

IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No OA 2 of 2012

BETWEEN

SHANIQUE MYRIE

CLAIMANT

AND

THE STATE OF BARBADOS

DEFENDANT

JAMAICA

INTERVENER

EXECUTIVE SUMMARY

- [1] On March 14, 2011 Shanique Myrie arrived at the Grantley Adams International Airport in Barbados and was denied entry into that country. She was detained overnight in a cell in the airport and deported to Jamaica the following day.
- [2] Ms Myrie’s experiences in and deportation from Barbados prompted her to file an action before the CCJ. She claimed that she was made to undergo a painful and humiliating body cavity search by a Barbadian border official, that her detention cell was insanitary and that this and other treatment to which she was subjected amounted to a serious breach of her right of free movement and also a violation of her fundamental human rights and freedoms. She claimed an entitlement to a right to free movement within the Caribbean Community, specifically a right of entry without any form of harassment, based on the combined effect of Article 45 of the Revised Treaty of Chaguaramas (the “RTC” or “Treaty”) and a Decision of the Conference of Heads of Government of the Caribbean Community taken at their Twenty-Eighth Meeting (“the 2007 Conference Decision”). She also claimed that Barbados breached her rights under Articles 7 and 8 of the RTC to non-discrimination on the ground of nationality only and to treatment that is no less favourable than that accorded to nationals of other CARICOM States or Third States. The State of Jamaica had earlier sought and obtained leave to intervene in the action. At the trial Jamaica supported Ms Myrie’s claims.
- [3] Barbados denied that Ms Myrie was subjected to the alleged body cavity search or other improper treatment by any of its border officials. It denied that her detention cell was insanitary and denied that she was refused entry into Barbados for the sole reason that she was a Jamaican national. Barbados claimed that Ms Myrie was rightly refused entry because she was untruthful about the identity of her Barbadian host.

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- [4] Barbados further submitted that the 2007 Conference Decision did not create for Ms Myrie any legally binding right but that if it did, that right was not an absolute one and in any event could not be judicially reviewed. Barbados also objected to Ms Myrie's claim that she was discriminated against contrary to Articles 7 and 8 of the RTC.
- [5] The Court first satisfied itself of its jurisdiction. The Court noted that having previously been granted Special Leave to appear, Ms Myrie had fully complied with Article 222 RTC and so had established her standing to take her case before the Court. The Court also held that its jurisdiction to interpret and apply the Treaty extended to decisions and other determinations made by relevant competent authorities in the exercise of their functions ostensibly to fulfil or further the goals and objectives of the Treaty. The Court indicated, however, that it had no jurisdiction to grant some of the orders requested by Ms Myrie concerning specific claims that Barbados violated her fundamental human rights.
- [6] The Court went on to consider the relevant standard of proof to be applied in the case. It noted the flexible approach of international tribunals to this issue. The Court held that the standard of proof to be applied in this case must be lower than the standard used in a criminal case, whether domestic or international. Faced with the contradictory versions of events presented, the Court gave very careful and anxious consideration to all the material before it given the seriousness of the allegations. The Court was ultimately satisfied that its findings were fully supported by the objective evidence, the testimony given and the reasonable inferences that the Court was entitled to make.
- [7] After outlining the uncontroverted facts of the case, the Court made findings concerning the allegedly insanitary state of the cell in which Ms Myrie was detained, the body cavity search to which she said she was subjected and the circumstances under which this cavity search allegedly took place. It was Ms Myrie on whom the burden of proof rested to prove these facts and, after examining all the oral and written evidence presented, the Court found that she had properly discharged this burden cast upon her.
- [8] The Court then addressed Barbados' claim that the 2007 Conference Decision was not a binding decision within the meaning of Article 28 RTC because the Minute of the Conference decision a) referred to what the Conference had "*agreed*" and not to what it may have "*decided*" and b) noted that a "reservation" had been made by Antigua and Barbuda. Barbados submitted that a mere "agreement" prevented the action taken by the Conference from becoming a binding *decision* and in any event the presence of a "reservation" also had a similar effect on the binding nature of the Conference activity because observance of the required unanimity principle had been breached. The Court rejected both submissions. The Court held that the variance between what was "agreed" and what was "decided" was of no consequence as it was not unusual for the Community to record its decisions while using the word "agreed". Further, the Court noted that subsequent CARICOM documents frequently referred to the action taken at the 2007 Conference Meeting as an implementable decision binding on Member States. As to the Antigua and Barbuda "reservation", the Court noted that there was no evidence to

