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# Hassle Free Travel: Myrie v. Barbados and Freedom of Movement in CARICOM

Jane E. Cross

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**HASSLE-FREE TRAVEL: MYRIE V.  
BARBADOS AND FREEDOM OF  
MOVEMENT IN CARICOM**

*By Jane E. Cross\**

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\* Professor, Nova Southeastern University College of Law. The author wishes to thank Angelique Davis, the Lutie Lytle Workshop, my Sirico Workshop group (Christine Coughlin, Bruce Ching, and Deborah Borman) for their assistance with writing this article. I also thank my fellow WARriors, Shakira Pleasant, Teri McMurtry-Chubb, Sha-Shana Crichton, Brenda Gibson, and Vanita (Saleema) Snow whose support and guidance has been invaluable to my success and sanity in this process. In addition, I thank Andrea Ewart and Kenneth Lewis for their invaluable comments on this article. Moreover, I wish to acknowledge my indebtedness to my colleagues in the American and Caribbean Law Initiative. Finally, I salute the courage, persistence and optimism of the Caribbean people as they chart the course to increasing regional integration.

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First and foremost, however, this is a case about a young Jamaican woman who one day left her country, for the very first time, in order to travel to another Caribbean country and, having arrived there, found herself in a situation from which, several months later, according to Jamaican medical practitioners, she was still suffering post-traumatic stress.<sup>1</sup>

### I. INTRODUCTION: HASSLE-FREE TRAVEL

Shanique Myrie, a twenty-two-year-old, left Jamaica on March 14, 2011, to visit a friend in Barbados.<sup>2</sup> Upon arriving in Barbados, she was denied entry, subjected to invasive body cavity searches, detained overnight in “demeaning and unsanitary conditions” and deported the next day.<sup>3</sup> She was never allowed to enter Barbados or given a reason why she was denied entry and subjected to insults and inhumane treatment.<sup>4</sup> Alleging violation of her right to freedom of movement under the Revised Treaty of Chaguaramas, Ms. Myrie filed an application at the Caribbean Court of Justice (“CCJ” or “Court”) just over a year later.

Long before Ms. Myrie’s denial of entry, the right to freedom of movement has been an aspirational goal in Caribbean regional integration. In particular, the notion of “hassle[-]free travel” emerged in the Report of the West Indian Commission (“WIC”) entitled “Time for Action.”<sup>5</sup> The report’s recommendation for implementing hassle-free travel enthusiastically embodied those hopeful objectives while also invoking the practical impediments to Caribbean regional integration. Thus, within the Caribbean Community (“CARICOM”),<sup>6</sup>

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<sup>1</sup> Myrie v. Barbados, [2013] CCJ 3 (OJ), ¶ 1.

<sup>2</sup> *Id.* ¶ 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> WEST INDIAN COMMISSION (“WIC”), TIME FOR ACTION 142 (1993).

<sup>6</sup> The Caribbean Community (“CARICOM”) is a grouping of twenty countries: fifteen Member States and five Associate Members. *See* CARICOM,

intraregional freedom of movement lies at the heart of the challenges to regional integration. In concept and function, the topic of free movement of people exemplifies the complexities of fully implementing Caribbean regional integration.<sup>7</sup> As summarized in a Green Paper by the Barbados Ministry of Labour and Immigration:

Hassle[-]free travel refers to the freedom of CARICOM nationals to travel into a[n]d within the jurisdiction of any member state without harassment or the imposition of impediment. The notion of hassle[-]free travel is intended to foster a greater sense of community and to encourage greater intra-CARICOM tourism.<sup>8</sup>

Several issues factor into the discussion of this topic within the larger context of generating regional unity. First, the freedom of movement issue emerged early in the regional integration process as an impediment to regional cooperation. Second, the mechanism for resolving these issues that could arise with this freedom was ultimately established but required implementation. Third, the freedom of movement issue, while political, is a highly personal and sensitive concern that encapsulates the heart of CARICOM cooperation. Even with these issues, regional integration in the Caribbean typically has afforded hassle-free travel. Nonetheless, failing to uphold this goal in

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*Member States and Associate Members*, <https://caricom.org/member-states-and-associate-members/>.

<sup>7</sup> Mia Mottley, *Prime Minister, Barbados, Address at the Opening Ceremony of the 39th Regular Meeting of the Heads of Government of CARICOM*, CARICOM (July 6, 2018), <https://caricom.org/address-by-the-hon-mia-amor-mottley-q-c-m-p-prime-minister-of-barbados-at-the-opening-ceremony-of-the-39th-regular-meeting-of-the-heads-of-government-of-caricom/> (quoting a statement by Errol Barrow, the first Prime Minister of Barbados, that “the regional integration movement is a fact of daily experience. It is a reality which is lived but which we have not yet been able to institutionalise.”).

<sup>8</sup> *Comprehensive Review of Immigration Policy and Proposals for Legislative Reform*, BARBADOS MINISTRY OF LABOUR & IMMIGRATION, 27 (2009), [https://barbadosunderground.files.wordpress.com/2009/10/green\\_paper\\_on\\_immigration\\_policy.pdf](https://barbadosunderground.files.wordpress.com/2009/10/green_paper_on_immigration_policy.pdf).

singular instances can have an enduring, sensational impact on the lives of CARICOM citizens as illustrated in *Myrie v. Barbados*.<sup>9</sup>

As the Caribbean region has sought to consolidate the hallmarks of regional cooperation, an ongoing political and nationalistic battle has emerged between the aspirational language of the Revised Treaty of Chaguaramas (“RTC”)<sup>10</sup> and the practical, colonial imbued requirements of domestic law. In the midst of these tensions are ongoing concerns about national security and crime prevention within and among CARICOM nation states. These salient issues came together in the original jurisdiction ruling of the CCJ in *Myrie v. Barbados*.<sup>11</sup> In this landmark case, the CCJ has revisited a key issue of the freedom of movement as part of the Caribbean Single Market and Economy (“CSME”). In remedying an essential question concerning freedom of movement under the RTC, the CCJ also addressed a potentially ruinous flaw<sup>12</sup> in the CSME’s implementation.<sup>13</sup> The Court, well aware of its role, stated:

Given the historic background of this aspect of free movement, a background that can be found both in the

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<sup>9</sup> *Myrie*, *supra* note 1. Daniel Turack labeled the CARICOM approach as a “qualified freedom of movement”. Daniel C. Turack, *Freedom of Movement in the Caribbean Community*, 11 DENV. J. INT’L L. & POL’Y 37, 42 (1981). He also stated, “The freedom of establishment provisions of the CARICOM Treaty are purposely weak and allow the prospective host country the necessary latitude to curtail any significant influx of nationals from other CARICOM members.” *Id.* at 49.

<sup>10</sup> In 2006, the Revised Treaty of Chaguaramas replaced the original treaty that was enacted in 1973. See AGREEMENT TO ENABLE THE ENTRY INTO FORCE OF THE REVISED TREATY OF CHAGUARAMAS ESTABLISHING THE CARIBBEAN COMMUNITY INCLUDING THE CARICOM SINGLE MARKET AND ECONOMY, <http://www.commonlii.org/caribbean/other/treaties/CaricomTSer/2006/5.pdf>.

<sup>11</sup> *Myrie*, *supra* note 1.

<sup>12</sup> This flaw was noted in WEST INDIAN COMMISSION, *supra* note 5, at 135–42 (1993). It has been called the “implementation gap.” See Derek O’Brien, *CARICOM: Regional Integration in a Post-Colonial World*, 17 EUR. L.J. 630, 640–42 (2011).

