IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No. DMOJ2016/001

Between

CABRAL DOUGLAS **Applicant**

And

THE COMMONWEALTH OF DOMINICA **Respondent / Proposed Defendant**

THE COURT,

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

Having regard to the application for special leave to commence proceedings, together with the annexures thereto, filed at the Court on the 24th August 2016 and the amended proposed originating application filed on the 18th October 2016, the request to be heard filed on behalf of the Commonwealth of Dominica on the 16th September 2016, the Interlocutory Application for an Order Striking Out the Commonwealth of Dominica's Request to be Heard together with the Affidavit of Mr Cabral Douglas in support thereof filed by the Applicant on the 23rd September 2016, the Commonwealth of Dominica's Response to the Interlocutory Application together with the Affidavit of Ms Tara Leevy in support thereof filed on the 4th October 2016, the parties' completed case management checklists filed on the 11th October 2016, the Skeleton Argument of the Applicant filed on the 18th October 2016, the case management conference held on the 20th October 2016, the written submissions of the Commonwealth of Dominica filed on the 11th November 2016, the Response Submissions of the Applicant filed on 25th November 2016, and to the public hearing held via videoconference on 12th December 2016,

and after considering the oral submissions of:

- the Applicant, by Mr. Leslie Thomas, QC, appearing with Ms. Thalia Maragh, Attorneys-at-Law
- the Respondent/Proposed Defendant, by the Honourable Mr. Levi A. Peter, Attorney General of the Commonwealth of Dominica, appearing with Ms. Jo-Anne Xavier-Cuffy and Ms. Marie-Therese Etienne, Attorneys-at-Law
- the Caribbean Community, by Ms. Gladys Young, Attorney-at-Law

issues on the 20th day of February, 2017 the following

JUDGMENT

Introduction

[1] In the afternoon of the 23rd February 2014, a chartered flight landed at the Douglas-Charles International airport in the Commonwealth of Dominica. On board were Jamaican recording artist and entertainer Mr Leroy Russell, also known as "Tommy Lee Sparta" ('Mr Russell'), and three other Jamaicans: his manager, Mr Junior Fraser; his disc jockey, Mr Mario Wallace; and his personal assistant, Mr Oralie Russell. Mr Russell was to have headlined an international concert to mark the opening of the annual carnival in Portsmouth but he did not make it to the venue. Upon disembarking the aircraft, he and his entourage were denied entry into Dominica by immigration officials, arrested, detained at the nearby Marigot police station, and deported the following day. The non-appearance of the featured artist led to the cancellation of the concert.

[2] Two and a half years later, on 24th August 2016, an Application was filed in this Court by the organizer of the ill-fated concert, Mr Cabral Douglas ('the Applicant') pursuant to Article 222 of the Revised Treaty of Chaguaramas (the 'Treaty' or 'RTC') seeking special leave to commence proceedings against the Commonwealth of Dominica ('the Respondent'). The Applicant alleges that he had, in his capacity as proprietor of his privately-owned entertainment business and relying on Articles 7, 8, 45, and 46 of the RTC, concluded a contract with leading Jamaican artist management firm Heavy D Promotions Ltd on 25th November 2013, for the appearance of Mr Russell at the Portsmouth concert ('the 2013 contract'). The accompanying proposed Originating Application asserts that the Respondent had, in denying entry to the four Jamaicans, violated Articles 7, 8, 45, and 46 and that these provisions contained rights or benefits intended for the Applicant's benefit as a proprietor in the entertainment business seeking to contract freely with skilled nationals pursuant to Article 46. He alleges that this infringement caused him consequential financial, reputational and other loss. Subsequently, on 18th October 2016, the Applicant filed an Interlocutory Application seeking leave to amend his Originating Application to abandon the claims of alleged breaches of Articles 8 and

46 and, instead, to substitute allegations of breaches of Articles 36 and 37 of the Treaty. The proposed amendment also makes references to and relies upon a Decision of the Conference of Heads of Government of the Caribbean Community taken at their Twenty-Eighth Meeting held at Needham's Point, Barbados, July 2007 ('the 2007 Conference Decision').

