IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No. OA 1 of 2013

Between

MAURICE TOMLINSON **Applicant**

And

THE STATE OF BELIZE
Proposed Respondent

CCJ Application No. OA 2 of 2013

Between

MAURICE TOMLINSON **Applicant**

And

THE STATE OF TRINIDAD & TOBAGO
Proposed Respondent

[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 applications for special leave to commence proceedings, together with the annexures thereto, filed on the 31st May 2013 and amended on the 5th August 2013, the requests to be heard filed on behalf of the State of Belize and the State of Trinidad and Tobago on the 2nd July 2013 and the 20th June 2013, respectively, the case management conference held on the 17th July 2013, the written submissions of the Applicant filed on the 16th September 2013, the written submissions of the State of Belize filed on the 4th October 2013, the written submissions of the State of Trinidad and Tobago filed on the 7th October 2013, further written submissions of the State of Trinidad and Tobago filed on the 25th October 2013, further written submissions of the Applicant filed on the 28th October 2013, and the hearing held via videoconference on 12th November 2013,

and after considering the oral submissions made on behalf of:

- the Applicant, by Lord Anthony Gifford, QC, appearing with Ms. Anika Gray, Attorneys-at-law

- the State of Belize, by Mr Nigel Hawke, appearing with Ms Iliana Swift and Mr Herbert Panton, 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 Nicole Anna Jones and Ms Lesley Almarales, Attorneys-at-law

issues on **the day of 2014** the following

JUDGMENT

[1] The Court consolidated two actions brought by Mr Tomlinson against Belize and Trinidad and Tobago. He claims that both States contravene their obligations under the Revised Treaty of Chaguaramas (the RTC) because, according to him, their Immigration Acts contain provisions which prohibit homosexuals from entering the respective States. The facts are agreed. Tomlinson is a homosexual. He is an activist for the LGBT community and has travelled to the respective States in this capacity from time to time. When he discovered the existence of the prohibitions he decided to refuse further invitations from the two States to avoid violating the laws and he claims to have suffered prejudice thereby.

[2] The criteria for granting leave to commence proceedings in accordance with the provisions of Article 222 of the Treaty are not in dispute. It is admitted that Tomlinson is a Jamaican national and that his country, Jamaica, declined to espouse his claim. Both Belize and Trinidad and Tobago agree with him that the right or benefit of free movement which he claims does directly enure to his benefit. They in fact stated that their policy and practice do not generally or at all treat homosexuals as a prohibited class for entry. Both States specifically expressed that they were bound by this Court's decision in *Shanique Myrie v The State of Barbados*[1] and that they intend to apply it fully. They agree that being a homosexual cannot, as such, qualify a CARICOM national as an "undesirable person" within the meaning of the 2007 Conference Decision. Jamaica, in explaining that it declined to espouse Tomlinson's claim, stated that in a number

[1] [2013] CCJ 3 (OJ).

of CARICOM countries there are outdated laws with anachronistic references still on the statute books but never invoked in practice.

[3] The relevant legislation reads as follows:

> The Belize Immigration Act section 5:
>
> 5.-(1) Subject to section 2 (3), the following persons are prohibited immigrants-
>
> (a)---
>
> (b)---
>
> (c)---
>
> (d)---
>
> (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) No appeal shall lie against the decision of the Minister in regard to any of the persons mentioned in paragraphs (g), (h) and (i) of subsection (1), unless such appeal be directed to identity only of the person affected by the decision.
>
> The Trinidad and Tobago Immigration Act section 8:
>
> 8.(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—
>
> (a)---
>
> (b)---
>
> (c)---
>
> (d)---
>
> (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;
>
> (f) persons who are reasonably suspected of attempting to bring into Trinidad and Tobago or of procuring prostitutes or other persons for the purpose of prostitution or homosexual or other immoral purposes.

[4] In the context of these proceedings, the main difference of opinion between the parties is whether or not there is an arguable case established that Tomlinson has been prejudiced in respect of the enjoyment of his Community rights although he has not been refused entry by either State. It is sufficient for an applicant only to make out an arguable case that the condition of prejudice can or will be satisfied

when the case is heard.[2] The main issue in this particular case and at this particular stage is therefore whether it is **arguable** that the mere existence of the respective Immigration Acts of Belize and Trinidad and Tobago has resulted in Tomlinson's having been prejudiced within the meaning of Article 222(b) RTC.