<sup>13</sup> CARICOM, *CARICOM Single Market and Economy (CSME)*, <http://csme.caricom.org/>. See also Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (RTC), arts. 1, 78, Feb. 4, 2002, 2259 U.N.T.S. 293, <https://www.un.org/ruleoflaw/files/v2259.pdf>.

well-known report of the West Indian Commission, Time For Action, and in several CARICOM reports, Community nationals are entitled to assume that the purpose of the 2007 Conference Decision is indeed “to enhance their sense that they belong to, and can move in, the Caribbean Community” and in the context of the relevant provisions of the RTC set out in the Annex to this judgment, the full extent of the right is that both entry and stay of a Community national in another Member State must not only be “definite” but also “hassle[-]free” or “without harassment or the imposition of impediments”. These are essential elements of the right.<sup>14</sup>

Addressing the free movement of persons has revived a key integration issue that frustrated the establishment of the West Indies Federation and also presented the CCJ with a problematic steppingstone in the Caribbean regional integration process. As a Caribbean Policy Development Centre Paper observed “[t]he importance of free movement to the CSME project is heavily rooted in an understanding of what a Single Market is and what components are necessary for it to function effectively.”<sup>15</sup> This paper also explained that:

In the wider context, freedom of movement is associated with the right of members of a “formal” regional community (such as CARICOM) to settle and work in any member state of that community. In the Caribbean context, however, the term “freedom of movement” has been associated with the less ambitious objective that is commonly referred to as “hassle[-]free travel.”<sup>16</sup>

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<sup>14</sup> Myrie, *supra* note 1, at ¶ 63.

<sup>15</sup> Peter W. Wickham et al., *Freedom of Movement: The Cornerstone of the Caribbean Single Market and Economy (CSME)*, CARIBBEAN POL’Y DEV. CTR. 15 (2004) (explaining the development of freedom of movement within CARICOM from 1989 to 2004).

<sup>16</sup> *Id.* at 18.



Even with this association, much of the discussion on freedom of movement within CARICOM has focused primarily on achieving freedom of movement for skilled workers within the CSME, while the basic issue of hassle-free travel has taken a secondary position. As with many aspects of the CSME framework, the creation of freedom of movement mechanisms based on regional, or supranational law remains problematic due to the perceived infringement on the domestic sovereignty of CARICOM nations. Moreover, the ability of the CCJ<sup>17</sup> to resolve these issues by interpreting and proclaiming regional law allows for the CCJ's implementation of the RTC. However, those powers also place the CCJ in the crosshairs of legal debates that impact notions of sovereignty and territorial integrity. Further, while the resolution of these issues further advances the RTC's goals, the fallout from ongoing tensions can be highly problematic for the expansion of the CCJ's appellate jurisdiction in the region.

Since its publication in 2013, *Myrie v. Barbados* has become the seminal case for hassle-free freedom of movement in the Commonwealth Caribbean.<sup>18</sup> This case is highly significant because it considers the question of freedom of movement within the larger context of regional integration. In so doing, it exposes the complexities of operationalizing the CSME while overcoming the legal and historic insular barriers to regional integration. At the regional level, the *Myrie* ruling obviates the need for nations to conform their national travel and immigration laws to the RTC. Rather than requiring the implementation of national legislation, the CCJ's decision operationalized Article 45 of the RTC by using the treaty's own mechanisms. The key to implementing regional law was the CCJ's reliance on the 2007 Heads of Government Conference Decision concerning the implementation of Article 45. Creating a legal framework for freedom of movement for CARICOM nationals is more difficult when the reason for movement is other than the employment of skilled labor. Like the CSME framework for establishing work permits, a cooperative strategy for establishing

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<sup>17</sup> Under Article 211 of the RTC, the Caribbean Court of Justice has "compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application" of the RTC. RTC, *supra* note 13, art. 211.

<sup>18</sup> *Myrie*, *supra* note 1.

hassle-free travel serves to fortify the economic alliances of the CSME. Yet, the political impediments to establishing hassle-free travel have also hindered regional economic integration.<sup>19</sup> Thus, at a crucial juncture in operationalizing the CSME, the CCJ employed its original jurisdiction authority to implement the hassle-free travel provisions of the RTC.

This article explores the development of the right of freedom of movement in two main parts. First, it examines the history of freedom of movement within the context of regional integration starting with the West Indies Federation. Second, the article extensively examines the *Myrie v. Barbados* case to explore how the CCJ has interpreted Community law to implement hassle-free travel within CARICOM. In so doing, this paper studies the evolution and implementation of the right of freedom of movement in CARICOM.

## II. REGIONAL INTEGRATION IN THE COMMONWEALTH CARIBBEAN AND FREEDOM OF MOVEMENT IN THE CARIBBEAN

Understanding the particular historical importance of the *Myrie v. Barbados* case requires an overview of the progression of freedom of movement within the Commonwealth Caribbean. Through the evolution of the West Indies Federation into the CSME of CARICOM, the advancement of freedom of movement provides insights into the Commonwealth Caribbean's colonial and post-colonial tensions in establishing sovereign nations while structuring regional treaties and institutions. These historical developments highlight the political and practical complications of a unified regional approach to freedom of movement.

More importantly, the evolution of freedom of movement shows an interplay between several interrelated features of the Commonwealth Caribbean for two important reasons. First, British imperialism initiated the integration of the region based on colonial administrative exigencies rather than regional political self-governance.<sup>20</sup> Second, the creation of this framework within the failed

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<sup>19</sup> See O' Brien, *supra* note 12, at 632.

<sup>20</sup> *Id.*

West Indies Federation provides the historic backdrop for the ongoing tensions attendant to the development of a contemporary regional freedom of movement policy.

#### A. Freedom of Movement in the Failed West Indies Federation

The emergent conceptualization of freedom of movement was incorporated into the creation, or perhaps more accurately imposition, of the West Indies Federation (“WIF” or “Federation”)<sup>21</sup>. From its onset the organization of the WIF was an attempt by Great Britain to organize the West Indies into a federated unit for the purpose of repackaging its colonial rule into a regional conglomerate.<sup>22</sup> The purpose of the union was to ease regional administration, but this attempted fusion ultimately spurred national independence movements in the region due to Great Britain’s attempt to create a revamped colonial structure adopted from the Australian and United States models.<sup>23</sup> This restructuring was particularly ill-timed in that it coincided with the coalescing of independence yearnings in the region, and indeed throughout much of the British Empire.<sup>24</sup> Thus, in the wake of World War II when colonial nations were calling for independence, this reorganization of the British Caribbean naturally encountered obstacles.<sup>25</sup>

Prior to the establishment of the WIF, the 1948-49 Report of the British Caribbean Standing Closer Association Committee (“SCAC”)<sup>26</sup> incorporated freedom of movement into its list of

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<sup>21</sup> Elisabeth Wallace, *The West Indies Federation: Decline and Fall*, 17 INT’L J. 269, 270 (1962).

<sup>22</sup> See O’ Brien, *supra* note 12, at 631–32.

<sup>23</sup> Charles H. Archibald, *The Failure of the West Indies Federation*, 18 THE WORLD TODAY 233, 238 (June 1962).

<sup>24</sup> O’ Brien, *supra* note 12, at 635.

<sup>25</sup> Salvatore Caserta & Mikael Rask Madsen, *Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies*, 79 L. & CONTEMP. PROBS. 89, 90 (2016).

<sup>26</sup> The SCAC was established after the Montego Bay Conference of 1947. The SCAC’s establishment received the approval of British West Indian colonial legislatures and consisted of “17 representatives of those legislatures under the chairmanship of Sir Hubert Rance.” British Information Services, *The British Colonial Empire in 1948* (1949) at 8,

proposed legislative powers for the Federation.<sup>27</sup> According to the Report, matters subject to concurrent legislation of the Federation and the constituent territories included “[i]mmigration, emigration and deportation” and “[m]ovements of persons, alien and other” between the territories.<sup>28</sup> These subjects were placed under concurrent legislative powers because Federal law would consequently prevail over inconsistent law in the constituent territories. With this concurrent designation, “there [could] be no room for variation” in those subjects “which are essential to the existence of the Federation.”<sup>29</sup> By its inclusion in the concurrent legislative list in two categories, “freedom of movement was treated not so much as a perquisite of Federation but rather as a prerequisite.”<sup>30</sup>

At the same time, however, the SCAC recognized that “in some circles there is a demand for full independence, or for self-government, either in advance of or simultaneously with Federation, on the basis of existing political units.”<sup>31</sup> The SCAC opined, nonetheless, that “the sheer force of circumstances of the modern world makes independence on a unit basis a mirage.”<sup>32</sup> The SCAC further clarified that its rationale for this conclusion was not a “reflection on the political capacity, or the public spirit, of the peoples of the territories.”<sup>33</sup> Rather, the report explained that real political independence requires financial stability.<sup>34</sup> Accordingly, the report asserted that “Federation, and only Federation, affords a reasonable

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[https://books.google.com/books?id=bhkuAAAAAYAAJ&printsec=frontcover&dq=British+Information+Services,+The+British+Colonial+Empire+in+1948+\(1949\)&hl=en&newbks=1&newbks\\_redir=1&sa=X&ved=2ahUKewigvb7EhpbrAhUSQ60KHV86BLYQ6AEwAHoECAQQAg](https://books.google.com/books?id=bhkuAAAAAYAAJ&printsec=frontcover&dq=British+Information+Services,+The+British+Colonial+Empire+in+1948+(1949)&hl=en&newbks=1&newbks_redir=1&sa=X&ved=2ahUKewigvb7EhpbrAhUSQ60KHV86BLYQ6AEwAHoECAQQAg).

