IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No GDOJ2018/001

Between

Tamika Gilbert
Lynnel Gilbert
Royston Gilbert
Glennor Gilbert Applicants

And

The State of Barbados Proposed Defendant

THE COURT,

composed of A Saunders, President, and J Wit, D Hayton, W Anderson and M Rajnauth-Lee, Judges

having regard to the Application for Special Leave to commence proceedings together with the Affidavit of Tamika Gilbert in Support sworn to on the 8th day of August 2018 and the annexures thereto, the Proposed Originating Application and the annexures thereto filed on behalf of the Applicants on the 25th day of September 2018, the Request to be Heard filed on behalf of the State of Barbados on the 10th day of October 2018, the written submissions of the Applicants together with annexures filed on the 22nd day of November 2018, the written submissions of the State of Barbados together with annexures filed on the 7th day of December 2018, the written submissions in reply of the Applicants filed on the 17th day of December 2018 and to the hearing of the Application for Special leave to commence proceedings held via video conference on the 15th day of January 2019

and after considering the written and oral submissions made on behalf of:

- **the Applicants**, by Mr Ruggles Ferguson, Mr Ferron Lowe, Ms Anika Johnson-Cassone and Ms Sabina Gibbs, Attorneys-at-Law
- **the Proposed Defendant**, by Ms Anika Jackson and Mrs Deidre Gay-Mckenna, Attorneys-at-Law

delivers on the **20th day of May 2019** the following

JUDGMENT

Introduction

[1] The Applicants are nationals of Grenada. On 11 October 2016, the Applicants, a mother, father, and two adult daughters, arrived in Barbados for the purpose of conducting business at the United States Embassy, and generally enjoying the day in Barbados as a family. After completion of their business at the US Embassy, the Applicants visited a mall in Bridgetown. Shortly after, the daughters, Tamika and Lynnel, were accused by a store owner of stealing her cell phone. They strenuously denied the accusation and Tamika invited the accuser to search her bag.

[2] Shortly after the accusation was made, the store owner left, and returned with officers of the Royal Barbados Police Force who proceeded to question Tamika and Lynnel. Tamika and Lynnel, in addition to denying any knowledge of the 'stolen cell phone', identified themselves as nationals of Grenada, visiting Barbados for the day, primarily for the purpose of obtaining US visas. They also informed the police officers that they were due to depart Barbados that evening. Tamika and Lynnel were subsequently arrested by the police officers, placed in a van and taken to a nearby police station.

[3] At the police station, Tamika and Lynnel were subjected to what they described as humiliating and degrading strip searches, where they were instructed by a police officer to strip, stoop and cough. They were questioned, and statements were taken from them and from their mother, Glennor. Importantly, the Applicants contend that the police officers were not satisfied with that portion of Tamika's statement where she complained, *"I was subjected to an embarrassing bodily search"*. The Applicants claim that they were only allowed to leave the police station after Tamika removed that portion of her statement. The entire ordeal at the police station lasted approximately 6½ hours. No family member was charged in connection with the allegations made on 11 October concerning the theft of the cell phone. The Applicants returned to Grenada that same day.

[4] On 13 January 2017, Tamika and Lynnel caused complaints to be made to the Commissioner of Police in Barbados about the treatment they suffered at the hands of the police officers. By letter dated 21 November 2017, more than a year after the incident, the Applicants were informed that an Inspector of Police had been assigned to investigate their complaints. To date, the Applicants have not been informed of the outcome of the investigation.

[5] Almost two years after that incident, on 25 September 2018, an application was filed in this Court by the Applicants pursuant to Article 222 of the Revised Treaty of Chaguaramas (the "Treaty" or "RTC") seeking special leave to commence proceedings against the State of Barbados (the "Proposed Defendant"). The Applicants allege that the Proposed Defendant violated their rights to freedom of movement provided for under Caribbean Community Law as embodied in Article 45 of the RTC and a Decision of the Conference of Heads of Government of the Caribbean Community taken at their Twenty-Eighth Meeting (the "2007 Conference Decision") when the agents of the Proposed Defendant detained the Applicants, and in the case of Tamika and Lynnel, subjected them to humiliating strip searches. In their proposed Originating Application, they seek damages for breach of the right to freedom of movement.

