[2012] CCJ 3 (OJ)

IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No OA 002 of 2012

Between

Shanique Myrie **Claimant**

And

Barbados **Defendant**

THE COURT,

composed of D Byron, President, A Saunders and J Wit, Judges

Having regard to the request for leave to intervene filed on behalf of the State of Jamaica on July 13, 2012, the written submissions in opposition to the request filed on behalf of the Defendant on August 2, 2012, the written submissions filed on behalf of the Claimant on August 2, 2012 and the written submissions filed by the State of Jamaica on August 23, 2012 in response to the submissions of the Defendant and to the hearing held via videoconference on September 20, 2012

and after considering the oral submissions made on behalf of:

- **the Claimant,** by Ms Michelle Brown, Attorney-at-Law
- **the Defendant,** by Mr Roger Forde, QC appearing in association with Mr P K H Cheltenham, QC, Dr David Berry and Ms Donna Brathwaite, Attorneys-at-Law
- **the State of Jamaica,** by Dr Kathy-Ann Brown and Mr O'Neil Francis, Attorneys-at-Law

delivered on September 27, 2012 its judgment and issues on October 26, 2012 the following

REASONS FOR JUDGMENT

Introduction

[1] This judgment arises out of an application by the State of Jamaica for leave to intervene in proceedings brought by Ms Shanique Myrie, a national of Jamaica, against the State of Barbados. The Court opted to deal with the matter during the Long Vacation because the Court considered it to be one requiring prompt attention. Oral submissions having been received on September 20, 2012, the Court on September 27, 2012 made several orders including an order granting leave to Jamaica to intervene in the proceedings. These are the reasons for the orders that were made.

[2] Ms Myrie had previously applied for and obtained Special Leave to appear as a party in the proceedings filed against Barbados. Her application for Special Leave was supported, *inter alia*, by evidence demonstrating that, in accordance with Article 222(c)(ii)[1] of the Revised Treaty of Chaguaramas ("the Revised Treaty"), Jamaica had expressly agreed that she should herself bring her claim against Barbados in lieu of Jamaica espousing it on her behalf.

[3] Ms Myrie filed an Originating Application on May 17, 2012 alleging that the object or purpose of the Revised Treaty was being frustrated and prejudiced by Barbados. She claimed relief for serious injury, prejudice suffered and impairment of benefits in respect of enjoyment of her rights under the treaty, with specific reference to Articles 7, 8, 9, 28(1) and 45. The claim is rooted in an incident involving her and Barbadian Customs and Immigration officials on March 14 and 15, 2011 at the Grantley Adams International Airport.

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[1] Article 222(c) states: "Persons, natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:

(a) …
(b) …
(c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:
    (i) omitted or declined to espouse the claim, or
    (ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; "

[4] Arising from the allegations made in the Originating Application, the Court is required, among other things, to consider, interpret and apply several provisions of the Revised Treaty and also a Decision of the Conference of Heads of Government at their Twenty-Eighth Meeting held in Barbados from July 1-4, 2007 ("the Conference Decision").

[5] On May 24, 2012 in keeping with Part 10.3 of the relevant Rules of Court, the Registrar of the Court sent a Notice to The Community and all Member States of the filing of Ms Myrie's Originating Application. The Registrar's notice set out the relief and Orders sought by Ms Myrie and gave notice that any person or Contracting Party who wished to intervene in the proceedings should file an application for leave to intervene within six weeks of being served with the said notice.

[6] Barbados filed a Defence to Ms Myrie's claims on July 11, 2012. Many of the factual allegations contained in the Originating Application are disputed in the Defence. More importantly for the purpose of the present proceedings, the status, validity and efficacy of the Conference Decision were put in issue as was the interpretation that Ms Myrie placed on the several Articles of the Revised Treaty which she claims were violated by Barbados.