[3] The special leave application was heard by this Court on 12th December 2016. At the hearing, the Court granted the Interlocutory Application to amend so that the Applicant now relies upon alleged breaches of Articles 7, 36, 37 and 45 only of the Treaty, coupled with the 2007 Conference Decision. In both its written submissions before, and its oral submissions at the hearing, the Respondent denies that it has committed any breaches of the Articles of the Treaty or the 2007 Conference Decision in relation to the Applicant, or at all, whether as pleaded in the special leave application, the amended proposed Originating Application, or otherwise. It further denies that the Applicant suffered 'consequential loss' for which he would be entitled to be compensated in the proposed substantive proceedings. The Respondent opposes the grant of special leave to the Applicant to commence such proceedings arguing that the Applicant has not satisfied the *locus standi* requirements set out in Article 222 of the Treaty.

Article 222 of the RTC

[4] Article 222 of the RTC 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

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) 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."

[5] In ascertaining whether these conditions have been satisfied in this case it is particularly necessary to consider Article 222 (a) and (b) since the arguments were concentrated on these provisions. Identification of the responsibility for establishing these Article 222 conditions is not controversial. In accordance with the universally accepted rules of evidence, this Court has accepted the basic proposition that 'he who alleges must prove'. In *Myrie v State of Barbados*[1] the Court indicated that the claimant clearly bore the burden of proving disputed facts that were necessary to sustain her cause of action. And, in the context of the allegation made by the claimant in *Tomlinson v Belize* and *Tomlinson v Trinidad and Tobago*[2] that domestic legislation had violated his Treaty rights, this Court held that the claimant bore the burden of proving that the legislation was indeed in breach of the State's obligations under the RTC. These were statements made in the substantive proceedings but there can be no doubt that the principle applies equally to the preliminary proceedings. Thus, in the Article 222 application in *Trinidad Cement Limited & TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana*,[3] the Court stated that the applicant must bring himself "within the meaning of 'persons' set out in the chapeau" of the Article.

[6] In the present proceedings, it is the Applicant who alleges that the Article 222 (a) and (b) conditions have been satisfied such as to give rise to his entitlement to bring

[1] [2013] CCJ 3 (OJ), (2013) 83 WIR 104 [25].
[2] [2016] CCJ 1 (OJ), (2016) 88 WIR 273 [28] et seq.
[3] [2008] CCJ 1 (OJ), (2008) 72 WIR 137 [22].

the substantive action before the Court. It is, therefore, necessarily the Applicant who bears the burden of proving that those requirements have been established.

[7] It bears emphasis that the Applicant is required to establish the various Article 222 conditions to differing standards of definitiveness. In relation to the devolvement of Treaty rights required by Article 222 (a), and the prejudice in the enjoyment of these rights required by Article 222 (b), the Applicant need only prove an 'arguable case'. On the point of the threshold required to prove the enuring of the Treaty rights and benefits, and of prejudice in the enjoyment of those rights and benefits, this Court held in *Trinidad Cement Limited & TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana*,[4] 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."[5]

[8] And recently, in *Tomlinson v Belize* and *Tomlinson v Trinidad and Tobago*,[6] the Court said:

> "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. 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." [7]

[4] [2009] CCJ 1 (OJ), (2009) 74 WIR 302.
[5] ibid [33].
[6] [2014] CCJ 2 (OJ), (2014) 84 WIR 239,
[7] ibid [4] (footnotes omitted).

[9] As a general proposition, the Article 222 conditions must be established by an Applicant in relation to that Applicant's own rights and benefits sourced from the Treaty. This is evident from the requirement that the Applicant must demonstrate that the right or benefit conferred by the RTC on a Contracting Party was intended to enure to the benefit of the Applicant 'directly'. It is to be emphasized that the issue is not whether the Applicant suffered loss because of the breach of someone else's treaty rights but whether the Applicant suffered loss because of the breach of the Applicant's treaty rights.

