

**IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction**

CCJ Application No. OA 1 of 2013

Between

MAURICE TOMLINSON **Claimant**

And

THE STATE OF BELIZE **Defendant**

CCJ Application No. OA 2 of 2013

Between

MAURICE TOMLINSON **Claimant**

And

THE STATE OF TRINIDAD & TOBAGO **Defendant**

[Consolidated by Order of the Court dated 17th day of July 2013]

JUDGMENT SUMMARY

- [1] The Claimant, Mr Maurice Tomlinson, a Jamaican national, is a homosexual and noted LGBTI rights activist. He is also an attorney-at-law and a graduate of the University of the West Indies (UWI) who, in his role as an activist, routinely travels throughout the Caribbean region. Mr Tomlinson alleges that he has been prejudiced in the enjoyment of his right as a CARICOM national to enter the States of Belize and Trinidad and Tobago without hassle, due to the respective Immigration Acts of Belize (section 5) and Trinidad and Tobago (section 8) which purportedly include homosexuals as a class of persons prohibited from entering these territories. While conceding that he has never actually been refused entry on any occasion by either State, Mr Tomlinson nonetheless argues that the mere existence of these statutory provisions prevent him from entering both States since, in so doing, he would be breaking their domestic laws. Accordingly, his rights as a CARICOM national would be prejudiced in contravention of his right to free movement

under Article 45 of the Revised Treaty of Chaguaramas (RTC) and the 2007 Decision of the Conference of Heads of Government of CARICOM, as well as his right to not be discriminated against on the basis of nationality only (Article 7 of the RTC). Additionally, being a UWI graduate and thus a Skilled CARICOM National, his rights under Article 46 RTC would be prejudiced.

- [2] Mr Tomlinson sought several declaratory orders from the Court to the effect that he has a right to enter these States and that the provisions of the respective Immigration Acts prohibit his lawful entry thereby violating his rights to freedom of movement and not to be discriminated on the basis of nationality only. Additionally, he sought an order that the Defendant States amend their Immigration Acts so as to remove homosexuals from any class of prohibited immigrants.
- [3] Belize and Trinidad and Tobago maintain that Mr Tomlinson is entitled to enter their respective territories without hassle and to remain there for up to six months; and also that, as a homosexual, Mr Tomlinson does not constitute a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society” so that he is not an “undesirable person” as envisioned under the 2007 Conference Decision. Further to this, the States highlight the fact that Mr Tomlinson has entered both territories in the past without hindrance and that the existence of the legislation has not caused him to suffer prejudice of which he complains.
- [4] The Court, fully endorsing its decision in the earlier *Shanique Myrie* case, observed that the 2007 Conference Decision created a binding obligation on the Member States to allow all CARICOM nationals hassle free entry and stay of six months upon arrival into their respective territories, subject 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. The Court agreed with the States that homosexuals, as such, cannot be categorised as ‘undesirable persons’ and concluded that homosexual CARICOM nationals have a right to freedom of movement on the same terms as any other CARICOM national. The primary issue to be determined was whether the States’ obligation has been breached by the mere existence of the statutory provisions being challenged by Mr Tomlinson.
- [5] Referencing the jurisprudence of international tribunals, the Court noted that the proper construction of a domestic statute in the context of an international dispute was ultimately

an exercise in ascertaining evidence of state practice. Although considerable deference was to be given to the view of the State itself as to the meaning of its own law, the Court would not be bound by this view in its assessment of whether the application of the statute was consistent with the State's international obligation. Ultimately, the Court determined that Mr Tomlinson was not in danger of being prejudiced by the existence of the Immigration Acts of Belize and Trinidad and Tobago. This determination was based on the following reasons.

