

Maurice Tomlinson v The State of Belize and The State of Trinidad and Tobago

Citation: [\[2016\] CCJ 1 \(OJ\)](#)
Date of Judgment: 10 June 2016
Nature of Judgment: Judgment on merits
Judgment as to costs
Composition of the Court: President: D Byron
Judges: R Nelson, A Saunders, J Wit, and W Anderson

CCJ Application No	Parties	
OA 1 of 2013	Claimant	Maurice Tomlinson
	Defendant	The State of Belize
OA 2 of 2013	Claimant	Maurice Tomlinson
	Defendant	The State of Trinidad and Tobago
These Applications were consolidated by Order of the Court dated 17 July 2013		

Counsel

- Claimant:
Mr Douglas Mendes SC, Mr Westmin R A James and Mr Imran Ali, Attorneys-at-Law
- The State of Belize:
Ms Anika Jackson, Solicitor General, Mr Nigel Hawke and Ms Samantha Matute, Attorneys-at-Law
- The State of Trinidad and Tobago:
Mr Seenath Jairam SC, Mr Wayne D Sturge, Mr Gerald Ramdeen, Mr Kashka Hemans, Ms Deowatee Dilraj-Batoosingh and Ms Lesley Almarales, Attorneys-at-Law
- The Caribbean Community:
Dr Chantal Ononaiwu and Ms Gladys Young, Attorneys-at-Law

Nature of Dispute

The dispute involved a claim by Maurice Tomlinson, a homosexual, Jamaican national, that his right to free movement under Articles 45 and 46 of the Revised Treaty of Chaguaramas (RTC) and the Decision of the Conference of Heads of Government of the Caribbean Community (the 2007 Conference Decision) taken in 2007, was prejudiced by the Immigration Laws of Belize and Trinidad and Tobago because the mere existence of those laws operated to deny him entry based on his sexuality. The Claimant also alleged that differentiated treatment of homosexual nationals in respect of the Immigration Laws of Trinidad and Tobago amounted to a breach of Article 7 of the RTC and his right thereunder to freedom from discrimination based on nationality. The Claimant brought separate proceedings against the States of Belize and Trinidad and Tobago, which the Court consolidated.

Summary of Legal Conclusions and Orders

- The Court dismissed the claims and refused all remedies and relief sought.
- The Court ordered the parties to bear their own costs.

Legal Provisions at Issue

- Articles 7, 45, 46, 211, 214, 222 and 240 of the RTC

Other Relevant Community Law / Material Relied on

- Decision of the Conference of Heads of Government of the Caribbean Community taken at their Twenty-Eighth Meeting concerning the right of entry of CARICOM nationals (the 2007 Conference Decision)
- Part 31.1(3) of the CCJ Original Jurisdiction Rules 2015

Past CCJ Case Law

- *Shanique Myrie and The State of Barbados* [2013] CCJ 3 (OJ)
- *Trinidad Cement Limited & TCL Guyana Inc and The State of the Co-operative Republic of Guyana* [2009] CCJ 1 (OJ)
- *Hummingbird Rice Mills Ltd and Suriname and The Caribbean Community* [2012] CCJ 2 (OJ)

Other Sources of International Law

- *Certain German Interests in Polish Upper Silesia* (1926) PCIJ Rep Ser A No 7
- *Dietrich v R* [1992] HCA 57
- *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* [1989] ICJ 5
- *WTO India - Patents (US), India - Patent Protection for Pharmaceutical and Agricultural Chemical Products - AB-1997-5 - Report of the Appellate Body* (19 Dec 1997) WT/DS50/AB/R
- *LaGrand (Germany v United States of America)* 2001 ICJ 466
- *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*: C-397/01 to C-403/01 [2004] ECRI-8835

- *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116
- WTO *The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts*
- WTO *United States - Carbon Steel (India), United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* - AB-2014-7 - Report of the Appellate Body (8 Dec 2014) WT/DS436/AB/R

Facts

The Claimant, a Jamaican national, is a homosexual male who had travelled to Belize and Trinidad and Tobago numerous times. Belize and Trinidad and Tobago had never denied entry to the Claimant but had immigration laws under which they could deny entry to homosexuals. Since learning of the existence of those laws, the Claimant ceased to travel to both territories.

Findings

Tomlinson sought (a) a declaration that the national laws were in breach of the RTC; (b) an order to amend the Immigration Acts of the Defendant States; (c) an order to permit his entry into those States pending such amendments; (d) damages; (e) costs and (f) additional relief the Court may award.