<sup>27</sup> British Caribbean Standing Closer Association Committee (SCAC), Report, 1948-49, Col. 255, at 79–80 (UK). The Report included lists of suggested exclusive and concurrent legislation.

<sup>28</sup> *Id.* at 80.

<sup>29</sup> *Id.* at 17, 79.

<sup>30</sup> K. W. Patchett, *English Law in the West Indies: A Conference Report*, 12 INT’L. & COMP. L.Q. 922, 957 (1963).

<sup>31</sup> SCAC, *supra* note 27, at 11.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 12–14.

prospect of achieving economic stability” and through the Federation, “that political independence . . . is our constant object[ive].”<sup>35</sup>

However, the WIF’s incorporation of freedom of movement posed apparent threats to economic stability. As a result, “[t]he Conference on Freedom of Movement was called in order to help resolve the difficulties that had arisen in 1953 over the control of migration.”<sup>36</sup> In particular, Trinidad observed that “the immediate granting of freedom of movement would in the existing economic circumstances lead to a flood of immigrants swamping the island’s prosperity.”<sup>37</sup> At the same time, Trinidad recognized that it was illogical to envision a federation with barriers to movement.<sup>38</sup> Thus, it proposed a delay before eliminating all barriers to movement.<sup>39</sup> As the Prime Minister of Trinidad and Tobago, Dr. Eric Williams, later explained:

The issue of freedom of movement involved the large-scale migration to Trinidad from the smaller islands, frequently illegal. It was sought to link freedom of movement of persons with freedom of movement of goods. Britain’s approval of the secession of British Guiana, which was theoretically a refuge for the redundant population of the smaller islands, and the suspicion that Britain was beginning to find Caribbean

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<sup>35</sup> *Id.* at 14.

<sup>36</sup> Lloyd Braithwaite, *Progress Toward Federation, 1938—1956*, 6 SOC. & ECON. STUD. 133, 155 (June 1957). One catalyst for the Conference on Freedom of Movement was the disagreement over the Federation’s legislative powers expressed by the Trinidad and Tobago delegates at the Federation’s Conference held in London in April of 1953. During the 1953 conference, the legislative authority for freedom of movement between Federation territories was moved from the Federation’s Concurrent Legislative List to its Exclusive Legislative List subject to certain limitations for health, security, and economic concerns. *See* Colonial Office, *infra* note 41, at 1.

<sup>37</sup> Charles H. Archibald, *The Failure of the West Indies Federation*, 18 THE WORLD TODAY 233, 238 (June 1962).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

migrants unwelcome, made the issue a very sensitive one in Trinidad and Tobago.<sup>40</sup>

The Conference on Freedom of Movement unanimously adopted four resolutions regarding the Federation's legislative authority on free movement of persons.<sup>41</sup> The first resolution stated that the Preamble to the Federal Constitution should reference the objective of the Federation to achieve "the greatest possible freedom of movement for persons and goods within such Federation."<sup>42</sup> Nevertheless in response to Trinidad and Tobago's concerns, Chapter III of the 1958 Federal Constitution deferred the implementation of freedom of movement of persons with the Federation "until five years after the establishment of the Federation."<sup>43</sup>

Three articles in Chapter III delayed implementation of the Federation's mechanisms for the freedom of movement of persons between Federation territories.<sup>44</sup> Collectively, these provisions sought to sunset any Federation territory's laws concerning freedom of movement that were not repealed five years following the coming into force of the Federation's Constitution, or enacted after that five-year period. First, article 49 excluded from the requirements for the freedom of movement of persons any law related to maintaining public health or public security in a Federation territory.<sup>45</sup> Second, article 50

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<sup>40</sup> Eric Williams, *A New Federation for the Commonwealth Caribbean*, 44 POL. Q 242, 247 (Jul. -Sept. 1973).

<sup>41</sup> Colonial Office, Report of the Conference on Movement of Persons within a British Caribbean Federation, 1955, Colonial No. 315, at 2-3 (UK). The Conference unanimously adopted a total of six resolutions. The first four resolutions focused on freedom of movement within the Federation. In particular, the second through fourth resolutions removed control over movement of persons within the Federation from the Federation's Exclusive Legislative List and placed that authority over interterritorial movement on the Federation's Concurrent Legislative List. However, the Federation's Exclusive Legislative List preserved control over immigration into, and emigration and deportation from the Federation itself.

<sup>42</sup> *Id.* at 1.

<sup>43</sup> Williams, *supra* note 40 at, 247.

<sup>44</sup> West Indies (Federation) Order in Council, 1957, SI 1957 No. 1364. This order was authorized by the passage of the British Caribbean Federation Act, 1956. The West Indies (Federation) Order in Council, 1957 included an annex with the WIF Constitution.

<sup>45</sup> *Id.*

provided for a review and a repeal of any law controlling movement of persons after a five-year period. Finally, article 51 prevented any new laws enacted from coming into effect after the five-year period if those new laws concerned movement of persons.<sup>46</sup> These laws could be saved from repeal or allowed to come into force if the Federal legislature expressed its lack of objection to any such law within the prescribed time frames.<sup>47</sup> In short, the repeal of laws that controlled the movement of persons between Federation territories was self-executing in that the Federal legislature only needed to act to preserve laws controlling movement of persons that did not fall within the article 49 exceptions. Through this repeal mechanism, Chapter III of the Federation Constitution endeavored to fulfill the Constitution's objective to establish "the greatest possible freedom of movement of persons" within the Federation.<sup>48</sup>

Apart from Chapter III, the Third Schedule of the 1958 Constitution included in the Federation's Exclusive Legislative List "[i]mmigration into, and emigration and deportation from, the Federation."<sup>49</sup> This provision gave the Federation sole authority to legislate on free movement of persons into or out of the Federation while Chapter III would effectively prohibit the individual Federation states from passing immigration laws affecting movement between Federation territories after the expiration of the five-year period in article 50. As one author noted, however, the repeal procedure of article 50 "was never invoked nor did the Federal legislature find time to pass movement legislation on interterritorial movement" and similarly, "the Federal legislature never exercised this exclusive power" to legislate on this subject.<sup>50</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* For laws in force at the end of five years, the Federal legislature had ninety days to express its lack of objection. For laws enacted after the five-year period, the Federal legislature had sixty days to express its lack of objection to permit the law to come into force.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at art. 116 (1), The Third Schedule. The Exclusive Legislation List meant that only the Federal legislature, and not the territorial legislatures, could act on these matters.

<sup>50</sup> Patchett, *supra* note 30, at 959.

After the inauguration of the Federation in 1958 and with the advent of independence, the West Indies Constitutional Conference in 1961 revised the freedom of movement provisions in the Federation's Constitution. The revised provisions placed interterritorial movement of persons within the Federal Government's exclusive legislative power subject to certain limitations for a nine-year period.<sup>51</sup> Within that time frame, the Federal Government could only exercise its "exclusive" power with the concurrence of the individual Federation states.<sup>52</sup> Moreover, the individual territories in the Federation could not legislate increases of or expansions in migration control without the Federal Government's consent.<sup>53</sup> However, the operation of these provisions was problematic due to their ambiguity:

It is not clear whether the Federal power was to be subject to concurrence at each exercise or whether the exclusive power was to be freely exercisable after all governments had agreed. Whichever view is taken, it is apparent that ground was again given to those who feared the consequences of loosened controls.<sup>54</sup>

Ultimately, the WIF dissolved soon after the withdrawal of Jamaica and then Trinidad and Tobago. Jamaica, the largest nation in the WIF, took two important steps that ultimately resulted in its withdrawal from the WIF.<sup>55</sup> First, a Jamaican delegation in London learned from the Colonial Secretary that Jamaica could achieve dominion status without the Federation.<sup>56</sup> Second, in May 1960, the

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<sup>51</sup> *Report of the West Indies Constitutional Conference*, W. I. GAZETTE 5 (June 29, 1961), <https://ufdc.ufl.edu/UF00076857/00200>. While Eric Williams of Trinidad and Tobago indicated that this nine-year period coincided with the establishment of a customs union favored by Jamaica, Norman Manley of Jamaica expressed displeasure with connecting free movement of people and free movement of goods. Overand R. Padmore, *Federation: The Demise of an Idea*, 48 SOC. & ECON. STUD. 21, 55 (Dec. 1999).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Patchett, *supra* note 30, at 959.