Applicant as Person of a Contracting Party

[10] The Applicant has asserted that he is a national of the Respondent, a Contracting Party to the Treaty. The Respondent has in turn conceded that the Applicant is its national. It may therefore be taken that the Applicant has satisfied the Court that the chapeau of Article 222 has been satisfied.

Treaty Right Conferred on Contracting Party enuring to Applicant's Benefit Directly

[11] To satisfy Article 222 (a) condition, the relies on Articles 7, 36, 37 and 45 of the Treaty. The Court now considers these provisions in turn.

Article 7 – Non-Discrimination

[12] 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."*

[13] Article 7 has been the subject of judicial clarification by this Court. In *Myrie v The State of Barbados*[8] the Court held that "…discrimination in the context of Caribbean Community law occurs where…the facts of the case disclose treatment that is…less favourable than is accorded to a person whose circumstances are similar…except

[8] *Myrie* (n 1).

for [the difference in nationality], with no objective and reasonable justification for the difference in treatment… Invariably, though not always, discrimination must be inferred and so, where [an Applicant] establishes facts, including for example the presentation of statistical evidence or a proven pattern of conduct, that raise a *prima facie* case that the defendant State is engaged in discriminating on grounds of nationality, the burden shifts to that State to disprove the discrimination."[9] The Court said further:[10]

> "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. According them, on grounds of nationality, less favourable treatment by profiling or stereotyping them is outlawed by Article 7. In other words, if officials of the defendant State associate some or most nationals of another Member State, whether reasonably so or not, with certain negative attributes or tendencies, it is unlawful for the defendant State to treat an individual of that other Member State prejudicially by imputing to that individual any of those negative attributes or tendencies. In this regard the Court accepts the statement that 'what may be true of a group may not be true of a significant number of individuals within that group'… The production of statistics can naturally play a key part in establishing a breach of Article 7."

[14] The Applicant alleges that the rights conferred on him by Article 7 were infringed by the Respondent. Specifically, he submits that the circumstances of the refusal of entry of the Jamaican nationals demonstrate an arguable case of discrimination on grounds of nationality. It has not been established nor, so as far the Court is aware, admitted by Dominica that the denial of entry to the Jamaicans was in breach of the RTC.

[15] Article 7 can have no application to the Applicant. On the face of it, Article 7 was intended to apply where one Contracting Party discriminates against a person of another Contracting Party on the basis only of the nationality of that person. It is

[9] ibid [84] (footnotes omitted).
[10] *Myrie* (n 1) [85] – [86] (footnotes omitted).

necessarily incongruent with the Treaty provisions for the Applicant to attempt to prove that the Contracting Party of which he is a national discriminated against him because of his nationality.

[16] Furthermore, Article 7 is 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. Article 7 therefore does not confer an inherent substantive right but rather provides the rule by which the framers of the Treaty intended to ensure that rights granted, whether expressly or impliedly, were not distorted by discriminatory actions by one Contracting Party against the nationals of another Contracting Party. This explains why the Article appears within the Chapter dealing with the principles against which the remainder of the Treaty is to be interpreted and understood; and that its application is restricted to the 'scope of application of [the] Treaty.'[11]

Article 36 - Prohibition of New Restrictions on the Provision of Services

[17] Article 36 of the Treaty provides as follows:

> **"ARTICLE 36**
>
> ***Prohibition of New Restrictions on the Provision of Services***
>
> *1. The Member States shall not introduce any new restrictions on the provision of services in the Community by nationals of other Member States except as otherwise provided in this Treaty.*
>
> *2. Without prejudice to the provisions relating to the right of establishment, persons providing services may, in order to provide such services, temporarily engage in approved activities in the Member State where the services are to be provided under the same conditions enjoyed by nationals of that Member State.*
>
> *3. The Member States shall notify COTED of existing restrictions on the provision of services in respect of nationals of other Member States.*
>
> *4. For the purposes of this Chapter, 'services' means services provided against remuneration other than wages in any approved sector and 'the provision of services' means the supply of services:*

[11] Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market & Economy, Article 7(1).

