

# **FREE MOVEMENT OF COMMUNITY NATIONALS, CCJ, SHANIQUE MYRIE, COMMUNITY LAW AND OUR CARIBBEAN CIVILISATION**

By

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Prime Minister of St. Vincent and the Grenadines**



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PRIME MINISTER OF ST. VINCENT AND THE GRENADINES**

[FORMAL GREETINGS!]

**INTRODUCTION**

The Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy was signed by the Heads of State and Government on July 05, 2001, at their twenty-second meeting of the Conference of Heads in Nassau, Bahamas. I was one of the signatories on behalf of the Government and people of St. Vincent and the Grenadines.

The Revised Treaty of Chaguaramas (RTC) is the foundation text of community law for the Caribbean Community

(CARICOM). The Caribbean Court of Justice, inaugurated in April 2005, has been accorded by the RTC (Article 211) compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:

- (a) disputes between Member States parties to the Agreement;
- (b) disputes between Member States parties and the Community;
- (c) referrals from national courts of the Member States parties to the Agreement;
- (d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.

The rulings, judgments, and advisory opinions of the CCJ accordingly constitute an essential part of Community law.

The Revised Treaty of Chaguaramas of 2001 and its predecessor Treaty of Chaguaramas of 1973 have been constructed on the basis of “intergovernmentalism” and its riding partner, national sovereignty. The founding fathers of both Treaties eschewed supranational community governance in favour of institutional arrangements which groped for a consensus without a driving executive apparatus at the centre. However, in order to implement any viable programme for an elaboration of the CARICOM Single Market and Economy (CSME), a credible process of disputes settlement had to be fashioned. At the core of the processes of disputes settlement is the CCJ in its original, compulsory and exclusive jurisdiction. Thus, a supranational juridical institution, the CCJ, emerged. On the basis of the Trinidad Cement and Shanique Myrie cases of 2009 and 2012 respectively, the consensual intergovernmentalists, wedded to national sovereignty, may be thinking that, inadvertently, they have

contributed to the establishment of a Trojan Horse of supranationalism in the form of the CCJ.

In an interesting article entitled “CARICOM and its Court of Justice” and published in the Common Law World Review in December 2008, its authors Derek O’Brien and S. Foadi, concluded:

*“At its conception CARICOM was designed to be run along strictly intergovernmental lines as manifested in its institutional structure and mode of governance. The establishment of a regional court with compulsory jurisdiction, therefore, marks a significant step in the direction of supranationalism. Even if decisions and recommendations of CARICOM’s principal organs remain unenforceable, other than by the traditional methods available under international law, the governments of Member States can now be held to account for their failure to observe the requirements of the RTC. The introduction of a*

*right for individuals and businesses to hold the governments of Member States, including their own government, to account before the CCJ is a particularly important innovation because it wrests control of the pace of regional integration away from the Heads of Government. Even the threat of being held to account by the CCJ as a result of an action brought by an individual or business could help to inculcate in the governments of Member States what Weiler refers to as the “habit of obedience”. In this regard it is difficult to overstate the importance of the CCJ’s judgment in the Trinidad Cement case and its liberal approach to the grant of special leave to individuals and businesses.”*

On the uncharitable assumption that the Heads of State and Government wanted absolutely no truck with “supranational” interventionism and no dilution of a pristine national sovereignty, why did they agree to set up the CCJ under the Revised Treaty?

Possible answers include the following:

- (i) It was unavoidable, but necessary and desirable, in the quest to advance the CARICOM Single Market and Economy.
- (ii) The general public, especially business leaders, university graduates, sports persons, entertainers, and diverse categories of workers, were demanding a more effective and mature regionalism than that which was hitherto on offer.
- (iii) The Heads of State and Government probably felt that they would nevertheless retain effective control of the dispute settlement process by virtue of Article 12(8) of the RTC which stipulates that: “Notwithstanding any other provision of this Treaty, the Conference may consider and resolve disputes between Member States.”