<sup>55</sup> Hugh W. Springer, *Federation in the Caribbean: An Attempt that Failed*, in THE AFTERMATH OF SOVEREIGNTY: WEST INDIAN PERSPECTIVES 188, 202–3 (David Lowenthal & Lambros Comitas eds., 1973).

<sup>56</sup> *Id.* at 203.



Jamaican government resolved to hold a national referendum on whether Jamaica should remain in the WIF.<sup>57</sup> The referendum to remain in the WIF failed by a vote of forty-six percent in favor of remaining to fifty-four percent against continued membership in the WIF.<sup>58</sup> This failed national referendum resulted in Jamaica's withdrawal even though its Premier, Norman Manley, was once an outspoken supporter of the WIF.<sup>59</sup>

With Jamaica's departure, Trinidad and Tobago became the largest remaining member in the Federation. As shown in its position on freedom of movement, Trinidad and Tobago was concerned that its continuing membership in the WIF would result in Trinidad and Tobago "bear[ing] the cost of funding the WIF or supporting the poorer eastern Caribbean islands."<sup>60</sup> Before withdrawing, however, Trinidad and Tobago offered the remaining other eight nations an option to join Trinidad and Tobago as a unitary state.<sup>61</sup> Instead, the remaining eight nations contacted the Colonial Secretary to state their intention to form a new federation.<sup>62</sup> After the WIF dissolved on May 31, 1962, Jamaica and Trinidad and Tobago achieved independence in August 1962.<sup>63</sup>

#### B. RTC & CSME: The Regional Integration Development and Freedom of Movement

Shortly after the WIF's collapse, the Commonwealth Caribbean nations embarked on several regional ventures, with each arrangement progressively advancing regional integration. Borrowing

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<sup>57</sup> *Id.* at 202.

<sup>58</sup> *Id.* at 204.

<sup>59</sup> O' Brien, *supra* note 12, at 634.

<sup>60</sup> *Id.* at 635.

<sup>61</sup> Charles H. Archibald, *The Failure of the West Indies Federation*, 18 THE WORLD TODAY 233, 234 (June 1962).

<sup>62</sup> It was not until 1981 that seven of these remaining eight nations formed the Organization of Eastern Caribbean States. See Dr. C.L. Mitchell, Economic Affairs Secretariat, OECS, HISTORICAL PERSPECTIVE OF OECS ECONOMIC INTEGRATION OVER THE PAST 10 YEARS (1992), <https://www.oecs.org/en/our-work/knowledge/library/oecs-economic-union/historical-perspective-of-oecs-economic-integration-over-the-past-10-years-july-1992-6398b0pt-pdf>.

<sup>63</sup> O' Brien, *supra* note 12, at 635.

heavily from the 1960 European Free Trade Agreement, the first treaty for the Caribbean Free Trade Association (“CARIFTA”) was signed in December 1965.<sup>64</sup> Before this agreement was implemented, the Fourth Conferences of the Heads of Government of the Commonwealth Caribbean agreed that “Free Trade should be introduced with respect to all intra-Commonwealth Caribbean trade by 1st May, 1968.”<sup>65</sup> Based on this pronouncement, a second CARIFTA treaty was signed and came into effect in 1968.<sup>66</sup>

CARIFTA created the institutional steppingstone for CARICOM and later, for the formation of the Caribbean Single Market and Economy. In 1972, the Heads of Government Conference of Commonwealth Caribbean Countries agreed to transform CARIFTA on its fifth anniversary into CARICOM.<sup>67</sup> The Treaty of Chaguaramas that established CARICOM came into effect on July 4, 1973.

Article 38 of the Treaty of Chaguaramas, however, specifically excluded from its ambit the free movement of persons within

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<sup>64</sup> The Dickenson Bay Agreement was signed on December 15, 1965, by the Heads of Government of Antigua, Barbados and British Guiana. Richard L. Abbott, *The Caribbean Free Trade Association*, 1 *LAWYER OF THE AMERICAS* 1 (June 1969).

<sup>65</sup> Summary of Conclusions of the Fourth Conference of Heads of Government of Commonwealth Caribbean Countries, 23-27 October 1967, Bridgetown, Barbados, <https://caricom.org/summary-of-conclusions-of-the-fourth-conference-of-heads-of-government-of-commonwealth-caribbean-countries-23-27-october-1967-bridgetown-barbados/>.

<sup>66</sup> The second treaty was first signed on May 1, 1968, by the three signatories to the first treaty plus Trinidad and Tobago. On July 1, 1968, the following Windward and Leeward islands joined: Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and Saint Vincent and the Grenadines. On August 1, 1968, Jamaica and Montserrat entered the agreement. Abbott, *supra* note 64, at 1.

<sup>67</sup> “The Seventh Heads of Government Conference of Commonwealth Caribbean Countries has agreed that the Caribbean Free Trade Association (CARIFTA) will become a Common Market on 1st May, 1973, the fifth Anniversary of CARIFTA.” Communiqué Issued at the Conclusion of the Seventh Heads of Government Conference of Commonwealth Caribbean Countries, 9-14 October 1972, Chaguaramas, Trinidad and Tobago, <https://caricom.org/communique-issued-at-the-conclusion-of-the-seventh-heads-of-government-conference-of-commonwealth-caribbean-countries-9-14-october-1972-chaguaramas-trinidad-and-tobago/>.

CARICOM.<sup>68</sup> A paper written for the Caribbean Policy Development Centre noted that “[t]his article in the CARICOM Treaty (1973) effectively set aside initiatives towards greater freedom of movement and during this period Caribbean islands only maintained limited ‘informal’ mechanisms to allow the movement of employees of regional institutions such as the UWI and Meteorological Service as well as Lawyers.”<sup>69</sup> Entitled “Saving in Respect of Movement of Persons”, article 38 provided “[n]othing in this Treaty shall be construed as requiring, or imposing any obligation on, a Member State to grant freedom of movement to persons into its territory whether or not such persons are nationals of other Member States of the Common Market.”<sup>70</sup>

The next major step in regional integration, the creation of the Caribbean Single Market and Economy, was announced in the Grand Anse Declaration of 1989.<sup>71</sup> The Declaration provided, among the Common Market objectives, the goal of creating “arrangements by January 1991 for the free movement of skilled and professional personnel as well as for contract workers on a seasonal or project basis.”<sup>72</sup> In this declaration, the CARICOM Heads of Government also agreed to create the “Independent West Indian Commission for Advancing the Goals of the Treaty of Chaguaramas.”<sup>73</sup>

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<sup>68</sup> Treaty establishing the Caribbean Community (TOC), art. 38, July 4, 1973, 946 U.N.T.S. 18, <https://treaties.un.org/doc/Publication/UNTS/Volume%20946/volume-946-I-13489-English.pdf>.

<sup>69</sup> WICKHAM ET AL., *supra* note 15, at 9.

<sup>70</sup> TOC, *supra* note 68.

<sup>71</sup> Grand Anse Declaration and Work Programme for the Advancement of the Integration Movement (Grand Anse Declaration), July 1989, Grand Anse, Grenada, <https://caricom.org/grand-anse-declaration-and-work-programme-for-the-advancement-of-the-integration-movement-july-1989-grand-anse-grenada/>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* Annex II contained a resolution that provided “that no later than 1 October 1989, the Commission be established as an Independent West Indian Commission for Advancing the Goals of the Treaty of Chaguaramas and report to Heads of Government prior to their meeting in 1992” and named Sir Shridath Ramphal, as the chairman of the commission.