[7] Jamaica received the Registrar's notification on June 1, 2012 and on July 13, 2012, within the time limited for so applying, Jamaica requested leave to intervene in the proceedings. The request to intervene was supported by Ms Myrie. Barbados objected to the proposed intervention.

The statutory framework governing Intervention

[8] Article XVIII of the Agreement Establishing the CCJ ("the Agreement")[2] provides for intervention by Third Parties. Section 1 of this Article gives the Court a discretionary power to allow intervention in the proceedings by any Member State, the Community or a person who considers that it has a substantial interest of a legal nature which may be affected by a decision of the Court in the exercise of its original jurisdiction.

[9] Article XVIII is buttressed by Part 14 of the Rules of Court. Part 14 sets out how and when to intervene and the procedure to be followed both before an application to intervene is made and, if the same is successful, after it has been granted. Rule 2 of Part 14 requires the Applicant, *inter alia*, to set out the substantial interest of a legal nature that is claimed, how that interest may be affected by a decision of the Court and the contentions which the applicant wishes to put forward in the current proceedings. Rule 6 of Part 14 makes it clear that an Intervener shall accept the case as he finds it at the time of his intervention so that his intervention shall have prospective effect only.

Contentions of Jamaica

[10] Jamaica submits that its substantial legal interests that may be affected lie in the circumstance that any judgment rendered in this case will establish a binding precedent for all Member States, whether parties or not to the proceedings which give rise to the judgment. Jamaica relies for this submission on its interpretation of Article 221 of the Revised Treaty[3]. Jamaica considers that its interest in seeking to safeguard the rights enshrined in the Revised Treaty and ensuring that

[2] Article XVIII states: "1) Should a Member State, the Community or a person consider that it has a substantial interest of a legal nature which may be affected by a decision of the Court in the exercise of its original jurisdiction, it may apply to the Court to intervene and it shall be for the Court to decide on the application. 2) Whenever the construction of a convention to which Member States and persons other than those concerned in the case are parties, is in question, the Registrar shall notify all such States and persons forthwith. 3) Every State or person so notified has the right to intervene in the proceedings; but if the right is exercised, the construction given by the judgment will be equally binding on all parties."

[3] Article 221 atates: "Judgments of the Court shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219."

Barbados, like all other Member States, respects the rights and benefits arising under the same sufficiently entitle it to intervene in the proceedings. Jamaica contends that the rights and benefits at stake here for Jamaican citizens are among the most practical manifestations of the operation of the CARICOM Single Market and Economy ("the CSME") including freedom of movement within the Community arising under Articles 9, 28(1), 45 and 240 of the Revised Treaty; the right to non-discrimination on the ground of nationality as contained in Article 7; the right to most favoured nation treatment contained in Article 8 and the obligation of all Member States to respect and protect the dignity of every person in accordance with the Preamble and Article 9.

[11] The Claimant supports the submissions of Jamaica and requests that the Court grant Jamaica permission to intervene in the proceedings.

Contentions of Barbados

[12] Barbados disputes the interpretation placed on Article 221 by Jamaica. The position of Barbados is that a decision of this Court in proceedings can affect only the parties to those proceedings. Jamaica's interests are therefore entirely unaffected by the outcome of the present proceedings. Only Ms Myrie and Barbados can be bound by decisions arising out of the present Originating Application because judgments of this Court create binding precedent only for the existing parties before the Court. In this respect Barbados equates Article 221 with Article 59[4] of the Statute of the International Court of Justice ("ICJ"). Barbados also claims that there is no system of binding precedent in general public international law and various European publicists[5] are cited to support the notion that, as a court of both original and final jurisdiction, it is imperative that this Court should retain the ability to change the directions of its jurisprudence and depart from previous decisions.