(iv) The Heads of State and Government probably held to a mistaken belief that a literal reading of Article 222, which addresses the issue of locus standi before the CCJ, would have effectively debarred individuals and private entities from accessing the CCJ in its original jurisdiction. However, the first case heard by the CCJ would have disabused anyone who held such a literal and restrictive, as distinct from a liberal and purposive, interpretation of Article 222. That first case was Trinidad Cement Limited and TCL Guyana Incorporated v The Co-operative Republic of Guyana in 2009.

The activist and purposive orientation of the CCJ was again on display in the case involving the freedom of movement of Community nationals, namely, Shanique Myrie and the State of Barbados and the State of Jamaica of 2012 in which judgment was delivered in October 2013.



## **FREE MOVEMENT OF COMMUNITY NATIONALS UNDER THE RTC**

The Revised Treaty and a Decision of the Conference of Heads of State and Government of CARICOM in 2007 make up the relevant community law which the CCJ had cause to apply in the Myrie case.

Let us first outline what the RTC stipulates regarding the free movement of Community nationals. Article 45 of the RTC asserts the goal of free movement of the Caribbean Community nationals in sweeping terms: *“Member States commit themselves to the goal of free movement of their nationals within the Community.”* Article 46 of the RTC sets out “the first step” towards the broad goal of “free movement” by making specific provisions for the “movement of skilled community nationals”, thus:

“(i) Without prejudice to the rights recognized and agreed to be accorded by Member States in Article 32, 33, 37, 38 and 40

among themselves and to Community nationals, Member States have agreed and undertake as a first step towards achieving the goal set out in Article 45, to accord to the following categories of Community nationals the right to seek employment in their jurisdictions:

- (a) University graduates;
- (b) Media workers;
- (c) Sportspersons;
- (d) Artistes; and
- (e) Musicians

recognised as such by the competent authorities of the receiving Member States.”

[Articles 32,33,37,38 and 40 address respectively the prohibition of new restrictions on “the right of establishment”; removal of restrictions on “the right of establishment”; removal of restrictions on the provision of services; removal of restrictions on banking, insurance and other financial

services; and the removal of restrictions on movement of capital and current transactions.]

Article 46(2) of the RTC emphasises that the Member States “*shall establish appropriate legislative, administrative and procedural arrangements*” to facilitate the movement of the listed skilled nationals. Article 46(2)(b) ambitiously enjoins the Member States in the establishment of these “appropriate, administrative and procedural arrangements” to:

*“provide for the movement of Community nationals into and within their jurisdictions without harassment or the imposition of impediments, including:*

- (i) The elimination of the requirement for passports for Community nationals travelling to their jurisdictions;*

- (ii) *The elimination of the requirement for work permits for Community nationals seeking approved employment in their jurisdictions;*
- (iii) *Establishment of mechanisms to certify and establish equivalency of degrees and for accrediting institutions;*
- (iv) *Harmonisation and transferability of social security benefits.”*

Article 46(3) of the RTC proceeds to reaffirm a heretofore accepted proposition that: *“Nothing in this Treaty shall be construed as inhibiting Member States from according Community nationals unrestricted access to, and movement within, their jurisdictions subject to such conditions as the public interest may require”.*

Article 46 (4) envisages an enlargement of the freedom of movement of Community nationals beyond the five categories of persons listed in Article 46(1), as follows:

*“The Conference [that is, the Conference of Heads of State and Government] shall keep the provisions of this Article under review in order to:*

*(a) Enlarge, as appropriate, the classes of persons entitled to move and work freely in the Community; and*

*(b) Monitor and secure compliance therewith.”*

Since July 2001, the Conference of Heads has enlarged the classes of persons entitled to move and work freely in the Community, including nurses, teachers, and artisans.