Following the declaration, the WIC Report, published in 1992, dedicated a portion of its discussion to “Ease of Travel and Freedom of Movement.”<sup>74</sup> Based on a Progress Report from the WIC, the Heads of Government at their July 1991 meeting agreed “to the immediate commencement of efforts to advance action by the Community” in six areas recommended by the WIC.<sup>75</sup> The first two areas identified for action were (1) “[t]ravelling in the [r]egion” and (2) “[f]ree [m]ovement of skilled persons.”<sup>76</sup> In so doing, the WIC created a bifurcation of the freedom of movement concept within CARICOM.

This noted partition of freedom of movement into two components – one for tourists and visitors and the other for skilled laborers was an important, yet problematic evolutionary step for freedom of movement in the region. The summary of the Progress Report explained that the first recommendation would “[p]ermit West Indians to travel in their Region with the freedom and ease due to them as citizens of a nation common to all [*sic*] and encourage exchange visits, especially among young people.”<sup>77</sup> Similarly, the second recommendation on skilled labor would “[a]llow West Indian graduates of UWI (and other institutions to be identified) and media people to work and live freely anywhere in the Region as a first step to permitting the free movement of skilled people within the Region.”<sup>78</sup>

Article 45 of the RTC states that “Member States commit themselves to the goal of freedom of movement of their nationals within the Community.”<sup>79</sup> By its wording, this provision appears to be aspirational rather than binding.<sup>80</sup> This wording, however, reflects the sentiment of the WIC, which noted that free movement of persons, though aspirational, was integral to deepening regional integration.<sup>81</sup>

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<sup>74</sup> WIC, *supra* note 5, at 133–42.

<sup>75</sup> Communiqué Issued at the Conclusion of the Twelfth Meeting of the Conference of Heads of Government, 2–4 July 1991, Basseterre, St. Kitts and Nevis, <https://caricom.org/communique-issued-at-the-conclusion-of-the-twelfth-meeting-of-the-conference-of-heads-of-government/>.

<sup>76</sup> Grand Anse Declaration, *supra* note 71.

<sup>77</sup> WIC, *supra* note 5, at 14.

<sup>78</sup> *Id.*

<sup>79</sup> RTC, *supra* note 13, art. 45.

<sup>80</sup> Myrie, *supra* note 1, at ¶ 58.

<sup>81</sup> WIC, *supra* note 5, at 141.

For those reasons, the report recommended “the earliest implementation” of mechanisms to ensure “‘hassle[-]free’ travel for West Indians within the Region.”<sup>82</sup> Thus, while noting the need for freedom of movement, the WIC also perceived that there was an implementation gap for ensuring this freedom.<sup>83</sup> Accordingly, the report concluded that the implementation of its recommendations on freedom of movement would be “an essential pillar for the establishment of the Single Market and Economy.”<sup>84</sup> Yet, the report recognized the practical difficulties of achieving hassle-free travel stating:

Commissions, even Heads of Government, may propose but civil servants in the end dispose. This is a universal truth which the existing decision-making machinery in CARICOM does not fully accommodate. An imperial ukase to introduce hassle-free travel, for instance, will not yield results at the Immigration and Customs barriers unless the employees of Immigration and Customs departments from top to bottom are not only instructed, but are enlisted in the cause over a sustained period of time. We are convinced that this is a fundamental truth which will have applications to every single recommendation we make in this Report.<sup>85</sup>

### III. *MYRIE V. BARBADOS* – A CASE ILLUSTRATING THE ANTI-THESIS OF HASSLE-FREE TRAVEL

This discerning observation by the WIC seems to presage the case of *Myrie v. Barbados*.<sup>86</sup> After Ms. Myrie’s filing of the initial application on May 17, 2012, the extensive proceedings for this case took place over a year and a half and ended with the Court’s decision on October 4, 2013.<sup>87</sup> As a preliminary matter, the Court granted leave

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<sup>82</sup> WIC, *supra* note 5, at 142.

<sup>83</sup> *Id.* at 141.

<sup>84</sup> *Id.* at 142.

<sup>85</sup> *Id.* at 15–16.

<sup>86</sup> Myrie, *supra* note 1, at ¶ 1.

<sup>87</sup> *Id.*

to establish its jurisdiction in hearing this case.<sup>88</sup> After settling the matter of its original jurisdiction to interpret the RTC, the Court functioned as a trial court in hearing the case.<sup>89</sup> Accordingly, the Court convened several case management conferences, received numerous written submissions, held public hearings and visited Grantley Adams International Airport (“GAIA”) in Barbados.<sup>90</sup>

The primary issue in this case dealt with the freedom of movement within the Caribbean Community.<sup>91</sup> Unfortunately, the facts of this case horrifically illustrate the antithesis of hassle-free intraregional travel. As noted at the beginning of this article, the Court sympathetically explained:

First and foremost, however, this is a case about a young Jamaican woman who one day left her country, for the very first time, in order to travel to another Caribbean country and, having arrived there, found herself in a situation from which, several months later, according to Jamaican medical practitioners, she was still suffering post-traumatic stress.<sup>92</sup>

Fourteen months after Ms. Myrie was denied entry to Barbados, her lawyer filed an application in the Court that also permitted the State of Jamaica to intervene. As the Court summarized:

Ms. Myrie instituted these proceedings against the State of Barbados, the Defendant. She claims a right to free movement within the Caribbean Community. She also claims that the treatment to which she was subjected by border officials in Barbados amounts to a serious

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<sup>88</sup> *Myrie, supra note 1*, at ¶ 7.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* The opening paragraph of the decision lists the extensive proceedings of the Court. There were four case management conferences, including the preliminary one, two pre-hearing reviews, and nine days of public hearings. Moreover, the decision listed thirteen attorneys of record—two for the Claimant, Ms. Myrie, five for the Defendant, Barbados, three for the Intervener, Jamaica, and three for CARICOM.

<sup>91</sup> *Id.* at ¶ 1.

<sup>92</sup> *Id.*

violation of this right. She characterises the body cavity search as an assault, a rape, of such a serious character that it constitutes a violation of her fundamental human rights and freedoms for which the State of Barbados must be held accountable. Ms. Myrie further submits that she was singled out and treated in the way that she was because of her Jamaican nationality and that the treatment meted out to her was less favourable than treatment reserved for nationals of other States.<sup>93</sup>

A. The Undisputed Story – The Denial of Entry, Detention and Deportation of Shanique Myrie

The facts of Ms. Myrie's case are extensive. These facts bear review here because their iteration humanizes the right to freedom of movement. Above all, this extraordinary set of events undergone by an ordinary human being highlights the urgency of establishing the parameters of free movement rights. In repeating the details of her case, we are reminded that legal rights involve human stories and that the guarding of those rights guards our very humanity. Unfortunately, the horrendous experiences of a young woman on her first trip overseas illuminated the pressing need to close the implementation gap for hassle-free travel under the RTC.

On Monday, March 24, 2011, Shanique Myrie, a then twenty-two-year-old Jamaican woman, landed in Barbados on a scattered clouded day.<sup>94</sup> At 4:30 p.m., Ms. Myrie disembarked from an inbound Caribbean Airlines flight that had originated in Jamaica. Three minutes later she had arrived in the Arrivals Hall at GAIA. Ms. Myrie then proceeded to Booth 12 where she handed Officer Alicia Young her Jamaican passport. Officer Young questioned Ms. Myrie about the circumstances and purposes of her visit. Ms. Myrie “answered that this was her first visit to Barbados, that she had come for a short vacation of two weeks, that she had US\$300.00 cash with her, and that she

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<sup>93</sup> Myrie, *supra* note 1, at ¶ 3.