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indicate that this “reservation” was intended to amount to or was ever regarded as a negative vote on the decision. All the evidence suggested that neither the Community nor any Member State had ever suggested that the decision was not validly made. On the contrary, the 2007 Conference Decision was always treated as valid and binding by the CARICOM Secretariat and various Organs of the Community.

- [9] The Court also rejected Barbados’ submission that, in any event, Article 240 RTC suggests that decisions such as the Conference Decision must be domestically enacted before they become binding on the Community plane. The Court held that Article 240 RTC is not concerned with the creation of rights and obligations at the Community level but speaks to giving effect to Community rights and obligations *in domestic law*. If binding regional decisions can be invalidated *at the Community level* by the failure on the part of a particular State to incorporate those decisions locally, the efficacy of the entire CARICOM regime would be jeopardized. Domestic incorporation could not be a condition precedent to the creation of Community rights as such an interpretation would produce an anomaly when some States incorporated a Decision and others did not. This would destroy the certainty, predictability and uniformity of Community law.
- [10] The Court stated that Barbados’s position that the Court was unable to review the activities of its immigration and customs officers was misguided. The Court explained that the purpose of Article 30 RTC is to allow Member States, as part of their sovereignty, to reserve public service positions strictly for their own nationals and it was not intended to limit the right to free movement or to prevent the Court from subjecting to judicial scrutiny the actions of officials in the exercise of their duties in the context of the RTC.
- [11] Since the right of “definite entry” conferred by the 2007 Conference Decision was a critical element in the case the Court considered it important to explain certain substantive and procedural entitlements associated with the right. The Court explained that the right is part of the broader concept of free movement of CARICOM nationals within the Community and that concept entails the right of Community nationals to have unrestricted access to, and movement entails the right of Community nationals to have unrestricted access to, and movement within, the jurisdiction of the Member States, subject to public interest considerations. The 2007 Conference Decision was another step in furthering the fundamental goal and clarifying the right of free movement as it made clear that every Community national is entitled to a “definite entry” of six months upon arrival in another Member State.
- [12] The Court noted that both the rights of establishment and of the provision of services, including services in the tourism sector, presume of necessity the right of movement of Community nationals without being obstructed by unreasonable restrictions. An essential element of the right of free movement is entry and stay of a Community national in another Member State hassle free, that is to say, without harassment or the imposition of impediments. The Court held that where a Community national is refused entry into a Member State on a legitimate ground, that national should be given the opportunity to

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consult an attorney or a consular official of his or her country or to contact a family member. The Court alluded to the principle of accountability which it had referenced in earlier cases. The court stated that, in this context, this principle requires Member States to give, promptly and in writing, reasons for refusing entry to a Community national. The receiving State is also obliged to inform the refused Community national of his or her right to challenge the decision. In this regard, the Court indicated that it expects Barbados to interpret and apply its domestic laws liberally so as to harmonise them with Community law or, if this is not possible, to alter them.