[6] The special leave application was heard on 15 January 2019. In both their written and oral submissions made before this Court, the Proposed Defendant denied that it committed any breaches of Article 45 or the 2007 Conference Decision in relation to the Applicants or at all, whether as pleaded in the special leave application, the proposed Originating Application, or otherwise. The Proposed Defendant opposes the grant of leave to the Applicants to commence such proceedings arguing that the Applicants have failed to satisfy the *locus standi* requirements set out in Article 222 of the RTC.

Whether special leave should be granted?

Article 222 of the RTC – Locus Standi of Private Entities

[7] Article 222 of the Treaty prescribes the conditions ('the Article 222 conditions') that

must be satisfied before private entities are permitted to bring proceedings before this Court. The Article provides as follows:

> *"Locus Standi of Private Entities*
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> *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:*
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> *(a) the Court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and*
> *(b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and*
> *(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; and*
> *(d) the Court has found that the interest of justice requires that the persons be allowed to espouse the claim."*

[8] This Court has established that an applicant seeking special leave under Article 222 of the RTC need only make out an arguable case as to the issues specified at 222(a) and (b). On the point of the threshold required to make out an 'arguable case', the Court in *Trinidad Cement Limited & TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana,*[1] stated that:

> "To require the applicant to meet a threshold of proof greater than 'an arguable case' could prolong the special leave procedure unnecessarily and prejudice the submissions that must be made at the substantive stage of the proceedings if the application was successful and an originating application is ultimately filed."[2]

[9] As to 222(b), the Court's position was articulated in *Tomlinson v Belize and Tomlinson v Trinidad and Tobago*[3] that, "[I]t 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".[4]

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[1] [2009] CCJ 1 (OJ); (2009) 74 WIR 302
[2] ibid at [33]
[3] [2014] CCJ 2 (OJ); (2014) 84 WIR 239
[4] ibid at [4]

[10] The Applicants relied on the Court's reasoning in *Hummingbird Rice Mills Ltd v Suriname and The Caribbean Community*[5] that where there is an arguable case and the Contracting Party entitled to espouse the case declines to do so, the Court should find that the interests of justice favour the applicant national being permitted to advance its own cause before the Court. The Applicants also submit that their case raises important issues regarding the right of freedom of movement within Barbados and the freedom to depart from Barbados without unnecessary harassment and impediments. They further argue that this case goes beyond the issues addressed by the Court in *Shanique Myrie v the State of Barbados*.[6] They therefore argue that it is in the interest of justice that leave ought to be granted.

[11] The Proposed Defendant urged the Court to refuse special leave arguing that the Applicants' rights under the Treaty had not been violated. The Proposed Defendant submitted that the Applicants had failed to make out an arguable case either that (a) the Treaty intended that a right conferred on a Contracting Party enured to their benefit directly or (b) they were prejudiced in the enjoyment of Article 45.

[12] This Court has accepted the basic proposition that 'he who alleges must prove'.[7] The Applicants therefore bear the burden of making out an arguable case that the conditions prescribed by Article 222 have been established.

[13] The first issue to be determined by the Court therefore is whether the Applicants have made out an arguable case that (i) they have a right to freedom of movement within the territory of the Member State during their visit there pursuant to Article 45 of the RTC and the 2007 Conference Decision, and, if they do, (2) that they have been prejudiced in respect of the enjoyment of this right in the circumstances of this case. If these requirements are met it then becomes necessary to consider whether the other Article 222 conditions have been fulfilled.

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[5] [2011] CCJ 1 (OJ) at [26]
[6] [2013] CCJ 3 (OJ); 83 WIR 104
[7] ibid at [25]; *Cabral Douglas v the Commonwealth of Dominica* [2017] CCJ 1 (OJ) at [5] and [6]

Whether the Applicants have made out an arguable case that a Treaty Right or benefit was intended to enure to their benefit directly?