[4] Article 59 states: "The decision of the Court has no binding force except between the parties and in respect of that particular case".
[5] Kaczorowska, *European Union Law*, 2nd Edition (London: Routledge, 2011), at p. 231; Arnull, *The European Union and its Court of Justice* (Oxford: Oxford University Press, 1999) at 528-533

[13] Secondly, Barbados contends that Jamaica's interest in securing respect for the rules of international law including the provisions of the Revised Treaty are too generalized to ground an application for intervention. Such interests are shared in common by all Member States of CARICOM and are therefore incapable of meeting the legal threshold established by Article XVIII. In elaborating on this submission Barbados considers Article 211 of the Revised Treaty (the Article giving the Court jurisdiction to hear disputes) and distinguishes State versus State claims[6] from applications by private entities[7]. According to Barbados, these two forms of claims seek to vindicate different rights because while a State brings a claim to ensure respect for its sovereignty and for the rules of international law, a private entity like Ms Myrie here is claiming personal remedies for specific harm allegedly done to her. Barbados claims that Jamaica has no, and can have no peculiar interest, far less a substantial interest of a legal nature which may be affected by a determination *in Ms Myrie's application*. Claims brought by nationals are brought in place of claims brought by Member States. According to Barbados, there exists adequate alternative mechanisms for Jamaica to advance the interests it seeks to espouse as, for example, it may bring a separate claim against Barbados or seek from the Court an Advisory Opinion.

[14] Thirdly, Barbados submits further that by expressly permitting these proceedings to be brought by its own national in lieu of bringing them itself [see: Para [2] above], Jamaica is precluded now from intervening in the very same proceedings. In support of this submission Barbados cites with approval the judgment of this Court in *TCL and TCL Guyana Incorporated v Guyana*[8]. In that judgment the Court justified the bringing of proceedings against a State by its own national on the ground that Article 222(c)(ii) is merely "a procedural device to avoid a State allegedly in violation [of the Revised Treaty] being twice vexed, once by an injured private entity and again by the Contracting Party of that private entity".

[6] See: Article 211(a)
[7] See: Article 211(d)
[8] [2009] CCJ 1 (OJ) at [43]

Barbados argues that, if Jamaica were to be permitted to intervene in Ms Myrie's claim, it would thereby be allowed to exercise rights it had previously expressly abandoned under Article 211(a). Jamaica would therefore be allowed to exercise diplomatic protection "through the back door".

[15] Finally, Barbados accepts that in the past Member States that were not parties to proceedings that were currently before the Court had been allowed to make written and oral submissions in those proceedings. But Barbados stresses that this application by Jamaica is unique in that it represents the first occasion on which a State has sought formally *to intervene* in proceedings and the present application is strenuously being resisted by a party. Granting leave to intervene will have costs consequences which were not contemplated by the parties and the Court should not permit intervention in such circumstances especially where the Intervener has other means to vindicate its interests.

Discussion

Interpretation of Article 221 of the Revised Treaty

[16] The respective contentions make clear that interpretation of Article XVIII of the Agreement is to a great extent conditioned by an understanding of the meaning of Article 221 of the Revised Treaty. To discover whether a proposed Intervener has "a substantial interest of a legal nature which may be affected by a decision of the Court" it is imperative that the Court first determine what exactly is meant by the phrase "Judgments of the Court shall constitute legally binding precedents for parties in proceedings before the Court…"

[17] Interpretation of the Revised Treaty must commence with an examination of its specific provisions. The Revised Treaty is a multilateral regional integration pact through which the States Parties express their intention to establish a community. By Articles 211, 215 and 216 the Member States have agreed to recognize as

compulsory, *ipso facto* and without special agreement, the exclusive jurisdiction of this Court to hear and determine disputes concerning the interpretation and application of the Revised Treaty. Member States have expressly undertaken to be bound by and to comply promptly with the judgments of the Court.