In respect of Belize, the Court considered whether the retention of the immigration laws operated to hinder the enjoyment of Mr Tomlinson's right to free movement in Belize. The Court examined whether section 5(1)(e) of the Immigration Act – which classifies prostitutes, homosexual or others living on or receiving the proceeds of prostitution or homosexual activities as prohibited immigrants – should be construed using the literal or purposive approach. In opting for a purposive approach, the Court found that Belize was deemed not to deny entry based on homosexuality, but to do so based on its assessment that a person desiring entry into Belize may seek to profit from illicit acts. The Court considered the practice of Belize which showed no evidence that discrimination based on sexuality operated to deny entry into Belize to Mr Tomlinson or other homosexual. Accordingly, the mere existence of the laws did not operate to hinder the Claimant's enjoyment of his right to free movement in Belize under the Conference Decision and Articles 45 and 46 of the RTC. The Court also noted its role as the final appellate Court for Belize, finding that when it pronounces on the meaning, interpretation or application of a provision of the national law of Belize, that pronouncement is authoritative even when it sits in its original jurisdiction. As the Court remained unconvinced that Tomlinson had been, may or will be prejudiced by the existence of the Immigration Act of Belize, the Claimant's claim therefore failed.

Turning to the immigration laws of Trinidad and Tobago, the Court noted that there are important distinctions as compared to the Belize Act. First, section 8(1)(e) prohibited entry of prostitutes, homosexuals, persons living on the earnings of prostitutes *or* homosexuals, *or*

persons reasonably suspected of seeking entry for these or other immoral purposes. Second, Trinidad and Tobago had also conceded that the section classified homosexuals as prohibited persons. Third, the Court was not the final appellate court and could not be as definitive in its interpretation. Despite these differences, the Court noted the similarity of the arguments of the Defendants, namely that neither State had applied the prohibition to CARICOM nationals.

Despite the differences in the two cases, including the concession by Trinidad and Tobago which had not been premised on any judicial pronouncements of the domestic Courts, the Court found that it was its responsibility to decide on the meaning of municipal law, as factual elements of state practice, even though considerable deference would be given to the views of the State.

The Court noted the sacrosanct rule in common law that national law should be interpreted to be consistent with the State's international obligations rather than a breach of those obligations. The Court highlighted human rights material that would support a liberal approach and noted that such human rights instruments recognised that sexual orientation is protected from discrimination. The Court further considered evidence of State practice to determine the international liability of Trinidad which would be grounded the practical application of the immigration legislation. Here, the Court made much of Trinidad and Tobago's passage of the Caribbean Community Act, which gives the RTC the force of law. Through that Act, Article 9 of the RTC is part of the domestic law, which means that national courts must do their best to ensure that the 2007 Conference Decision is effective. Moreover, it required that the executive and legislative arms of the State take all necessary measures to ensure the carrying out of Community obligations resulting from decisions of the Conference of Heads. The Court also noted statutory provisions which it found encourage, suggest or apply section 8(1)(e) in a manner consistent with the 2007 Conference Decision. The latter included Trinidad and Tobago's incorporation of Article 46 of the RTC which gave the Claimant, as a university Graduate, the right to enter Trinidad and Tobago. The Court also considered the actual practices and policies of the Immigration Division of Trinidad and Tobago, citing testimony of the Chief Immigration Officer of Trinidad and Tobago and official documents made available to the public.

Based on its review of these circumstances, the Court concluded that Tomlinson had not shown that he had been prejudiced in respect of enjoyment of this right to the extent required to demonstrate breach. Having reached that conclusion, the Court nonetheless stated that it was not to be taken to condone the indefinite retention on the statute books of a national law which in appearance seems to conflict with Community law. The Court counselled Member States to ensure that national laws, subsidiary legislation and administrative practices are transparent in their support of the free movement of all nationals and that in principle, national legislation should be expressly harmonised with Community law.

Turning to the claim of discrimination and breach under Article 7 of the RTC, the Claimant argued that the Immigration Act did not prohibit Trinidadian homosexuals from entering the country, whereas homosexuals from other States were prohibited. As the only difference was the fact of their nationality, Tomlinson argued that this constituted discrimination under Article 7. In dismissing this argument, the Court concluded that it is legitimate for a State to make distinctions between nationals and non-nationals under international law, and that a State can refuse entry to non-nationals. In any event, the Court noted that Article 7 is limited to issues falling within “the scope of application of the [RTC]”, and there was no indication that the RTC is intended to eliminate the basic elements of States sovereignty, one aspect of which was the sheer unbreakable tie between the State and its nationals.

Based on the foregoing, the Court dismissed the Originating Application and ordered the parties to bear their own costs.

This summary should not be used as a substitute for the decision of the Caribbean Court of Justice.