[14] Article 45 of the RTC provides that "Member States commit themselves to the goal of free movement of their nationals within the Community." In *Cabral Douglas v The Commonwealth of Dominica,* this Court, echoing *Myrie,* observed that the "2007 Conference Decision, which sought to create a regime to 'enhance [the] sense [of Community nationals] that they belong to, and can move in the Caribbean Community…',[8] 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 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'."[9]

[15] The Applicants rely on the Court's decision in *Myrie* that "the full extent of the right is that both entry and stay of a Community national in another Member State must not only be 'definite' but also 'hassle free' or 'without harassment or the imposition of impediments'. These are essential elements of the right."[10] The Applicants contend that in *Myrie,* "the Court approached the issue of the automatic stay on the basis that it is only one aspect of a broader right to freedom of movement that member states have undertaken to aspire to under Article 45".[11] They therefore argue that having been admitted entry, as Community nationals, they had a right to move within Barbados without harassment and impediments, inclusive of the right to depart Barbados without impediment and, it is that right that was infringed by the agents of the State of Barbados when they were detained.

[16] As mentioned earlier, the Applicants premise their argument on the alleged breach of the right to freedom of movement under Article 45 of the Treaty and the 2007 Conference Decision by the agents of the Proposed Defendant. In their written submissions, they contend that the issue of prejudice in the enjoyment of a right is

[8] CARICOM, 'Draft Report for the Twenty-Eight Meeting of the Conference of Heads of Government of the Caribbean Community', (Barbados, 1 – 4 July 2007) 39.
[9] *Cabral Douglas v The Commonwealth of Dominica* [2017] CCJ 1 (OJ) at [31].
[10] *Shanique Myrie* at [63]
[11] Applicants' Reply Submissions para. 7 and *Myrie* at [58]

one of mixed fact and law. They submit that on the material put before the Court, the Applicants have made out an arguable case that their detention by agents of the Proposed Defendant was unreasonable and unlawful, was aggravated by the manner in which they were detained, and that having disclosed to the Proposed Defendant's agents that they were visiting Grenadian nationals, the unreasonable and unlawful nature of the detention amounted to impediments and harassment. Accordingly, they argue that their right to free movement within Barbados was infringed.

[17] The Proposed Defendant's contentions were that the Applicants were permitted entry into Barbados on 11 October 2016 in accordance with Article 45 of the Treaty. They visited Bridgetown at some time during the course of the 11 October 2016. The Royal Barbados Police Force received a Report relating to the theft of a cell phone from a Boutique in Bridgetown. An investigation was duly conducted by members of the Royal Barbados Police Force as a result of the Report and in accordance with the relevant Laws of Barbados. Consequently, three of the Applicants, Tamika, Lynnel and Glennor, were lawfully interviewed by members of the Police Force. All of the Applicants subsequently left the police station on the very day following conclusion of the interviews.

[18] The Proposed Defendant submitted that the right to freedom of movement under the RTC and the 2007 Conference Decision was simply the right to "automatic stay" or "definite entry" upon arrival in a Member State and could not encompass the circumstances which formed the basis of the Applicants' case. The Proposed Defendant further submitted that the Applicants were indeed permitted hassle-free right of entry into Barbados for the purposes of obtaining United States visas and to enjoy the amenities afforded to visitors when they were allowed to enter and remain in Barbados on October 11, 2016. The State of Barbados has therefore satisfied its obligations under the Treaty and has not violated the Applicants' rights under the Treaty, it was submitted.

[19] The Proposed Defendant further argued that it was well established that rights prescribed under the Treaty could be curtailed or restricted by invoking any of the exceptions provided for by Articles 225 and 226 of the Treaty. The Proposed

Defendant submitted that Article 226 was particularly relevant and applicable to the Applicants' case, in that, Article 226 1 (a) provided that nothing in this Chapter shall be construed as preventing the adoption or enforcement by any Member State of measures to protect public morals or to maintain public order and safety.

[20] In *Myrie*, this Court pointed out that the 2007 Conference Decision took the fundamental Community goal of free movement beyond the defined group of Community nationals who were seeking economic enhancement in one way or the other and broadened it to Community nationals in general. The Decision clarified one aspect of the goal in that it gave every Community national the right to enter any Member State and stay there for up to six months.[12]

[21] The Applicants do not complain about the Proposed Defendant's actions as they relate to the Applicants' entry into Barbados or the stay granted to them on their entry into Barbados. The Applicants maintain that having been admitted entry as Community nationals, they had a right to move freely within Barbados without harassment and impediments. They submit that that right to move freely within Barbados without harassment and impediment included the right to depart Barbados without impediment. They claim that that right was infringed by the Proposed Defendant's agents when they detained the Applicants in the manner complained of.