<sup>94</sup> *Id.* at ¶ 14. For the weather report, see *Past Weather in Bridgetown, Barbados* — March 2011, timeanddate.com, <https://www.timeanddate.com/weather/barbados/bridgetown/historic?month=3&year=2011>.

would be staying with Ms. Pamela Clarke, whom she had met ‘through the internet’.”<sup>95</sup>

Apparently, the fact that Ms. Myrie met her intended host through the internet compelled Officer Young to submit Ms. Myrie to a second inspection.<sup>96</sup> At 4:38 p.m., Officer Young took Ms. Myrie to a waiting room across from the main entrance to the “Secure Immigration Area (“SIA”).”<sup>97</sup> Officer Young then entered the SIA to go to the office of Mr. Merlo Reid, her supervisor. She “handed him Ms. Myrie’s passport and Immigration Arrival Form with the request that he personally interview Ms. Myrie.”<sup>98</sup>

While Ms. Myrie waited, Officer Young returned to her station, but Mr. Reid did not immediately interview Ms. Myrie.<sup>99</sup> Before Mr. Reid spoke to Ms. Myrie, Police Officer Everton Gittens, who was dressed in plain clothes, told Mr. Reid he wanted to interview Ms. Myrie after Mr. Reid completed the second inspection.<sup>100</sup> During Ms. Myrie’s second inspection, Ms. Myrie provided Mr. Reid with the same responses that she had given Officer Young. She also gave him Ms. Clarke’s phone number. After this interview, Mr. Reid “found no cause to deny her entry into Barbados”<sup>101</sup> and stamped Ms. Myrie’s passport to grant her a thirty-day stay.<sup>102</sup> Ms. Myrie momentarily returned to the waiting room.<sup>103</sup> Mr. Reid returned to his office after informing Officer Gittens that Myrie’s inspection was completed.

Around 5:11 p.m., Officer Gittens, accompanied by a plain-clothed policewoman, Officer Sirphene Carrington, took Ms. Myrie upstairs from the SIA to the Drugs Squad Office of the Royal Barbados Police Force (“DSO”).<sup>104</sup> The officers then began

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<sup>95</sup> Myrie, *supra* note 1, at ¶ 16.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at ¶¶ 14, 16.

<sup>98</sup> *Id.* at ¶ 16.

<sup>99</sup> *Id.* at ¶ 17.

<sup>100</sup> *Id.* at ¶¶ 14, 16.

<sup>101</sup> *Id.* at ¶ 17.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at ¶ 18. The Court estimated this time by noting Officer Gittens and Carrington’s absence from video footage in the SIA and Arrivals Hall of GAIA.



interviewing Ms. Myrie “to ascertain whether she was a possible drug courier.”<sup>105</sup> About twenty minutes later, at 5:33 p.m., the officers escorted Ms. Myrie to the Luggage Hall for her suitcase and then to the Customs Area for examination by Customs Officers. At the Customs Examination desk, Ms. Myrie’s possessions were searched from 5:35 to 5:43 p.m.<sup>106</sup>

During this time, Officer Gittens twice left the Customs Area to enter the Public Arrivals Area.<sup>107</sup> Using the number that Ms. Myrie provided, Officer Gittens called Ms. Pamela Clarke by cell phone.<sup>108</sup> He identified himself to Ms. Clarke as a police officer in the Drugs Squad. He then informed Ms. Clarke of the Drug Squad’s interview with Ms. Myrie and asked Ms. Clarke if she knew Ms. Myrie. Ms. Clarke denied knowing Ms. Myrie and explained that she was helping her friend, Daniel Forde, and that Mr. Forde was at the airport to meet Ms. Myrie.<sup>109</sup> Prompted by Officer Gittens, Ms. Clarke described Mr. Forde’s clothing.<sup>110</sup> Officer Gittens then left the Customs Area to locate Mr. Forde. Initially, he could not find Mr. Forde. Officer Gittens then returned to the Customs Area and called Ms. Clarke once again to verify her description.<sup>111</sup> Officer Gittens then went outside once more to the Public Arrivals area and called out the name “Daniel Forde.”<sup>112</sup> Mr. Forde approached Officer Gittens and confirmed that he was there to give a ride to Ms. Myrie.<sup>113</sup>

After this brief conversation, Officer Gittens went back to the Customs Area. Around 5:45 p.m., once the Customs Officer found nothing illegal in Ms. Myrie’s luggage, Officers Gittens and Carrington then took Ms. Myrie back to the SIA waiting area.<sup>114</sup> Afterwards, Officer Gittens told Mr. Reid that he had interviewed Ms. Myrie and

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<sup>105</sup> Myrie, *supra* note 1, at ¶ 18.

<sup>106</sup> *Id.* at ¶ 14.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at ¶ 19.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* (Mr. Forde also explained that Ms. Clarke was unable to come to the airport because she had injured her hip.)

<sup>114</sup> *Id.* at ¶¶ 14, 20.

concluded that she was not truthful about visiting Ms. Clarke and that Ms. Myrie intended to stay with Mr. Forde.<sup>115</sup> Mr. Reid called Ms. Clarke and asked her if she regularly cleared people at the airport. Ms. Clarke replied that it was her first time doing so and that “she was doing a favour [*sic*] for a friend” and she then expressed regret for her actions.<sup>116</sup>

Following this conversation, Officer Gittens departed, and Mr. Reid retrieved Ms. Myrie from the waiting area and brought her to his office.<sup>117</sup> There, Mr. Reid explained to Ms. Myrie that she would be denied entry to Barbados. He placed a cancellation stamp on her passport and signed it.<sup>118</sup> In Barbados’s “register of persons refused entry”, the reason for Ms. Myrie’s denial of entry was listed as “[i]mproper representation.”<sup>119</sup> The official explanation for the denial stated that Ms. Clarke “was fronting” for Mr. Forde.<sup>120</sup> Mr. Reid then requested that an Immigration Officer, Saritta Chadderton, take Ms. Myrie and another detained female passenger, Ms. Rickreisha “Susan” Rowe, to the Customs Area for another search of her luggage.<sup>121</sup>

Subsequent to this final search, Ms. Myrie and Ms. Rowe were led to a detention cell in the SIA. The cell was small, cold, and windowless. It consisted of one narrow bed, a toilet and sink. Both women were detained for the night in these austere accommodations. Neither detainee was allowed to take her luggage or cell phone into the

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<sup>115</sup> Myrie, *supra* note 1, at ¶ 21.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at ¶ 22.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at ¶ 23.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at ¶ 22. Ms. Rowe was in detention when Ms. Myrie arrived. Later she testified about Ms. Myrie’s demeanor in detention. She observed that Ms. Myrie was crying when she was taken to the detention room. She also said that Ms. Myrie shared the details of her strip search. Ms. Rowe was being deported for overstaying her visitor’s permit. While she also had to suffer the deplorable conditions of the detention room, Ms. Rowe was not otherwise mistreated. Staff Editor, *Shanique Myrie Stands by Finger-Rape Story, Says Bajans Lying -Other Woman Testifies About Squalid Conditions*, STARBROEK NEWS (Mar. 27, 2011), <https://www.stabroeknews.com/2011/03/27/news/guyana/shanique-myrie-stands-by-finger-rape-story-says-bajans-lying/>.

cell. In the morning, they recovered their luggage and were taken to their flight accompanied by three female immigration officers in a manner that made it clear to “onlookers that they were being deported.”<sup>122</sup>

#### B. Ms. Myrie’s Own Story

As noted above, Ms. Myrie testified that she was taken twice to the DSO by two people fitting the description of Officers Gittens and Carrington.<sup>123</sup> She stated that Officer Gittens questioned her aggressively and told her that he suspected she was bringing drugs into Barbados. She told Officer Gittens that her bags had been searched to establish that she had not been carrying any drugs.<sup>124</sup> The officers then carried her suitcase upstairs and searched it again.<sup>125</sup> They opened the suitcase bottom and asked about some food items that she had packed.<sup>126</sup> Officer Gittens also took her slippers from the suitcase, cut them in half, sniffed them for drugs and threw them back in her suitcase.<sup>127</sup>

The officers questioned Ms. Myrie about Ms. Clarke and Mr. Forde.<sup>128</sup> After Officer Gittens spoke to Ms. Clarke, he told Ms. Myrie that “Daniel” was waiting for her and that he knew her name and described her clothing.<sup>129</sup> Ms. Myrie denied knowing Daniel Forde.<sup>130</sup> When Officer Gittens questioned how Mr. Forde knew these details about her, Ms. Myrie said Ms. Clarke must have told him.<sup>131</sup> During this questioning, Ms. Myrie was frequently accused of lying and claimed that Officer Carrington “repeatedly uttered slurs and expletives like ‘I hate these f----- Jamaicans,’ ‘You Jamaicans are all

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<sup>122</sup> Myrie, *supra* note 1, at ¶ 24.