Further, a decision of the Conference of Heads of CARICOM at its Twenty-Eight Meeting in July 2007, which fell to be

interpreted and applied by the CCJ in the Shanique Myrie case, widened significantly the freedom of movement of Community nationals. In that decision,

*“The Conference AGREED that all CARICOM nationals should be entitled to an automatic stay of six months upon arrival in order to enhance their sense that they belong to, and can move in the Caribbean Community, subject to the right of Member States to refuse undesirable entry and to prevent persons from becoming a charge on public funds”.*

### **THE MYRIE CASE**

As is now well-known, a 22-year old Jamaican lady, Ms. Shanique Myrie, travelled to Barbados on March 14, 2011. Upon arrival at the Grantley Adams International Airport in Barbados she was denied entry. In the process of seeking lawful entry to Barbados, Ms. Myrie was, among other things, subjected by the Barbados Customs and Police to insults, an

unlawful body cavity search in demeaning and unsanitary conditions, and detained overnight in a cell at the airport until her deportation to Jamaica the next day. On May 17, 2012, Ms. Myrie filed an original application at the CCJ, for redress under Community law. The matter was heard on the 8<sup>th</sup> and 9<sup>th</sup> of April 2013. On October 04, 2013, the CCJ with Chief Justice Sir Denys Byron presiding, delivered its historic judgment.

The Court, in its conclusion, granted a declaration that,

*“the State of Barbados breached Ms. Myrie’s right of entry without harassment or the imposition of impediments. The right was breached by the denial of entry, the treatment to which she was subjected, the conditions under which she was detained and her unjustified deportation, all of which contravened the 2007 Conference decision in conjunction with Article 45 RTC.”*

The CCJ further held that “*the State of Barbados with respect to this breach, given its seriousness and causal link between it and the damages Ms. Myrie incurred, has been established.*” Accordingly, the Court ordered that the State of Barbados pay Ms. Myrie BDS \$2,240.00 for pecuniary damages and BDS \$75,000.00 for non-pecuniary damages [BDS \$2.00 equal US \$1.00].

The reasoning of the CCJ in the Myrie Case on the applicable Community law, the substantive and procedural components of the right of “definite entry” in the context of the provisions of the RTC and the 2007 Conference of Heads’ decisions, is impressive and path-breaking.

A critical issue for determination revolved around the submission of Barbados that on a proper reading of Article 240 of the RTC decisions of the Conference of Heads must be enacted into local law before they become binding on the Community. Barbados contended thus, that since Barbados had not enacted the 2007 Conference of Heads’ decision into



domestic law, that decision could not have created a legally binding right for Community nationals in Barbados. The CCJ disagreed with this submission of Barbados.

Article 240 of the RTC states in its relevant provisions that:

- “1. Decisions of Competent Organs taken under this Treaty shall be subject to the relevant constitutional procedures of the Member States before creating legally binding rights and obligations for nationals of such States.
- “2. The Member States undertake to act expeditiously to give effect to decisions of competent Organs and Bodies in their municipal law.”

In rejecting the submission of Barbados on this issue, the CCJ reasoned thus:

*“Although it is evident that a State with a dualist approach to international law sometimes may need*

*to incorporate decisions taken under a treaty and thus enact them into municipal law in order to make them enforceable at the domestic level, it is inconceivable that such a transformation would be necessary in order to create binding rights and obligations at the Community level.*

*“Article 240 RTC is not concerned with the creation of rights at the Community level. The Article speaks to giving effect to such 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 is jeopardised and effectively the States would not have progressed beyond the pre-2001 voluntary system that was in force.---- The Court is entitled, if not required, to adjudicate complaints of alleged breaches of Community law even where Community law is inconsistent with domestic law. It*

*is obligation of each state, having consented to the creation of a Community obligation, to ensure that its domestic law, at least in its application, reflects and supports Community law.”*

The CCJ’s judgment placed the 2007 Conference of Heads’ decision on “*the entitlement of Community nationals to an automatic stay of six months*” in its historical and legal contexts. The Court insisted, accordingly, that this Conference decision gave every Community national the right to enter any Member State for six months. The Court thus held that “*the right conferred is expressed as an entitlement to ‘an automatic stay’ or ‘a definite entry’ of six months upon arrival.*” The CCJ was emphatic that:

*“The wording of the Decision [of Conference in 2007] where it speaks about ‘automatic stay’ or ‘definite entry’ upon arrival, suggests that the right does not depend on discretionary evaluations of immigration officers or other authorities at the port of entry. The*

*fact that entry and stay are described as ‘definite’ and ‘automatic’ precludes any dependency of the right itself on the exercise of domestic discretion.”*

Under the 2007 Conference of Heads’ decision there are two exceptions to “the right of definite entry”. First, the “undesirability” of the Community national, who seeks to enter another Member State; and secondly, the Community national may be refused entry on the ground that it is likely that such a person will become “a charge on public funds.”