(a) from the territory of one Member State into the territory of another Member State:

(b) in the territory of one Member State to the service consumer of another Member State;

(c) by a service supplier of one Member State through commercial presence in the territory of another Member State; and

(d) by a service supplier of one Member State through the presence of natural persons of a Member State in the territory of another Member State."

[18] The Applicant argues that the inability of Mr Russell to provide his services as an entertainer pursuant to the 2013 contract, necessarily resulted in an infringement of the Applicant's freedom to provide services. It is difficult to identify what action of the Respondent constituted a "new restriction" on the provision of services prohibited by Article 36 (1). The normal legislative or administrative measures that constitute 'new restrictions' include measures imposing new or additional age, licensing, qualification, or other competence requirements, and the like. The enforcement of previously existing immigration regulations in relation to persons entering Dominica may be inconsistent with the Treaty regime because, for example, such action breaches Articles 7 and 46, or the 2007 Conference Decision, but the enforcement of such regulations can hardly be considered the imposition of a 'new restriction' within the meaning of Article 36 (1).

[19] In order to bring proceedings to enforce Article 36 rights and benefits, the Applicant must satisfy the Court that the conditions-precedent in Article 36 to the exercise of these rights and benefits have been fulfilled. The service must fall within the list of 'approved activities' in any of the 'approved sectors'; it must be supplied cross-border; the activities involved in the service supply must be temporary; and the service must be 'provided against remuneration other than wages'.

[20] The Court is grateful to Ms Gladys Young of the Community's CSME Unit who confirmed that "entertainment services" is an approved sector, as required by Article 36 (4), but notes that there is nothing to suggest that the holding of the Portsmouth concert was an approved activity within that sector. Another requirement of Article

36 (4) is that the service be provided cross-border; a requirement which Professor Kaczorowska reports that the European Court of Justice has repeatedly stated to be necessary to come within the scope of European Union law.[12] In the context of the Caribbean Community, the Treaty specifies, in Article 36 (4), the four modes of provision of cross-border services. These modes reflect the regime of the World Trade Organization's General Agreement on Trade in Services ('WTO/GATS'). Mode 4, represented in Article I:2(d) of the GATS, and which is akin to Mode 4 as represented in Article 36 (4) (d) of the Treaty, is the mode relevant in these proceedings. Mode 4 has been consistently represented in the literature on WTO/GATS[13] as covering the movement of natural persons from one Member State into the territory of the host Member State to provide services. These persons may move either as (a) independent contractors or (b) employees of a foreign service supplier i.e., a service supplier *not* of the nationality of the host Member State.

[21] There is no suggestion that a service supplier (or natural person) of the host Member State could *itself* or *himself* come within the ambit of Mode 4. Indeed, the literature appears to debar such a possibility,[14] probably for the simple reason that one of the obligations owed by the host country is to ensure national treatment (i.e., to ensure that the foreign national get treatment that is no less favorable than that given to its national). A similar regime exists under the RTC in that Article 36 (2) requires national treatment for providers of services: cross-border services "are to be provided under the same conditions enjoyed by nationals of [the host] Member State." Obviously, this obligation makes no sense if the regime was held to apply to nationals of the host Member State.

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[12] See: Kaczorowska, *European Law* (3rd Edition, Routledge, 2013) at page 707.

[13] See for example: Bureau of Economic Analysis U.S. Department of Commerce, 'U.S. International Economic Accounts: Concepts & Methods' (30 June 2014) [14.9] < https://www.bea.gov/international/pdf/concepts-methods/ONE%20PDF%20-%20IEA%20Concepts%20Methods.pdf> accessed 18 January 2017; and Julia Nielson and Daria Taglioni, 'A Quick Guide to the GATS and MODE 4' (OECD/World Bank/IOM Seminar on Trade and Migration, Geneva, 12 – 14 November 2003) [15] <http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/Trade_2004_04051004/related%20docs/quick_guide.pdf> accessed 18 January 2017.