<sup>123</sup> *Id.* at ¶ 28.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

liars’ or ‘they only come here to steal our men and carry drugs into our country.’”<sup>132</sup>

Officer Gittens told Ms. Myrie that they planned to transport her to the hospital for a body search and made a call to make those arrangements.<sup>133</sup> However, after a conversation between the two officers, the female officer, Officer Carrington, took Ms. Myrie to a bathroom across the hall from the DSO.<sup>134</sup> Officer Carrington then locked the bathroom door and told Ms. Myrie to take off her clothes.<sup>135</sup> When Ms. Myrie asked why she needed to disrobe, Officer Carrington threatened to imprison her if she did not comply with the request.<sup>136</sup> Reluctantly, Ms. Myrie complied with the request. Officer Carrington put on a pair of gloves and conducted a painful, humiliating body cavity search on Ms. Myrie. As a result of this search, Ms. Myrie testified that “she cried and felt ashamed, dirty and angry” and “she felt she had been treated like a criminal.”<sup>137</sup>

When Ms. Myrie returned to the DSO with Officer Carrington, Officer Gittens had Ms. Myrie’s passport in hand and told her he was going to have her stamped entry cancelled if she did not tell the truth about what she was carrying for Mr. Forde and who Mr. Forde was.<sup>138</sup> Ms. Myrie repeated to Officer Gittens that she did not know Mr. Forde. After she confirmed she was “sticking to that story,” Officer Carrington told her “You are a liar, I don’t like you f----- Jamaicans, you are all liars, you think you’re going to come here and f--- up my country, it’s not going to happen.”<sup>139</sup>

During her questioning, Ms. Myrie “was refused permission to make a phone call to her family in Jamaica” and was denied the opportunity to contact the Jamaican embassy.<sup>140</sup> Officer Gittens told her that she would be released if she told the truth and Ms. Myrie

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<sup>132</sup> Myrie, *supra* note 1, at ¶ 28.(quoting Ms. Myrie’s testimony).

<sup>133</sup> *Id.* at ¶ 29.

<sup>134</sup> *Id.* at ¶¶ 29, 30.

<sup>135</sup> *Id.* at ¶ 30.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* (quoting Ms. Myrie’s testimony).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (quoting Ms. Myrie’s testimony).

<sup>140</sup> *Id.* at ¶ 31.

reiterated that she had been telling the truth.<sup>141</sup> After her questioning ended, Ms. Myrie never saw the two police officers again.<sup>142</sup>

Ms. Myrie also provided testimony about the physical condition of the detention cell at GAIA. The floors of the cell and bathroom were muddy.<sup>143</sup> The walls of the cell were covered with brown marks that resembled feces. The room was littered with spoiled toilet paper and smelled of feces.<sup>144</sup>

### C. Barbados's Summation of the Ms. Myrie's Ordeal

Barbados's version of Ms. Myrie's ordeal emphatically disputed her testimony. Both Officers Gittens and Carrington gave signed statements for an internal police investigation and testified in Court.<sup>145</sup> In their testimony, the officers stated a number of facts that were clearly contrary to Ms. Myrie's version of events. First, the officers indicated that Ms. Myrie was continuously supervised. They also stated that Ms. Myrie was not suspected of, not questioned about, and never told that she was suspected of transporting drugs. The officers further testified that Ms. Myrie was only questioned to determine whether she was carrying drugs. The officers likewise denied that Ms. Myrie's luggage was searched, her slippers were cut, and her cell phone was examined. Finally, they similarly disavowed that they had insulted Ms. Myrie for being Jamaican and that they subjected her to a cavity search.<sup>146</sup> Thus, Barbados's account of Ms. Myrie's ordeal was devoid of undue suspicion and mistreatment on its part.

Accordingly, Barbados denied Ms. Myrie's factual allegations as a basis for denying her claim. In its denial, "Barbados accept[ed] that Ms. Myrie was refused entry, detained overnight and deported the morning after her arrival[.]" but denied many of her other factual allegations. Specifically, based on the officers' statements, Barbados denied that Ms. Myrie was subjected to a body cavity search or was

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<sup>141</sup> Myrie, *supra* note 1, at ¶ 31.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at ¶ 26.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at ¶ 32.

<sup>146</sup> *Id.*

treated improperly, badly or unfavorably. Further, Barbados refuted her assertion that she was refused entry due to her nationality and claimed that Barbados's denial of entry resulted from Ms. Myrie not being truthful in her statements to immigration officers in Barbados.<sup>147</sup>

#### D. The Court's Determination of the Facts

The Court found most of the facts given by Ms. Myrie to be credible.<sup>148</sup> The Court also noted that after being deported back to Jamaica, Ms. Myrie called her friend, Julian Jackson, who had driven her to the airport on the day before.<sup>149</sup> When she met him at the airport upon her return, she started crying and told Mr. Jackson about her treatment in Barbados including the slurs about being Jamaican, calling her a liar, accusing her of carrying drugs and subjecting her to a body cavity search.<sup>150</sup> Mr. Jackson immediately drove Ms. Myrie to "the Ministry of Foreign Affairs and Foreign Trade where she made an oral report to the officials who advised her to put her complaint in writing."<sup>151</sup> She followed this advice and submitted a report that conformed to her testimony in Court. In response, the Jamaican Government sent a delegation to Barbados in an effort to investigate the incident.<sup>152</sup>

In addition, the Court remarked that two doctors testified to the Court about Ms. Myrie enduring psychological and emotional injuries as a result of the incident in Barbados. A medical doctor concluded that Ms. Myrie suffered from "mild post-traumatic stress syndrome" and that this condition arose out of her experience in Barbados.<sup>153</sup> Further, a forensic psychiatrist testified that, based on his

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<sup>147</sup> "This refusal was, in the view of Barbados, justified because its Immigration Act requires foreigners to answer the questions of immigration officers truthfully. Barbados also submits that Ms. Myrie was told that this was the reason for refusing her entry and that her detention overnight was in accordance with the laws of Barbados." Myrie, *supra* note 1, ¶ 5.

<sup>148</sup> *Id.* at ¶ 33.

<sup>149</sup> *Id.* at ¶ 34.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at ¶ 34.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at ¶ 35.

examination of Ms. Myrie, she “was still suffering from mental or emotional injuries and would continue to do so for some time.”<sup>154</sup>

However, given the differences in testimony concerning whether Myrie underwent a body cavity search and was subjected to slurs during her questioning, the Court had to ascertain the evidence establishing or disproving these events. Although Barbados denied that Officer Carrington conducted a body cavity search, the Court found that Ms. Myrie’s accurate recall of the bathroom and the small Drug Squad office bolstered the credibility of her story. Moreover, Ms. Myrie provided identifying details that helped the Court establish that the officers involved were in fact Officers Gittens and Carrington.<sup>155</sup> Furthermore, the Court found that the reports of the two officers lacked credibility because they were virtually identical given that the two officers collaborated on their recollection of the events. Specifically, the Court remarked that it was unlikely that two Drug Squad Officers did not tell Ms. Myrie that they suspected her of being a drug courier or that they did not search her for drugs.<sup>156</sup>

#### E. Ms. Myrie’s *Locus Standi*

Before hearing Ms. Myrie’s claims, the Court was first required to establish its original jurisdiction over her case.<sup>157</sup> Consequently, after granting leave to establish its jurisdiction, the Court held its first Special Leave hearing, on April 18, 2012, for submissions concerning its jurisdiction in the case.<sup>158</sup> This hearing was historic in that it served to establish the right of a CARICOM national to bring suit in the Court

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<sup>154</sup> Myrie, *supra* note 1, at ¶ 36.

<sup>155</sup> *Id.* at ¶¶ 36–9.

<sup>156</sup> *Id.* at ¶¶ 40–41.

<sup>157</sup> Article 211 of the RTC gives the CCJ “compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including . . . applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.” RTC, *supra* note 13, Art. 211.