The Court ruled that “undesirability” is meant to be concerned with matters such as the protection of public morals, the maintenance of public order and safety, and the protection of life and health. While admitting that each Member State has broad discretionary powers in this regard in their domestic law, the CCJ emphasised that:

*“---The scope of public policy and particularly that of the concept of ‘undesirable persons’, which is used*

*as a justification for derogation from the fundamental principle of freedom of movement and hassle free travel of Community nationals, cannot wholly or unilaterally be determined by each Member State without being subject to control by the major Community Organs, in particular the Conference [of Heads], and ultimately the Court as the Guardian of the RTC.”*

In balancing “the right of “automatic and definite entry” and the exception of “undesirability”, the CCJ invoked “the principle of proportionality”. Accordingly, the Court stressed that:

*“In light of, on the one hand, the fundamental nature of the principle of free movement and, on the other, the draconian character of non-admission, which constitutes its total negation, the Court holds that no restrictions in the interests of public morals, national security and safety, and national health should be*

*placed on the right of free entry of a national of any Member State unless that national presents a genuine, present and sufficiently serious threat affecting one of the fundamental interests in society. Undesirable persons within the meaning of the 2007 Conference Decision are therefore those Community nationals who actually pose or can reasonably be expected to pose such a threat.”*

The CCJ opined that “*in principle, evidence of an intention to stay with a host of ‘ill repute’ or telling lies to a border official could possibly be an indication that the visitor might present a ‘threat’ of the required category but without more this would be insufficient to establish that fact.*”

Regarding the issue of a visiting Community national being “*a charge on public funds*”, the CCJ adopted a practical stance. It asserted that, generally, it would be reasonable for the authorities to assess whether the visitor has funds available and whether these funds would suffice during the time the

Community national intends to stay into the country, taking into account factors such as the availability of a credit card and whether or not the visitor is staying with a private person or an establishment as a paying guest.

The CCJ also made the critical point that “it would not be reasonable to require a visiting Community national to show sufficiency of funds for a period of six months if the national does not intend to stay that long”.

Consequent upon its analysis of the substantive law in the Myrie Case, the CCJ provided procedural guidelines for border officials, which flowed from Community law itself. The Court affirmed that:

*“Given (a) the exceptional character of a decision to refuse a Community national admission into a Member State of the Community and (b) the principle of accountability which forms part of Community law, it is procedurally required that the reasons for*

*refusal be given to a person denied entry. These reasons must be given promptly and in writing. The only exception to this rule is to be found in Article 225(a) RTC which provides that nothing in the RTC shall be construed ‘as requiring any Member State to furnish information, the disclosure of which it considers contrary to its essential security interests.’ This exception would also require a strict and narrow interpretation, and it is evident that only in rare cases will Member States be justified in resorting to it.”*

The CCJ further insisted that “*the accountability principle*” requires Member States promptly and in writing to inform a Community national refused entry not only of the reasons for the refusal but also of his or her right to challenge that decision through an effective and accessible appeal or review procedure with adequate safeguards to protect the rights of the person denied entry.



As a practical, procedural matter, the CCJ advised that any Community national who is refused entry to a Member State, be afforded the opportunity to consult an Attorney or a consular official, if available, or in any event to contact a family member.

Prior to the sweeping historic judgment of the CCJ in the Myrie Case, the legal commentators O'Brien and Foadi had, in December 2008, with much prescience argued that:

*“---it is easy to despair of the whole CSME project. However, to do so would be premature and to overlook the role that the CCJ might be able to play in bridging this implementation gap. After all, the CCJ, in the exercise of its original jurisdiction, has been empowered to hold the governments of Member States to account for any breach of the requirements of the RTC. The importance of the RTC as the primary source of Community law also should not be underestimated. Many of the obligations which it*

*imposes upon Member States are open-textured: such as the obligation not to discriminate on the grounds of nationality, and to abstain from any measures which could jeopardise the attainment of the objectives of the CSME. There are also wide-ranging prohibitions against imposing restrictions on the right of the establishment, the provision of services, and the movement of capital and skilled Community nationals. There is considerable scope for judges of the CCJ to flesh out and breathe life into these provisions. As Lord Denning observed of the European Economic Community (EEC) Treaty in Bulmer v. Bulmer: ‘all the way through the Treaty there are gaps and lacunae. These have to be filled by judges, or by regulations or by directives. It is the European way’.*”

Given the work of the CCJ thus far in its celebrated “original jurisdiction” cases, it is at least in this one respect, the West Indian way, also.