[14] Julia Nielson and Daria Taglioni, 'A Quick Guide to the GATS and MODE 4' (OECD/World Bank/IOM Seminar on Trade and Migration, Geneva, 12 – 14 November 2003) [15] <http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/Trade_2004_04051004/related%20docs/quick_guide.pdf> accessed 18 January 2017. Nielson and Tagliona state that Mode 4 applies to:

persons providing services where a foreign service supplier obtains a contract to supply services to the host country company and sends its employees to provide the services;

- independent service providers abroad: an individual selling services to a host country company or to an individual;
- persons employed abroad by foreign companies established in the host country (but excluding nationals of the host country).

[22] The Applicant is not the provider of entertainment services and therefore not a service supplier within the meaning of Article 36 of the Treaty. He has not alleged in his Originating Application any facts to suggest that he was engaged in the 'cross-border' provision of services. It was clearly Mr Russell and his support staff who were the intended suppliers of services within the meaning of Article 36 (4) (d): they were entertainment services suppliers of one Member State (Jamaica) through the presence of natural persons (Mr Russell and his party) in the territory of another Member State (the Commonwealth of Dominica). The Applicant as a 'middle man' in the contractual arrangements was not the direct beneficiary of any of the treaty rights. He could at best, as proprietor of his privately-owned business, be regarded as a 'service supplier' of the Commonwealth of Dominica. Since the service was to be provided in Dominica, he is excluded from the benefit of Article 36 (4) (d) which confers the treaty benefit on "a service supplier of one Member State … in the territory of another Member State."

[23] The Applicant argues that the Jamaicans' right to supply services gave rise to the correlative right in the Applicant to receive the entertainment services and that this correlative right was infringed by the action of the Respondent in denying entry to the Jamaicans.

[24] This Court has made clear that not all Community rights arising out of the Treaty are express. Some rights may be implied as the necessary corollary of other rights and obligations in the Treaty. As a general statement of principle, the Court said in *Trinidad Cement Limited & TCL Guyana Incorporated v The Co-operative Republic of Guyana*, that:

> "Rights and benefits under the RTC are not always expressly conferred although some of them are, for example the rights referred to in Articles 32 and 46. Many of the rights, however, are to be derived or inferred from correlative obligations imposed upon the Contracting Parties. Unless specifically otherwise indicated, the obligations set out in the RTC are imposed on Member States (or a class of Member States) collectively. Where an obligation is thus imposed, it is capable of yielding a correlative right that

enures directly to the benefit of private entities throughout the entire Community."[15]

[25] The Court accepts that a correlative of the right to provide services must be the right to receive such services. The obligation of Contracting Parties to allow Community nationals to provide services across the border clearly yields not only the right to provide the services but also the right to receive the services. The right to provide services would be meaningless, or at least would be of considerably less valuable, if there were no right to receive those services. The right to receive services provides a benefit to many legal and natural persons in the Community. If a Member State restricts the provision of services through the imposition of a new restriction, it is not only the rights of persons who provide services which are prejudiced. Persons who would otherwise receive services are also prejudiced in the enjoyment of that right.

[26] That the right to receive services is correlative to the right to provide services has been recognized in the European Union.[16] In the *Watson* case[17] the Commission suggested that the freedom to move within the Union to receive services was the necessary corollary to the freedom to provide services. The matter was also considered by the ECJ in *Luisi and Carbone v Ministero del Tesoro*[18] and that court stated: "It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services."[19] Relying on this and other cases, Woods and Watson[20] opine that Article 56 TFEU dealing with services, "has been broadly interpreted to include the right to receive services… [and] raises the possibility of the right to travel and to receive services…"

[15] *Trinidad Cement Limited* (n 5) [32].
[16] *Watson and Belmann* (Reference for a preliminary ruling: Pretura di Milano – Italy) Case 118/75.
[17] ibid.
[18] Joined Cases 286/82 and 26/83.
[19] ibid [16].
[20] Lorna Woods and Phillippa Watson,Steiner & Woods EU Law, (11th edition, Oxford University Press, 2012) at page 526.