[22] The Court harbours no doubt that the right of free movement under Article 45 of the Treaty and the 2007 Conference Decision includes, subject to the exceptions in the RTC and particularly Articles 225 and 226, the right to move freely within the State of Barbados, and to depart Barbados without impediment. Accordingly, the Court is satisfied that the Applicants have shown an arguable case that the right under Article 45 of the RTC and the Conference Decision was intended to enure to their benefit directly. The Article 222 (a) condition has therefore been satisfied.

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[12] *Shanique Myrie* at [62]

Whether the Applicants have made out an arguable case that they were prejudiced in the enjoyment of this right?

[23] The question remains whether the Applicants have shown an arguable case that they have been prejudiced in respect of the enjoyment of the right as required by Article 222 (b). The Court is of the view that a breach of the right to free movement within the State of Barbados might occur, for example, in a situation where nationals of other Community member states, although permitted entry into Barbados and granted an automatic stay of six months upon arrival, were without proper justification not allowed to enter into designated spaces or at specified times, whilst nationals of Barbados were allowed such entry. In such a case, non-Barbadian Community nationals might properly argue that they had been prejudiced in the enjoyment of their right to free movement within Barbados. But here, where the Applicants were taken into police custody for the purpose of police investigations in the circumstances outlined, the Court does not agree that they have made out an arguable case that they were prejudiced in the enjoyment of their right to move freely within the State of Barbados. It cannot be doubted that persons, probably most of them nationals of Barbados, are regularly taken into police custody for the purpose of police investigations. Indeed, the Court was informed by the attorney for the Applicants that a national of Barbados was among the group of persons shopping with the Applicants and that this Barbadian national was also taken into custody by the police. Freedom of movement under the RTC does not immunize CARICOM nationals from the operation of law enforcement agencies in the receiving State.

[24] In the judgment of the Court, therefore, more would be required before the Applicants could make out an arguable case that their detention by the police in the circumstances of this case prejudiced the enjoyment of their right to free movement under the Treaty. But what "more" would be required? In this case the Applicants have alleged that they were treated in a wholly disproportionate manner. But, in order to show a breach of the right in question the Applicants would have had to demonstrate that, in their arrest and detention, there was some element of discrimination based only on their nationality. In other words, a breach of a

community national's right to freedom of movement within a receiving state should be premised, at least to some extent, on treatment that is discriminatory on the ground of nationality.

Article 7 – Non-Discrimination

[25] Article 7 of the Treaty provides as follows:

> *"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."*

[26] Article 7 has been clarified by the Court in *Myrie*. The Court held that "…[D]iscrimination in the context of Caribbean Community law occurs where…the facts of the case disclose treatment that is worse or less favourable than is accorded to a person whose circumstances are similar to those of the complainant except for their and the complainant's nationality, with no objective and reasonable justification for the difference in treatment. Differentiated treatment is not necessarily less favourable treatment."[13] In addition, the Court held that the "right contained in Article 7 is granted to Member States and enures to the nationals of those States. The latter are entitled to be treated as distinct individuals."[14] Accordingly, on grounds of nationality, less favourable treatment by profiling or stereotyping is outlawed by Article 7.

[27] In addition, the Court made the point in *Cabral Douglas*, that Article 7 was not a "stand -alone provision but rather was adopted to ensure that the rights enuring expressly or by necessary implication upon persons of the Community, were not thwarted because of discrimination on basis of nationality."[15]

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[13] *Shanique Myrie* at [84]
[14] ibid at [85]
[15] *Cabral Douglas* at [16]

[28] As the Court observed in *Myrie*, almost invariably, discrimination must be inferred.[16] In the judgment of this Court, therefore, an applicant for special leave would have to set out facts, including, where appropriate, the presentation of statistical evidence or a pattern of conduct, that allege that the Proposed Defendant State had engaged in discrimination on grounds of nationality. Alternatively, an applicant may set out facts which allege that the agents of the Proposed Defendant specifically targeted him or her because of "nationality only".