[5] It is clear that prejudice in the area of inter-CARICOM movement of nationals is not strictly limited to situations where a CARICOM national has actually been refused entry by a CARICOM Member State to which the 2007 Conference Decision applies. If the national can show that he has good reasons to fear that he will be refused entry by such Member State on the ground that he is a homosexual, for example because in the past other homosexuals have been refused entry by that State, he would seem to be on solid ground to claim prejudice. In this case, however, Tomlinson, who has not been able to establish any such facts, takes a much bolder position submitting that the very existence of the impugned Immigration Acts constitutes prejudice, whether or not the governments of these States have in the past applied or intend in the future to apply the prohibition by refusing entry to homosexuals.

[6] Although bold, this position is not wholly without a legal basis. In relation to homosexuals, there is indeed international case law, in particular jurisprudence of the European Court of Human Rights[3] and the UN Human Rights Committee,[4] which suggests that under certain circumstances the mere existence of legislation, even if not enforced, may justify a natural or legal person to be considered a victim of a violation of his or her rights under an international human rights instrument. Whether this provides a sufficient basis for ultimately accepting prejudice in the context of Community law in general and in this case in particular, bearing in mind the text of Article 222, is, of course, far from certain. It

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[2] *Trinidad Cement Limited & TCL Guyana Inc v The State of the Co-operative Republic of Guyana* [2009] CCJ 1 (OJ), (2009) 74 WIR 302.
[3] *Norris v Ireland* (1991) 13 EHRR 186 [33].
[4] *Toonen v Australia* Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

would, at least for now, seem arguable, however, that such an approach may also be a possible or proper one under the RTC.

[7] The resolution of this issue ultimately amounts to a determination of a dispute concerning the application of the Revised Treaty or, more generally, Community law. In that context, it touches squarely on the question of how to deal with perceived or actual contradictions between existing national legislation and, possibly, contrary state practice on the one hand[5] and international obligations under the Revised Treaty on the other. In the same vein, the question as to whether and to what extent this Court in its Original Jurisdiction could or should embark on the interpretation of domestic law in disputes concerning the application of the RTC is relevant. The Court has already made some statements on this issue in previous judgments and particularly in *Myrie* but it would appear, from the parties' submissions and otherwise,[6] that these issues have not been settled definitively. Allowing Tomlinson to bring and fully argue his case before this Court (and, consequently, allowing Belize and Trinidad and Tobago to argue theirs) would create a useful opportunity to hear the views of the Community and the other Member States, or possibly even third "persons"[7] and thus make it possible for the Court to provide further clarification on these important aspects of Community law. Given all the circumstances above, the Court is satisfied that the interests of justice require that Tomlinson be allowed to bring his claim and to appear in proceedings before this Court.[8]

[8] Without making a finding one way or another as to the matter of Tomlinson having been prejudiced and given all the circumstances and in particular the relatively low threshold that has to be met in establishing arguability at this stage, the Court grants Tomlinson special leave to commence proceedings against Belize and Trinidad and Tobago. In accordance with Rule 10.4(7) of the Caribbean Court

[5] See eg the following ECJ case law: *Commission v France* (Case C-167/73); *Commission v Germany* (Case C-58/89); *Commission v United Kingdom* (Case C-300/95); *Commission v Italy* (Case C-162/99).
[6] See, eg, David S Berry, *Caribbean Integration Law* (Oxford University Press 2014) 214-5.
[7] See Article XVIII(1) of the Agreement Establishing the Caribbean Court of Justice.
[8] See also *Hummingbird Rice Mills Ltd v Suriname and The Caribbean Community* [2011] CCJ 1 (OJ) [26].

of Justice (Original Jurisdiction) Rules 2006, as amended, Tomlinson must within seven days file an originating application with such amendments as the Court may approve.

The Rt Hon Mr Justice D Byron, President

The Hon Mr Justice R Nelson

The Hon Mr Justice A Saunders

The Hon Mr Justice J Wit

The Hon Mr Justice W Anderson