- [13] While the 2007 Conference Decision entitles a Member State to limit the free movement of a national of another Member State if such national is “undesirable” or would become “a charge on public funds”, the Court indicated that this entitlement must be construed as an exception to the right of entry. Consequently, the scope of the refusal and the grounds on which it is should be based must be interpreted narrowly and strictly and the burden of proof must rest on the Member of State that seeks to invoke either ground. The concept of undesirability must be concerned with the protection of public morals, the maintenance of public order and safety and the protection of life and health. While Member States have some discretion when invoking this exception, the scope of the concept of “undesirable persons” is subject to control by the major Community Organs, particularly the Conference, and ultimately by the Court as the Guardian of the RTC. Refusal on the basis of undesirability must be based on national law and on Community law but where the former is inconsistent with Community law, the latter must prevail. The Court also provided general guidelines on how a Member State may limit a visiting national’s right of entry on the ground of the visitor being a person likely to become a “charge on public funds”.
- [14] The Court held that in order for a Member State to limit the right of entry of a national of another Member State in the interests of public morals, national security and safety, and national health, the visiting national must present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The threat posed should, at the very least, be one to do something prohibited by national law. The national must pose a threat to do something prohibited by national law. The Court held that the principle of proportionality was also relevant to the application of Community law.
- [15] The State of Barbados justified its denial of entry to Ms Myrie on the basis that she had told lies to the immigration officials as to the identity of her host in Barbados but the Court found that in this case Barbados did not discharge its burden to justify the limitation placed on Ms Myrie’s right to entry as it produced insufficient evidence to establish that she posed such a threat as properly to deem her undesirable. While the truthfulness of replies to questions from border officials may, of course, be officials is, of course, a relevant consideration in assessing such threat, the Court was of the view that Barbados had not established Ms Myrie’s untruthfulness on her replies to such questions.
- [16] In addressing Ms Myrie’s claim of discrimination, the Court declared that discrimination in the context of Community law occurs where there exists treatment that is worse or less

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favourable than is accorded to a person whose circumstances are similar to those of the complainant except for their and the complainant's nationality. Where a claimant establishes facts that raise a *prima facie* case that the receiving State engaged in discriminating on grounds of nationality, the burden shifts to that State to disprove the discrimination. The Court ruled that the evidence presented by Ms Myrie and Jamaica, the Intervener, was not capable of raising a *prima facie* case that Ms Myrie was the victim of discrimination. Ms Myrie's claim that there had been a breach of Article 7 was therefore dismissed.

- [17] Ms Myrie's claim that, as a Jamaican, she was treated less favourably than nationals of other States was also dismissed. The Court stated that the right to Most Favoured Nation treatment, established by Article 8 RTC, may be regarded as a particular, albeit limited, manifestation of the principle of non-discrimination, although it is broader as it also extends to Third, i.e. non-CARICOM States. Since the Court had dismissed the discrimination claim and little or no evidence was proffered with regards to the treatment by Barbados of nationals of Third States, Ms Myrie's allegation of a breach of Article 8 RTC could not be sustained.
- [18] The final issue the Court considered was Ms Myrie's claim for damages. The Court reiterated the circumstances under which a claim for compensatory damages may succeed. The Court held that Ms Myrie's claim was such a case. It found that the breach of Ms Myrie's right of entry without harassment or the imposition of impediments encompassed all that transpired between the time of her arrival in Barbados and her unlawful expulsion the following day. This necessarily included her subjection to the body cavity search and being detained overnight in a cell in deplorable conditions. The Court held that this treatment constituted a very serious breach of Ms Myrie's right to entry and so she was entitled to be awarded damages, though not exemplary damages. The Court indicated that it had the power to award compensation for non-pecuniary damage under the RTC. The Court therefore awarded damages at the high end of the spectrum appropriate for the breach of the particular right in question, even though in principle the nature of the right of entry would not usually attract huge damages and indeed may in some cases attract no damages whatsoever.
- [19] In all the circumstances, the Court made a declaration that Barbados had breached Ms Myrie's right to enter Barbados. The Court ordered Barbados to compensate Ms Myrie in pecuniary damages in the sum of \$2240 and non-pecuniary damages to the tune of BBS\$ 75000. The Court also ordered Barbados to pay Ms Myrie's reasonable costs. The Court refused all other declarations and orders sought by Ms Myrie and Jamaica.

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