- [6] The Court agreed with Belize's interpretation of section 5(1)(e) of its Immigration Act. The wording and the context of this provision indicate that homosexuals are prohibited from entering the country only where they are seeking financial gain either by offering sexual services themselves or by profiting from those performed by others.. Further, section 5(1)(e) is to be considered in the context of Belize's CARICOM treaty responsibilities. Section 64(1) of Belize's Interpretation Act, to which section 3(2) of the Caribbean Community Act, 2004 of Belize specifically refers, prescribes that when ascertaining the meaning of any provision of an Act consideration should be given to "any provision of the Caribbean Community Treaty and any Community instrument issued under the Treaty, where relevant." Critically, the interpretation advanced by Belize is bolstered by the practice of the administrative and executive arms of the State of Belize which apply the legislation in a manner that is consistent with this interpretation.
- [7] With regard to Trinidad and Tobago, the Court noted that the wording of section 8(1)(e) of its Immigration Act differs from the Belizean statute as it regards "homosexuals" separate and apart from those "persons who live on the proceeds of homosexuals". Homosexuals, as such, therefore are seen as a category of prohibited persons. This was also the view of Trinidad and Tobago. Consequently, Mr Tomlinson would appear to be prohibited from entry by the above mentioned provision, although the Court envisioned the possibility of a more liberal interpretation of the law. In this regard, mention was made of the Preamble of the 1976 Constitution of Trinidad and Tobago, as well as section 4 which recognizes the right of the individual to equality before the law and protection of the law, and the right of the individual to respect for his private and family life. Reference was also made to relevant state practice, particularly the 2004 amendment to the Extradition (Commonwealth and Foreign Territories) Act, 1985, which introduced a prohibition to extradite persons who might be discriminated against on the basis of gender and sexual orientation; as well as the

Data Protection Act 2011, which aims at ensuring that protection is afforded to an individual's right to privacy and the right to maintain "sensitive personal information" as private and personal, including information on a person's sexual orientation or sexual life.

- [8] Be that as it may, Trinidad and Tobago posits that, despite the formal prohibition in section 8 of the Immigration Act, Mr Tomlinson has never been and could never have been prejudiced in the enjoyment of his right to enter the State since its Immigration Department does not apply the prohibition to CARICOM nationals who are homosexual. This administrative practice appears to be the expression of an official policy.
- [9] The Court accepted the existence of this policy. It pointed out that Article 46 of the RTC accords certain categories of Community nationals the right to seek employment in CARICOM Member States, including university graduates. This right has been incorporated into the laws of Trinidad and Tobago by virtue of section 3 of the Immigration (Caribbean Community Skilled Nationals) Act 1996, which requires an immigration officer to permit entry into Trinidad and Tobago of skilled CARICOM nationals who present a skills certificate, "notwithstanding any other written law" (as, for example, the Immigration Act). Consequently, if Mr Tomlinson enjoys a legal right of entry under the 1996 Act *despite* being a homosexual then it seems awkward that he could legally be denied entry under section 8 (1) (e) of the Immigration Act *because* he is a homosexual.
- [10] Mr Tomlinson expressed as his main concern that, especially in the absence of a published written document or instruction detailing the stated practice of the Immigration Department of Trinidad and Tobago, there is genuine uncertainty about the legality of this practice as immigration officers are under a duty to apply the law and run the risk of prosecution if they deliberately refuse to do so. Moreover, practices and policies may change over time. The Court rejected this view. It considered that the practice of admitting homosexuals of other CARICOM States is not a matter of discretion but is *legally required* by Article 9 RTC as this an appropriate measure within the meaning of that provision. Given the transformation of this Treaty provision into the domestic law of Trinidad and Tobago (through the Caribbean Community Act, 2005), this legal requirement equally exists within the domestic legal order of that State, notwithstanding any contradictory provision in the earlier Immigration Act.

[11] Despite the above reasoning, the Court cautioned that Member States should strive to ensure that national laws, subsidiary legislation and administrative practices are consistent with, and transparent in their support of, the right of free movement of all CARICOM nationals. It noted that this is a necessary component of the rule of law which is the basic notion underlying the Caribbean Community. The Court also emphasized that a permanent or indefinite discord between administrative practices and the apparent meaning of legislation is undesirable as the rule of law requires clarity and certainty especially for nationals of other Member States who are to be guided by such legislation and practice.

[12] The Court ultimately dismissed Mr Tomlinson's claims against Belize and Trinidad and Tobago and refused the requested remedies. As to costs, the Court, noting the importance of having novel issues of Community law ventilated before the CCJ, ordered that each party pay its own costs.

This summary is not intended to be a substitute for the judgment of the Caribbean Court of Justice or to be used in any later consideration of the Court's judgment.