[18] The jurisdiction and authority of this Court is to be sharply contrasted with, for example, that of the ICJ. The jurisdiction of the ICJ is, unlike this Court's original jurisdiction, not compulsory but based on the consent of the parties. The basic assumption underlying the ICJ Statute and Rules of Court is that in contentious cases there are two parties, and for Third States, an adversarial contentious proceeding is *res inter alios acta*. Despite some superficial similarity in wording it is therefore a mistake to equate Article XVIII(1) of the Agreement with Article 62[9] of the ICJ statute. Nor indeed, would it be appropriate to compare favourably Article 221 of the Revised Treaty with Article 59 of the ICJ statute which specifically indicates that decisions of the ICJ have no binding force except between the parties to the particular case. Unlike Article 221, Article 59 was clearly intended to express not merely the legal principle of *res judicata* but also positively to rule out a system of binding precedent by the ICJ[10]. In interpreting the Revised Treaty, the ICJ's jurisprudence on the question of intervention is of limited value.

[19] So far as the European Court of Justice ("ECJ") is concerned, it is interesting that Kaczorowska, who is cited by Barbados, also notes that while the EU legal system follows civil law systems in its approach to precedent and as such there is no doctrine of precedent under EU law, the ECJ will depart from its previous decision only in exceptional circumstances, and after considering all legal

[9] Article 62 of the ICJ Statute states:

> 62(1) Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
>
> (2) It shall be for the court to decide upon the request.

[10] Ian Brownlie, Principles of International Law at p. 21

implications[11]. This may help to explain why European States have a right to intervene in proceedings.

[20] The Court's interpretation of Article 221 as embracing a system of binding precedent for all Member States and the Community is supported by the views of those closely associated with the drafting of the Revised Treaty. For example, former Justice of the Court, Duke Pollard[12] states

> Article 221 of the Revised Treaty stipulates that judgments of the Court shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219. This provision constitutes, in the present submission, an important innovation in traditional international law which applies the principle of *jurisprudence constant*, that speaks to the tendency of international tribunals to follow previous decisions on an issue, but establishes no requirement to do so. By requiring the CCJ to apply the doctrine of *stare decisis* in arriving at judgments, however, competent decision-makers of CARICOM were concerned to ensure certainty in the applicable norms, stability of expectations on the part of economic actors and predictability of outcomes for investment decisions by investors. It is contemplated that the doctrine of *stare decisis* would be applied flexibly. In effect, competent decision-makers sought to ensure that the Court would promote dynamic stability in the applicable law and not espouse the petrification of relevant norms."

[21] The Court's case law has already demonstrated that its approach to Article 221 is consistent with the above views. One of the reasons why States were invited to make submissions on the relevant issues before the Court in *TCL and TCL Guyana Incorporated v Guyana*[13] was the recognition that the Court's resolution of the issues would bind *all* Member States.

Are Jamaica's interests too generalised to ground intervention?

[22] Once the interpretation of Article 221 is determined as indicated above, much of the argument under this heading loses its force. It is plain that the decisions the

[11] See Kaczorowska, *op. cit* at p. 231
[12] Duke Pollard, *The Caribbean Court of Justice, Closing the Circle of Independence* at p. 97
[13] [2008] CCJ 1 (OJ) at [24]

Court reaches in these proceedings are capable of providing an authoritative precedent to guide the conduct of *all* Member States. The quality and extent of Jamaica's interests in these proceedings are therefore not diminished by virtue of the fact that they are shared in common with other Member States. The judgments of the Court, especially in these early years, serve to define Caribbean Community law and Community law in turn affects the obligations of Member States and the rights of Community nationals. Jamaica's interests in the outcome of these proceedings are for Jamaica not matters of general abstraction but rather matters that could, among other things, condition Jamaica's legal obligations and the rights of its citizens.

[23] Disputes brought before the Court in its Original Jurisdiction invariably concern the interpretation and application of the provisions of the Revised Treaty. This remains the case whether the proceedings are brought by a Member State, the Community or an individual. The Court does not consider that the nature of a claim alters radically dependent upon whether it is brought by a national herself or by her State on her behalf. The character of the remedies sought from or given by the Court may vary but irrespective of which entity institutes proceedings the inquiry of the Court remains, at least in part, focused on whether alleged conduct, if it is established that the same has occurred, constitutes a violation of the Revised Treaty.