[27] It may likewise be said that within the Caribbean Community, a service recipient, as well as a prospective service recipient, has the right to provision of the service in accordance with the contracted or preferred mode of supply of cross-border services. Article 36 (4) (b) expressly recognizes the right to the receipt of one mode of service delivery: the right of a service consumer of one Member State to receive services in the territory of another Member State. In *Myrie*, the Court said:

> "… nationals of a Member State who supply these services must in principle have the right freely to enter any other Member State in order to ply their trade; but, logically following from Article 36(4)(b), also nationals of a Member State desirous of receiving such services in another Member State must be allowed to enter the latter State in order to receive that service without being obstructed by unreasonable restrictions."[21]

[28] The facts alleged do not suggest that the Applicant was a patron and in this sense a recipient of entertainment services such as to accord a corollary right under Article 36. On the other hand, it may be argued that as a 'middle man' standing between the concert patrons and the entertainment suppliers his position could be assimilated to that of a patron. The Court does not have to decide this issue because in either event the Court holds that whatever right he may have had in this regard did not accrue to him directly. In the circumstances of this case any such right was contingent on the lawful entry into Dominica of Mr Russell and his entourage.

Article 37 - Removal of restrictions on provision of services

[29] Article 37 of the Treaty requires the removal of restrictions on the provision of services. Article 37 (1) provides, subject to the provisions of the Treaty, that "…Member States shall abolish discriminatory restrictions on the provision of services within the Community in respect of Community nationals." The Council for Trade and Economic Development is required, subject to the approval of the Conference and in consultations with other Community Organs, to establish a

[21] *Myrie* (n) [61].

programme for the removal of restrictions on the provision of services in the Community by Community nationals.[22]

[30] The Applicant alleges that by denying entry to the four Jamaicans the Respondent imposed 'discriminatory restrictions' on the Jamaican service providers in breach of Article 37. There is necessarily some tension between the preceding allegation in relation to Article 36, that the Respondent imposed a new restriction on the provision of services, and the current contention that the Respondent breached its Treaty obligations in relation to Article 37, by not removing an existing restriction on the provision of services. Be that as it may, the allegation of discriminatory restriction suffers from the same defects as the allegations of breach of Article 7. The Applicant has not alleged facts to suggest that any such infraction impinged a right intended to enure to his benefit 'directly'. Further even if such facts had been alleged any right of the Applicant would not, in the circumstances of this case, have enured to him directly for the reasons given at [28].

Article 45 - Movement of community nationals

[31] Article 45 provides that, "Member States commit themselves to the goal of free movement of their nationals within the Community." 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…"[23], 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'.

[32] The Applicant alleges that the denial of entry to the Jamaican nationals, in breach of Article 45 and the 2007 Conference Decision, was of individual concern to the him

[22] Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market & Economy, Article 37(2).
[23] 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.

directly. The very reason why the Jamaican nationals were exercising their Community rights was to perform a contract with the Applicant.

[33] The Court is of view that the Applicant's reliance on Article 45 and the 2007 Conference Decision is misconceived. Article 45 is largely aspirational with the dispositive rights appearing in Article 46 (which specifies the categories of skilled nationals who are entitled to free movement) and the 2007 Conference Decision (which grants the right of movement to all CARICOM nationals for non-economic purposes). Neither of these provisions conferred rights which were intended to enure to the Jamaicans to provide services, far less so to the Applicant.