[29] It is noteworthy that the Applicants have not alleged a breach of Article 7 of the RTC. In their Reply Submissions, however, they submitted that being nationals of Grenada, they faced "distinct disadvantages and disabilities" not faced by nationals of Barbados should they have missed their flight back to Grenada and should they have been forced to overnight in Barbados at great inconvenience and expense. They argue that the Barbadian police took advantage of the Applicants' "distinct disadvantages and disabilities" to force Tamika to sign the statement of which they complained earlier. In the view of this Court, however, this argument fails to raise any issue of discrimination on the ground of "nationality only" Any national of Barbados could face "disadvantages or disabilities" should they be in police custody and miss a flight that had been booked for them to depart from Barbados.

[30] The Court is therefore of the view that the Applicants' reliance on Article 45 and the 2007 Conference Decision in the circumstances of this case is misconceived. They have failed to make out an arguable case that they were prejudiced in respect of the enjoyment of their right to free movement within the State of Barbados, and to depart Barbados without impediment. They have therefore not satisfied Article 222 (b) and so special leave cannot be granted.

The proper forum

[31] The Proposed Defendant has argued that the Applicants could have brought their claims for the actions of the Proposed Defendant in the "national courts" of Barbados

[16] *Shanique Myrie* at [84]

and that the availability of alternative remedies was a good enough reason for the Court to refuse the grant of leave. On the other hand, the Applicants contend that this Court is the proper forum for the hearing of the substantive case as the matter involves a question of the interpretation and application of the Treaty. The Applicants also voiced their concern that there was the potential for delay in any domestic proceedings which they may have filed in the courts of Barbados. They further submitted that a non-Barbadian national could not file a claim in the courts of Barbados for any alleged infringement of constitutional rights by the actions of the agents of the State of Barbados. The Court need say no more on this last submission but that it is wholly misconceived since the Constitution of Barbados plainly states that "***every person in Barbados*** is entitled to the fundamental rights and freedoms of the individual"[17] set out in that document. (emphasis added)

[32] In addressing the issue of the proper forum, this Court reiterates its position in *Cabral Douglas*, that,

> "[38] The Court does not consider that the issue of the 'proper forum' for proceedings, akin to the domestic law concept of 'forum non conveniens' is an appropriate matter for decision by this Court. The relevant function of this Court is to decide whether the requirements of Article 222 have been satisfied so that an Applicant may be given special leave to bring substantive proceedings. If the conditions have been established the Court will grant leave…where those conditions have not been satisfied, it is for a party to the special leave proceedings to decide whether to bring proceedings in a domestic court to vindicate that party's legal rights. If the party decides to bring those proceedings, it is not inconceivable that the domestic court could in an appropriate case, notwithstanding a finding by this Court that Article 222 was not satisfied, make a reference to this Court pursuant to Article 214 if that court finds that the conditions of Article 214 have been satisfied. The issue of whether a Community national may bring original jurisdiction proceedings is a separate and distinct question from whether that Community national has rights and benefits under the RTC which may require interpretative guidance by this Court."[18]

[33] Accordingly, the Court does not consider that the issue of the proper forum or the availability of alternative remedies is relevant to the grant of leave in this case. The Court considers it sufficient to repeat that notwithstanding the availability of

[17] Section 11 of the Constitution of Barbados
[18] *Cabral Douglas* at [38]

alternative remedies, if an applicant has fulfilled all the conditions of Article 222 of the RTC, special leave will be granted to espouse a claim.

Costs

[34] As regard costs in these proceedings, the Court considers relevant the principle it expounded in *Hummingbird Rice Mills Ltd v Suriname and the Caribbean Community*,

> "[a]t this nursery stage of the development of Caribbean Community law… the burden of establishing… basic principles underpinning the Single Market should not weigh too heavily and disproportionately on private entities and thus discourage the bringing of important issues of economic integration law before the Court". [19]

[35] Accordingly, each party should bear its own costs.

Order

[36] The Application for special leave pursuant to Article 222 of the Treaty is dismissed.

[37] Each party shall bear its own costs.

/s/ A. Saunders

The Hon. Mr Justice A Saunders, President

/s/ J. Wit

The Hon. Mr Justice J Wit

/s/ D. Hayton

The Hon. Mr Justice D Hayton

/s/ W. Anderson

The Hon. Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon. Mme Justice M Rajnauth-Lee

[19] [2012] CCJ 2 (OJ) at [6]