[24] Article XVIII of the Agreement must be looked at as a whole. By Article XVIII(2-3), Member States, and even "persons", are given *a right* during the course of Original Jurisdiction proceedings to intervene whenever the construction of "a convention" is in question. Such a convention must be one to which Member States and persons other than those concerned in the case are parties. Should such entities choose to exercise that right, the construction given by the judgment will be equally binding on all parties. Article XVIII(2-3) clearly refers to conventions other than the Revised Treaty. But if Third Member States have *a right* to intervene in those circumstances, then conferral of a right to

intervene in cases where the construction of the Revised Treaty itself is before the Court should be free from controversy given the binding nature of determinations concerning the interpretation and application of the Revised Treaty.

Diplomatic protection through the back door

[25] By expressly permitting its national to bring these proceedings in lieu of pursuing the claim itself, Jamaica has surrendered the right to bring its own proceedings against Barbados premised on the precise factual matrix supporting Ms Myrie's claim. But it is erroneous to regard Jamaica as automatically thereby having abandoned all interest in the claim. Jamaica is entitled to retain a keen interest in the outcome of proceedings brought by its national in the Court's Original Jurisdiction.

[26] The Court does not agree with the view that Barbados is "twice vexed" by reason of an intervention by Jamaica. Nor does the Court agree that by intervening Jamaica is being allowed to exercise diplomatic protection "through the back door". An Intervener may support the claim (or defence as the case may be) of a party but it must accept the case as it is at the time of intervention[14]. The Intervener may not expand the scope of the pleadings and may only make submissions and adduce relevant evidence in support of or in opposition to arguments made by the parties.

Increase in costs to Barbados and existence of alternative mechanisms

[27] Neither the likelihood of an increase in costs nor the existence of alternative means for Jamaica to institute proceedings against Barbados provides a good reason to exclude the intervention requested here. It is true that a party may incur further costs in responding to additional material put forward by an Intervener but any possible increase in costs is to be weighed against firstly, the Intervener's

[14] See Part 14.6

exercise of a right to secure its legal interests and secondly, the advantage to the Court of the possible assistance the Intervener may provide, whether by way of adducing relevant evidence or making legal submissions, in resolving the dispute. As to the issue of alternative means, it is solely a matter for Jamaica to determine whether it wishes to exercise the more limited right of participation intervention offers or whether it desires to vindicate its interests through the initiation of other proceedings.

Third Party participation in contentious proceedings

[28] This application by Jamaica is unique in that it represents the first occasion on which a State has sought formally to intervene in proceedings. Moreover, the present application was strenuously objected to by a party. In these circumstances the Court takes the opportunity to make brief remarks generally about Third Party participation in contentious proceedings.

[29] The Rules of the Court expressly permit Member States and The Community not parties in proceedings before the Court the opportunity to play some part in those proceedings or at least to make submissions on issues in dispute. In the case of referrals and proceedings for Advisory Opinions the Rules are quite explicit[15]. In contentious proceedings too the Court has had a practice in the past of receiving submissions from States that were not parties to the case then before it. This practice was built on Part 10.3 of the Rules which requires, within fourteen days, notification to the Community and all Member States of the filing of any Originating Application.

[30] In *TCL and TCL Guyana Incorporated v Guyana*[16], for example, before the proposed Applicants in that case had been granted special leave to appear as a party, the Court invited written submissions from the Caribbean Community and the Contracting Parties to the Agreement on the interpretation of certain

[15] See Part 11.2(4-6) in the case of Referrals and 11.3(5-6) in the case of Advisory Opinions
[16] [2008] CCJ 1 (OJ)

provisions of the Revised Treaty. The Court justified taking this step on the premise that

> "The resolution of these issues goes to the jurisdiction of the Court. Given their importance for the determination of the rights and obligations of the Contracting Parties as well as private entities in their jurisdictions, the Court would wish to afford the Community and the Member States parties to the Treaty the opportunity to make written legal submissions on these issues before making a determination on the application for special leave."