[34] The attempt to link freedom of movement of Community nationals for non-economic purposes with the right in Article 36 to provide services is misguided. It is the case that in *Myrie* this Court indicated that tourism was one of the service sectors capable of triggering Article 36 rights[24] but this was in no way intended to override the distinction between the regimes governing movement for (a) the provision or receipt of services, (b) employment purposes, (c) non-economic purposes. The conditions to be met for the exercise of free movement are different for each of the three categories, although there might be some overlap. For example, as was foreshadowed in *Myrie*, any Community national is entitled to travel within the Community to receive services against remuneration to the service supplier. Such services include tourism services.[25] By way of comparison, a skilled Community national is entitled to travel within the Community to seek, obtain and retain employment but that is very different from a service provider travelling to the territory of another Member State to supply services. Article 36 (4) makes it abundantly clear that "'services' means services against remuneration other than wages". A skilled Community national moving pursuant to Article 46 to seek employment, therefore, does not have the Treaty right, by virtue only of such movement, to provide services in accordance with Article 36. Neither does a Community national possess the right to provide services if such national is moving

[24] At paragraph 61 of *Myrie* (n 1), the Court, indicated that tourism was one of the service sectors capable of triggering Article 36 rights: "Without doubt, one of the service sectors capable of triggering these rights is tourism as tourists can reasonably be considered recipients of services." (footnote omitted).
[25] *Myrie* (n 1) [61].

pursuant to the 2007 Conference Decision since the rights conveyed by the Conference decision entail moving for non-economic purposes.

Conclusion on standing

[35] For the foregoing reasons, this Court decides that the Applicant has failed to satisfy the requirement under Article 222 (a) to show an arguable case that the Treaty intended that a right or benefit conferred on a Contracting Party enured to his benefit directly. It follows that the Article 222 (b) requirement to demonstrate an arguable case of prejudice in the enjoyment of those rights, necessarily cannot be made out. In consequence, the application for special leave to bring original jurisdiction proceedings against the Respondent fails.

[36] The Court notes that the Applicant has not provided particulars of the claimed categories of damages; nor indicated how such damages are linked to the alleged wrongful act of the Respondent; or given any suggestion how the amounts claimed were calculated. This Court reaffirms its dictum in *Hummingbird Rice Mills Ltd v Suriname and the Caribbean Community*[26] that it is best practice to give these particulars, and emphasizes the great importance that sufficient particulars are given in the proposed Originating Application.

The proper forum

[37] The parties made significant submissions on the proper forum for these proceedings. The Applicant's contention is that this Court is the proper forum for the hearing of the substantive case as the matter involved a question of the interpretation and application of the Treaty, namely, whether the Respondent had breached the Applicant's Treaty rights. The Respondent asserts that the proper forum for the Applicant to seek redress would be "his national courts". The Respondent alleges that the Applicant's claims, particularly those founded on the principles of freedom of contract and frustration of contract, are not justiciable before this Court in its original jurisdiction as they are founded in common law. That being the case, any rights derived therefrom are extraneous to the provisions of, and rights conferred by,

[26] [2012] CCJ 2 (OJ).

the Treaty. Further, any alleged breaches of those rights do not constitute a cause of action under Article 36 or any other provision of the RTC. The Respondent is also of the view that the language used by the Applicant clearly "demonstrates that the true nature of any claim [Mr Douglas] may have…ought to be brought in the national courts" and in this regard, relied on this Court's decision in *Johnson v CARICAD.*[27]

[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. In circumstances, such as here, 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.

Costs

[39] As regard the costs of these proceedings, this Court considers relevant the principle it expounded in *Hummingbird Rice Mills Ltd v Suriname and the Caribbean Community*[28] that, "[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

[27] [2009] CCJ 3 (OJ), (2009) 74 WIR 57.
[28] [2012] CCJ 2 (OJ).

entities and thus discourage the bringing of important issues of economic integration law before the Court".[29] Accordingly each party should bear its own costs.

Order

[40] The Application is dismissed.

[41] Each party will bear its own costs.

/s/ CMD Byron

The Rt Hon Sir Dennis Byron (President)

/s/ A. Saunders

The Hon Mr Justice A Saunders

/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

[29] ibid [6].