

CCJ Advisory Opinion

Citation: [\[2020\] CCJ 1 \(OJ\) \(AO\)](#)
Date of Judgment: 18 March 2020
Nature of Judgment: Advisory Opinion
Composition of the Court: President: A Saunders
Judges: J Wit, W Anderson, M Rajnauth-Lee and D Barrow

CCJ Application No	Parties
AOJ2019/001	The Caribbean Community The State of Barbados The State of Grenada The Federation of St Kitts and Nevis The State of Antigua and Barbuda Amici Curiae The University of the West Indies, Mona Campus The University of the West Indies, Cave Hill Campus

Counsel

- The Caribbean Community:
Dr Corlita Babb-Schaefer, General Counsel and Mr O'Neil Francis
- The State of Barbados:
Ms Donna K Brathwaite QC, Deputy Solicitor General and Ms Sandra Rawlins
- The State of Grenada:
Ms Dia C Forrester, Solicitor General
- The Federation of St Kitts and Nevis:
Ms Simone Bullen Thompson, Solicitor General and Ms Tashna Powell-Williams

- The State of Antigua and Barbuda:
Dr Carla Brookes-Harris, Deputy Solicitor General and Dr Vanessa Moe, Crown Solicitor
- The first Amicus Curiae, The University of the West Indies, Mona Campus:
Mr Andre Sheckleford
- The second Amicus Curiae, The University of the West Indies, Cave Hill Campus:
Dr David S Berry, Mr Westmin James and Ms Nicole Foster

Nature of Dispute

The advisory opinion was requested by the Caribbean Community (CARICOM) after the decision made by the Conference of Heads of Government (the Conference) at the 18th Special Meeting to expand the coverage of CARICOM Skilled Nationals. At the 30th Inter-Sessional Meeting, Antigua and Barbuda and St Kitts and Nevis requested to opt-out of the expansion decision. The Community sought an advisory opinion on whether the opt-out violated Article 27(4) of the Revised Treaty of Chaguaramas (RTC).

Summary of Legal Conclusions and Orders

- The Court found that opt-outs of obligations arising from decisions of the Conference were lawful and did not constitute a violation of Article 27(4) of the RTC.
- The Court advised that the principle of non-reciprocity should be applied where there is an opt-out of obligations.

Legal Provisions at Issue

- Articles 4, 6, 7, 8, 9, 10, 12, 14, 27, 28, 30, 45, 46, 47, 48, 51, 56, 57, 75, 78, 134, 142, 143, 169, 211, 212 and 237 of the RTC

Other Relevant Community Law / Material Relied on

- CARICOM Secretariat, 'Eighteenth Special Meeting of the Conference of Heads of Government of the Caribbean Community on the CARICOM Single Market and Economy: Confirmed and Unconfirmed Summary of Conclusions', HGC (Spec) 2018/18/CUSC, 3 – 4 December 2018
- CARICOM Secretariat, 'Thirtieth Inter-Sessional Meeting of the Conference of Heads of Government of the Caribbean Community (CARICOM): Confirmed and Unconfirmed Summary of Conclusions', INS/HGC/2019/30/CUSC, 26 – 27 February 2019
- CARICOM Secretariat, 'Thirtieth Meeting of the Conference of Heads of Government of the Caribbean Community: Summary of Recommendations and Conclusions', HGC/2009/30/DEC.B.1.7, 2 – 5 July 2009

- CARICOM Secretariat, ‘Thirty-Sixth Regular Meeting of the Conference of Heads of Government of the Caribbean Community: Confirmed Decisions’, HGC 2015/36/CD, 2 – 4 July 2015
- CARICOM Secretariat, ‘Summary of Recommendations and Conclusions of the Seventeenth Inter-Sessional Meeting of the Conference of Heads of Government of the Caribbean Community’, 9 – 10 February 2006
- Consolidated Version of the Treaty on European Union (Consolidated Version) [2016] OJ C202/13 (TEU)
- Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU)
- Charter of Fundamental Rights of the European Union [2016] OJ C202/389. 31
- Revised Treaty of Basseterre establishing the Organisation of Eastern Caribbean States Economic Union (adopted 18 June 2010, entered into force 20 January 2011)

Past CCJ Case Law

- *Shanique Myrie v The State of Barbados (No 2)* [2013] CCJ 3 (OJ)

Other Sources of International Law

- The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17
- Articles 3, 20 and 21 of Vienna Convention on the Law of Treaties 1969

Facts

Article 46 of the RTC lists Community nationals who enjoy the right to move freely and seek employment throughout the Community. Under the RTC, the list included university graduates, media workers, sportspersons, artists, and musicians. Since then, the Conference expanded the list per Article 46(4)(a) of the RTC. The most recent expansion included Agricultural Workers and Security Guards. At the 30th Inter-Sessional Meeting, the Conference agreed to a requested opt-out of the expansion decision taken at its 18th Special Meeting by Antigua and Barbuda and St Kitts and Nevis. The Conference granted a special dispensation of five years to Antigua and Barbuda and St Kitts and Nevis, under Article 27(4) of the RTC, to opt-out of the implementation of the decision of the Conference taken at its 18th Special

Meeting. The Conference also agreed that the Community would request an Advisory Opinion from the Court for further clarity on the matter.