The States of Jamaica, Barbados, Trinidad and Tobago and St Vincent and the Grenadines responded positively to the Court's invitation and, without intervening formally in the proceedings each made submissions on the issues then being considered by the Court.

[31] In *TCL v CARICOM*[17], after special leave had been granted to the Claimant and an originating application had been filed, the Court invited the Contracting Parties to participate in a Case Management Conference and to consider whether they wished to be joined as parties to the proceedings and make written and/or oral submissions on the issues in dispute. Grenada initially expressed but did not ultimately pursue its desire so to participate. Jamaica did participate and later filed written submissions. The Commonwealth of Dominica and Suriname declined to participate but both States indicated to the Court that their views were reflected in the submissions made by the Community.

[32] Part 23.2 of the Rules gives the Court the authority to "require Member States and organs of the Community not being parties to the proceedings to supply all information which the Court considers necessary for the proceedings". Clearly, if the Court can *require* these Third Parties to provide necessary information it can surely allow them voluntarily to do so. It is in this context that one must view Rule 10.3.

[17] [2009] CCJ 4 (OJ)

[33] Third Parties, more precisely the Community and Member States, that opt only to make written and oral submissions naturally play a far more limited role in proceedings than those who seek and are granted leave formally to intervene. As compared with the former, the latter for example can seek any particular orders from the Court. With the Court's leave, they can adduce oral and documentary evidence, cross-examine witnesses and even be entitled to receive or required to bear costs. The Court will always be astute to monitor and control the nature and extent of any intervention, especially in a case like this one where Jamaica opted not to bring the proceedings itself, so that the Intervener does not widen the scope of the inquiry or cause undue material prejudice to a party and in particular the party standing in a position that is adverse to that of the Intervener.

[34] The Intervener is, however, by no means a full-fledged party. The Intervener cannot expand the factual and legal framework of the case beyond that which is defined by the parties. The Intervener's position is an ancillary one. If the original case is discontinued or withdrawn or where the Originating Application is declared inadmissible, the intervention is spent.

Submissions from Third Member States and the Community

[35] The issues of Community law on which the parties are joined in this case and the interpretation of the relevant Articles of the Revised Treaty in issue are matters of profound interest to all the Member States and the people of the Community. Just as in *TCL and TCL Guyana Incorporated v Guyana*[18] the Court was aided by the views and submissions of Member States that were not party to those proceedings[19], the Court now extends an invitation to Member States and the Community to make submissions on the issues in dispute in these proceedings whether in relation to the relevant law or the material facts.

[18] [2009] CCJ 1 OJ
[19] See [2009] CCJ 1 OJ at [7]

Orders of the Court

[36] In all the circumstances the Court granted leave to Jamaica to intervene and made the following orders:

a) The Registrar do serve on the State of Jamaica copies of the documents served on the parties to the current proceedings;

b) The State of Jamaica shall, within 28 days of service upon it of the said documents, file a statement specifying –

i) the order which Jamaica wishes the Court to make in the current proceedings;

ii) any legal submissions on which Jamaica relies, and

iii) the nature of any evidence offered in support of Jamaica's contentions, annexing any documents on which it is intended to rely.

c) The Registrar do serve on the Member States and the Community copies of the documents referred to above at (a) so that Member States not wishing to intervene may indicate by 31st October, 2012 whether they wish to make submissions on this matter;

d) A case management conference is scheduled for 6th December, 2012 for further consideration of this matter;

e) There be no order as to costs.

_____/s/_____
The Rt Honourable Mr Justice Dennis Byron, President

_____/s/_____
The Hon Mr Justice A Saunders

_____/s/_____
The Hon Mr Justice J Wit