45 of the RTC and the 2007 Conference Decision to a great extent softened this distinction in relation to CARICOM nationals, although exceptions still remain in place for the latter. Article 7 of the RTC is limited to 'the scope of application of

[31] *Trinidad Cement Limited v The Community* [2009[CCJ 2 at [32]

this Treaty' and there is no indication that the RTC is intended to eliminate the basic elements of State sovereignty, one aspect of which is the sheer unbreakable tie between the State and its nationals.

The position of homosexual Skilled Community Nationals

[60] The position of homosexual Skilled Community Nationals has already been discussed but a few brief additional comments may nevertheless be in order. Trinidad and Tobago has denied that Tomlinson is a Skilled Community National as he has not been recognised as such by the competent authorities of Trinidad and Tobago. Particular emphasis is placed on the fact that he cannot show a proper certificate issued by the Government of Trinidad and Tobago or by the Government of another qualifying CARICOM State. Such certificate, Trinidad and Tobago argued, is required on the basis of Article 46 of the RTC and Skilled Nationals Act, section 4. Tomlinson concedes that he has not applied for this certificate but avers that because he has proof of being a University graduate, any such certificate is unnecessary.

[61] The Court notes that to be able to invoke the rights under Article 46 as a skilled Community national, a CARICOM national need not only belong to a certain category, for instance that of a University graduate, but also be 'recognised as such by the competent authorities of the receiving Member States.' How such recognition takes place is a matter for the States themselves. In the case of Trinidad and Tobago, section 8 of the Skilled Nationals Act expressly provides that a degree from UWI satisfies the qualification requirements for a certificate.

[62] It was suggested by counsel for CARICOM that the right of free movement under Article 46 of the RTC has been created for the sole purpose of seeking employment and, therefore, could not be invoked by skilled Community nationals for any other reason. This view, however, strikes the Court as being too narrow. Article 46 of the RTC has been promulgated as 'a first step towards achieving the goal of free movement of Community nationals generally as set out in Article 45 of the RTC.' The Article first addresses itself to an elaboration of that right and then extends it

to such matters as the elimination of the requirement of work permits, etc. Likewise, the Skilled Nationals Act does not seem to limit the free movement rights of skilled Community nationals to seeking employment but, instead, broadens these rights to enable these nationals to find work within that State.

Conclusion

[63] It follows from the above, that the claims of Tomlinson against Belize and against Trinidad and Tobago fail. In consequence, the requested remedies must be refused. Both States accept Tomlinson's right of entry into their territories and a requested declaration in those terms hardly advances matters. The Court holds that Tomlinson has no valid reason to assume that his rights will not be respected by the States. The reasons for this conclusion are twofold. First, State practice in relation to section 5 (1) (e) of the Belize Immigration Act and section 8(1)(e) of the Trinidad and Tobago Immigration Act does not suggest any incompatibility with the RTC or the 2007 Conference Decision. Second, the practice or policy of admitting homosexual nationals from other CARICOM States (not falling under the two exceptions mentioned in the 2007 Conference Decision) is not a matter of discretion but is *legally required* based on Article 9 of the RTC as this is an *appropriate measure* within the meaning of that provision. Given the transformation of this Treaty provision into domestic law, this legal requirement equally exists within the domestic legal order of a Member State, notwithstanding a real or apparent contradictory provision in the national Immigration Act.

[64] As to costs, the Court takes into account Part 31.1(3) of its Original Jurisdiction Rules 2015, which states that in exceptional circumstances the Court may order that the costs be shared or that the parties bear their own costs. As the Court stated in *Hummingbird Rice Mills Ltd v Suriname*:[32]

> What does or does not amount to exceptional circumstances is to be determined on a case by case basis. At this nursery stage of the development of Caribbean Community law, it is important that the burden of establishing the basic principles underpinning the Single Market should not weigh too heavily and disproportionately on private entities and thus

[32] [2012] CCJ 2 (OJ) [6].

discourage the bringing of important issues of economic integration law before the Court.

[65] It cannot be denied that this case raised novel questions and has contributed to the clarification and development of Community law. In the circumstances, the Court will order each party to bear its own costs.

[66] The Court was greatly assisted by the invaluable contributions and submissions of Counsel for all the parties involved. The Court acknowledges and regrets the delay in delivering this judgment.

Decision

[67] **The Court:**

(a) **Dismisses** the Amended Originating Application filed herein; and
(b) **Orders** each party to bear its own costs.

/s/ CMD Byron

The Rt Hon Sir Dennis Byron (President)

/s/ R. Nelson

The Hon Mr Justice Rolston Nelson

/s/ A. Saunders

The Hon Mr Justice A Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ W. Anderson

The Hon Mr Justice W Anderson