Findings

The Community requested clarity on two major issues, namely, (i) whether a Member State can, under Article 27(4) of the RTC, lawfully opt-out of a decision of the Conference taken under Article 46 of the RTC concerning the enlargement of the classes of persons entitled to move and work freely in the Community; and (ii) whether the principle of non-reciprocity would enable nationals of those Member States which opt-out of a decision under Article 27(4) of the Treaty to nevertheless derive the benefits of the decision.

In response to the first question, the Court noted that Article 27(4) set out a narrow application for opt-outs. The Court went on to distinguish in this regard between reservations, on the one hand, and opt-outs, on the other hand. While reservations are made unilaterally, opt-outs require consent from all the parties bound by the treaty and must be justified by valid reasoning. Further, while both opt-outs and reservations purport to exclude or modify a legal effect, reservations belong to and must be interpreted within the context of general public international law. The opt-out of Article 27(4), on the other hand, belongs to and must be interpreted within the specific context of the new and unique legal order created by the RTC. Additionally, opt-outs cannot be compared to a waiver of obligations to grant rights as provided for in Article 48 of the RTC.

The Court considered that the ordinary meaning must be given to Article 27(4) in context and in light of the object and purpose of the RTC. In principle, opt-outs are permissible concerning any decision of any competent Organ of the Community. Five conditions were prescribed for the effective implementation of opt-outs as contemplated by Article 27(4):

- (i) one or more of the Member States must request to opt-out of a decision
- (ii) the decision-maker must be a competent Organ of the Community.
- (iii) the Conference must agree to the request of the Member State(s) to opt-out of the relevant decision, even if that decision was taken by another Community Organ.
- (iv) the Member State opting out of a decision is entitled only to opt-out of the obligations arising from the decision
- (v) an opt-out is permissible only if the fundamental objectives of the Community, as laid down in the treaty, are not prejudiced by the opt-out.

The Court found that all elements were satisfied in this case. On the fifth element, the Court found that freedom of movement of skilled nationals, which is essential for the achievement of a seamless economic space and critical for the success of any regional trading bloc, is a fundamental objective of the Community. In finding that this fundamental objective would not

be prejudiced by the opt-out in question, the Court took into account that (i) the opt-out was made available to two Member States each of which is categorised under Article 4 of the RTC as a less developed country; (ii) the duration of the opt-out was temporary, lasting for five years; and, (iii) the opt-out related only to two categories of skilled nationals. Having regard to these circumstances, the Court found that the impact of the opt-out did not meet the requisite threshold of detriment to the Community. As such, the opt-out was valid.

The Court then turned to the second Issue on It was requested to give an advisory opinion, namely, whether the principle of non-reciprocity would enable nationals of those Member States which opt-out of a decision under Article 27(4) of the Treaty to nevertheless derive the benefits of the decision. The Court found that while opt-outs under Article 27(4) are largely governed by a process that is consensual and political, constrained only by adherence to the fundamental objectives of the Community and the rule of law, they must not be treated with the principle of reciprocity like other treaties. First, the RTC expressly acknowledges that some Member States were entering the CARICOM Single Market and Economy (CSME) at a disadvantage because of the size, structure and vulnerability of their economies. As such, special considerations must be made for the less developed Member States. Second, the Court noted that Article 27(4) specified that opt-outs applied only to obligations and not rights, and considered that the exclusion of rights from the scope of opt-outs barred the application of the principle of reciprocity to the opt-out in question. Third, the Court found that Article 8 of the RTC supports the view that opt-outs of the kind considered in this case must be understood as being enjoyed on a non-reciprocal basis. The Court explained in this regard that Article 8 requires each CARICOM Member State to accord to another CARICOM Member State treatment no less favourable than that accorded to, *inter alia*, a third CARICOM Member State. Subject to the provisions of the RTC, there was, therefore, an onus on the Member States to extend to the Agricultural Workers and Security Guards of Antigua and Barbuda and St Kitts and Nevis the right to seek employment in their respective States.

In light of the above, the Court advised that it was lawful for the States of Antigua and Barbuda and St Kitts and Nevis to request an opt-out of the obligations arising from the enlargement decision of the Conference, and it was also lawful for the Conference to grant the opt-outs in all the circumstances. Further, the Court advised that the principle of non-reciprocity be applied to the enlargement decision.

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