## **THE FALL-OUT OF THE MYRIE JUDGMENT**

My reflections lead me to conclude that many Governments, individual Ministers of Governments, and Immigration Officials across the CARICOM region do not as yet appreciate the significance of the Myrie judgment to the freedom of movement of Community nationals and the CSME.

I so conclude given certain public statements from some Ministers of Government and public officials at the time of the judgment in October 2013 and subsequently.

At the Inter-Sessional Meeting of the Conference of Heads of CARICOM in St. Vincent and the Grenadines in March 2013, there was a specific item on the agenda of the implications of the Myrie judgment. First, since decisions of Conference are now explicitly accorded the status of being a vital part of Community law, great care has to be exercised in the

formulating of Conference decisions particularly those which touch and concern the rights of Community nationals.

Secondly, CARICOM governments have an obligation to ensure that domestic law be put in conformity with Community law since to the extent of any inconsistency on any relevant matter, Community law would prevail.

Thirdly, immigration and other border control officials must incorporate the Myrie guidelines provided by the CCJ at the points of entry to Member States of CARICOM. Immense education of these officials and alterations of pre-existing domestic regulations and procedures to conform with Community law, are urgently required.

Fourthly, the implication of the Myrie judgment for Haitians seeking entry into other Member States is yet to be satisfactorily addressed by the Governments. After all, Haiti, is now as “bona fide” signatory to the CSME, as distinct from, for example, the Bahamas. Haitians are thus entitled to all

the rights which appertain under Community law to “*the freedom of movement*” of Community nationals. Haiti, however, has a population of ten million persons, most of whom do not speak English. What is the likely impact of these facts on St. Kitts and Nevis with a population of 50,000 or on St. Vincent and the Grenadines with a population of 110,000, or indeed on Trinidad and Tobago with a population of 1.2 million?

Fifthly, the Myrie judgment opens up the CARICOM’s Member States to all Community nationals, thus giving life and meaning to regional integration. It is this fact which has excited many who had hitherto considered CARICOM a jaundiced entity in which only especial categories of persons are privileged.

Sixthly, there is a controversial and problematic legal issue of the machinery for the enforcement of the decisions of the CCJ, although I am of the view that the solution already exists in our legal systems.

The Organisation of Eastern Caribbean States (OECS) through its Revised Treaty of Basseterre establishing the OECS Economic Union of June 2010, and its decisions thereunder, have gone much further than CARICOM on the matter of freedom of movement of persons. Article 3 (c) of the Protocol of Eastern Caribbean Economic Union states emphatically:

*“3. To achieve the objectives set out in Article 2, the activities of the Protocol Member States shall include under the conditions and timing set out in this Protocol \_\_*

*(c) The abolition, as between Protocol Member States, of the obstacles to the free movement of persons, services, and capital.”*

*[The seven Protocol Member States are Antigua and Barbuda, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent and the*

*Grenadines. The other two members of the broad OECS entity, namely Anguilla, and the British Virgin Islands are not Protocol Member States of the OECS]*

Article 12 of the Protocol to the Revised Treaty of Basseterre elaborates the issue of “Movement of Persons” in the following terms:

“12.1: Freedom of movement for citizens of Protocol Member States shall be secured within the Economic Union Area.

“12.2: Such freedom of movement shall entail the abolition of any discrimination based on nationality between citizens of the Protocol Member States as regards employment, remuneration, and other conditions of work and employment.

“12.3: Citizens of Protocol Member States shall enjoy in the Economic Union Area the rights contingent to

the freedom of movement that are agreed by  
Protocol Member States.

“12.4: The OECS Authority and the OECS Commission  
shall regularly monitor the implementation of this  
Article.

“12.5: Notwithstanding any provisions of this Article, a  
Protocol Member State may, subject to the approval  
of the OECS Authority, regulate the movement of  
such citizens.”

[Under the Revised Treaty of Basseterre, the OECS Authority,  
which comprises the Heads of Government, has a wide  
centrally coordinated authority in a range of vital subjects to  
the Economic Union. It is to be noted that it is the OECS  
Authority which approves the provisions for freedom of  
movement of persons, not the Protocol Member States  
individually. The OECS Commission is an administrative and  
supervisory mechanism in the Economic Union.]



Since August 01, 2012, there has been complete freedom of movement of all OECS nationals of Protocol Member States within the OECS Economic Union. Passports are not required for travel within the Union, only an approved national identification card with a photograph. There is an indefinite stay after automatic entry and there is no requirement for work permits. Approved contingent rights for citizens of Protocol Member States include primary and secondary education for children, medical and health services on the same terms and conditions as for native citizens of the Protocol Member States.

The issue of “contingent rights” within CARICOM for children and spouses of skilled Community nationals is an unresolved problem of immense importance. Similarly, the practicalities of the issuance of “Skilled Nationals’ Certificates” vary from Member State to Member State in CARICOM. And although there is a CARICOM passport issued by each Member State of the Community, it has no significant meaning beyond the

symbolism of a consciousness of Community. Community nationals are not permitted to travel to other Member States with only a picture identification, except of course in the case of OECS nationals of Protocol Member States within the OECS Economic Union.

Increasingly, the issue of economic citizens in CARICOM and the OECS has arisen for consideration in terms of “the freedom of movement” provisions in both CARICOM and the OECS. As is well-known the OECS Member States of Antigua and Barbuda, Dominica, Grenada, and St. Kitts and Nevis grant “economic citizenship” to “aliens” outside of the well-established categories of citizenship through birth, descent, marriage, and naturalisation. My government has raised this matter sharply within the context of the OECS Economic Union, but the query applies also to CARICOM. My government does not grant “economic citizenship”. We are opposed to it on the basis that the office of citizen is the highest office in the land. It creates the bonds of community and nationhood; it is not a commodity for sale. Similarly, our

passports are not for sale; they constitute, for us, the outward sign of the inward grace of citizenship. The question is: should economic citizens be accorded the “freedom of movement” rights as community nationals? The issue is yet to be resolved!

## **CONCLUSION**

Despite the limitations in the functioning of CARICOM, the supranational CCJ has offered immense possibilities further to ennoble our Caribbean civilization. Still, while celebrating the role of the CCJ and its path-breaking judgments in its original jurisdiction, including the Myrie case, we ought to be careful not to go overboard. The CCJ has shown that it will hold governments of Member States accountable for any failure to observe the requisites of the RTC and decisions of the Conference of Heads. The CCJ has clearly been creative in plugging loopholes in the RTC and to fill the lacunae within the framework of the purposes of the RTC and regional integration generally. And we must ensure that the gains

secured through the CCJ and other organs of CARICOM be not eroded.

Nevertheless, the CCJ cannot do what the people of the Community and their duly-elected leaders fail and/or refuse to do, that is, advance and strengthen the governance arrangements at the centre, perhaps by creating a CARICOM Commission so long advocated by Sir Shridath Ramphal and the West Indian Commission (WIC) Report of 1992,, and to push more assuredly for a deepening of regional integration through each of the four pillars: Functional cooperation, coordination of foreign policy, coordinating national and regional security, and extending economic integration, including the deepening of the CSME.

Our Caribbean civilization has taken a battering on the social and economic fronts largely on account of the global economic downturn of September 2008 and continuing, the frequency and severity of natural disasters, and the self-inflicted home-grown challenges arising from the regional insurance and

indigenous banking melt-down, and unacceptable levels of serious crimes. It is evident to all reasonable persons of discernment that our region would find it more difficult by far to address its immense current and prospective challenges unless its governments and peoples embrace strongly a more mature, more profound regionalism. That ought to be a noise in the blood, an echo in the bone of our Caribbean civilisation.

Thank you!