<sup>158</sup> Myrie, *supra* note 1, at ¶ 7.

for infringement of the right to freedom of movement under the RTC.<sup>159</sup>

To resolve this issue, the Court examined the five requirements of Article 222 of the RTC concerning *locus standi* of private entities. To establish *locus standi*, the Court must determine whether: (1) the individual bringing suit is a “Person[], natural or juridical, of a Contracting Party”;<sup>160</sup> (2) that individual directly benefits from a right under the RTC; (3) that individual’s enjoyment of that RTC right has been prejudiced; (4) the Contracting Party has not brought the claim or has agreed to let the affected individual bring the claim; and (5) the interest of justice requires that the affected individual be allowed to bring the claim.<sup>161</sup>

In establishing its jurisdiction, the Court found that Ms. Myrie met all of these requirements. It opined that as a Jamaican national, Ms. Myrie was a “Person of a Contracting Party” and that she had an “arguable” right under the RTC from which she directly benefited and her enjoyment of that right had been prejudiced.<sup>162</sup> The Court also noted that Jamaica had permitted Ms. Myrie to bring the case and that the interest of justice required granting Ms. Myrie permission to pursue her claim.<sup>163</sup>

#### F. Ms. Myrie’s Right to Freedom of Movement

Ms. Myrie presented two claims based on her nationality. The first was her right to be free from discrimination based on her nationality. In this claim, Ms. Myrie alleged that Barbados had violated “her rights under Articles 7 and 8 of the RTC to non-discrimination on the ground of nationality only and to treatment that is no less favourable than that accorded to nationals of other CARICOM States

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<sup>159</sup> Salvatore Caserta & Mikael Rask Madsen, *Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies*, 79 L. & CONTEMP. PROBS 89, 111 (2016).

<sup>160</sup> “Contracting Party” is defined as a party to the RTC. RTC, *supra* note 13, art. 1.

<sup>161</sup> *Id.* at art. 222.

<sup>162</sup> Myrie, *supra* note 1, at ¶ 7.

<sup>163</sup> *Id.* As noted above, Jamaica later became an intervener in this case. In addition, CARICOM was also represented in this case.



or third States.”<sup>164</sup> Her second claim raised the issue of freedom of movement. She based her claim to the right to freedom of movement on Article 45 of the RTC as implemented by “a Decision of the Conference of Heads of Government of the Caribbean Community taken at their Twenty-Eighth Meeting (the 2007 Conference Decision).”<sup>165</sup>

Barbados tested Ms. Myrie’s second claim by asserting in effect that there was an implementation gap in the establishment of the right of freedom of movement under Article 45 of the RTC.<sup>166</sup> Hence, Barbados challenged the legal basis for Ms. Myrie’s assertion of her right of freedom of movement under the RTC for four reasons.<sup>167</sup> *First*, Barbados argued that the 2007 Conference Decision did not create any legally binding rights because it was an agreement and not a decision within the meaning of Article 28(1) of the RTC.<sup>168</sup> *Second*, due to a reservation by Antigua and Barbuda, Barbados opined that the Decision lacked the required unanimity under Article 28 (1) and further that the Decision had “not been subjected to Barbados’[s] constitutional procedures as required under Article 240(1) of the RTC.”<sup>169</sup> *Third*, Barbados asserted that if the 2007 Conference Decision did create a right of freedom of movement for individuals, that constructed right and related allegations of wrongful treatment by Barbados border officials are not subject to judicial review under the RTC because the exercise of immigration and customs procedures constitute “activities” that in accordance with Article 30 of the RTC are excluded from the free movement rights under the RTC.<sup>170</sup> *Fourth*, Barbados claimed that any right of entry created for Community nations is not an absolute or unrestricted right because the 2007 Conference Decisions recognized “the rights of Member States to

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<sup>164</sup> Myrie, *supra* note 1, at ¶ 3.

<sup>165</sup> *Id.* at ¶ 4.

<sup>166</sup> *Id.* at ¶ 6.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

refuse undesirable persons entry and to prevent persons from becoming a charge on public funds.”<sup>171</sup>

With its last two arguments, Barbados challenged Ms. Myrie’s allegations of discrimination due to her nationality. In that regard, Barbados argued that its officers did not discriminate against Ms. Myrie based on her nationality or otherwise and consequently there was no violation of the non-discrimination provision in Article 7 of the RTC. Barbados also claimed that Ms. Myrie was not treated less favorably than nationals of other states and therefore, there was no violation of the most favored nation treatment as required by Article 8 of the RTC.<sup>172</sup>

#### G. The Court’s Response – Filling the Implementation Gap for Hassle-Free Travel

Filling the implementation gap involved a two-step process for the Court. The Court first reviewed the applicable Community law to determine whether there was binding law implementing freedom of movement in CARICOM. After making that determination, the Court needed to explore the impact of Community law on domestic law in Barbados in the absence of domestic legislation implementing Community law in Barbados. As discussed below, it is the second step that is of particular significance in common law nations that espouse dualism in applying international law.

The freedom of movement question in Ms. Myrie’s case was based on Article 45 of the RTC and the 2007 Conference Decision, both of which were critical to the Court’s determination and bear repeating here before reviewing the key portions of the Court’s decision.

Article 45 of the RTC states: “Member States commit themselves to the goal of free movement of their nationals within the Community.”

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<sup>171</sup> Myrie, *supra* note 1, at ¶ 6.(quoting the 2007 Conference Decision).

<sup>172</sup> *Id.* at ¶ 7.

As reproduced in the Court's opinion, the 2007 Conference Decision provides:

### 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 rights of Member States to refuse undesirable persons entry and to prevent persons from becoming a charge on public funds.

**NOTED** the reservation entered by **Antigua and Barbuda** in this regard<sup>173</sup>

The question raised by these two provisions is whether the arguably aspirational language of Article 45 of the RTC was implemented by a unanimous decision of the Heads of Government as required by Article 28(1) of the RTC. To determine that question, the Court needed to address the legal significance of the 2007 Conference Decision in creating binding Community law notwithstanding the reservation by Antigua and Barbuda.

#### 1. The Relationship Between Community and Domestic Law Under the RTC

In its discussion of the applicable law, the CCJ began by distinguishing the impact of the applicable community and domestic law on this case.<sup>174</sup> Although the Court indicated that the Immigration Act and Administrative Acts of Barbados are applicable to the facts, the Court would first need to determine whether "Community law" also applied to the case.<sup>175</sup> Given that the Court has the authority to interpret the RTC, the Court's first determination required it to determine whether Article 45 of the RTC had been implemented. At

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<sup>173</sup> Myrie, *supra* note 1, at ¶ 43.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* The Court determined that "Community law" would include for this decision, the RTC and the 2007 Conference Decision.

the heart of this discussion was the distinction between the creation of binding law at the municipal level and the creation of “binding rights and obligations *at the Community level*.”<sup>176</sup> Accordingly, as International Court of Justice Judge Patrick Robinson explained

The dualist dichotomous approach to international law, resulting in the possibility that in a dualist country a treaty may not be enforceable in its courts, but at the international level that country may be in breach of the treaty, quite often creates difficulties and a kind of legal paradox; nonetheless that paradox and dichotomy remain an essential part of the constitutional system of dualist countries.<sup>177</sup>

Turning to Community law, the Court’s first discussion focused on the binding nature of the 2007 Conference Decision. As noted above, Barbados raised two key points concerning this decision. First, Barbados argued that since the wording of the 2007 Conference Decision used the word “agreed” and not “decided”, this statement was not a binding decision within the meaning of Article 28(1) of the RTC.<sup>178</sup> Further, Barbados contended that the reservation by Antigua and Barbuda meant that the 2007 Conference Decision was not “an affirmative vote of all its members” within the meaning of Article 28(1).

The Court succinctly dispensed of these two arguments. First, it noted that other CARICOM documents consistently referenced the 2007 Conference Decision as a decision.<sup>179</sup> Thus, it concluded that: “it is of no consequence that the 2007 Conference Decision uses the word ‘agreed’ and not ‘decided’”.<sup>180</sup> Second, it explained that the reservation did not detract from the unanimity of the decision for three reasons:

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<sup>176</sup> Myrie, *supra* note 1, at ¶ 51.

<sup>177</sup> Patrick Robinson, *The Myrie Judgement: Community Law vs National Law*, JAMAICA OBSERVER (Oct. 16, 2013), [http://www.jamaicaobserver.com/columns/The-Myrie-judgement--Community-law-vs-national-law---p---\\_15253513](http://www.jamaicaobserver.com/columns/The-Myrie-judgement--Community-law-vs-national-law---p---_15253513).

<sup>178</sup> Myrie, *supra* note 1, at ¶ 6.

<sup>179</sup> *Id.* at ¶ 45.

<sup>180</sup> *Id.*

(1) a reservation was not equivalent to a veto and was therefore not a negative vote; (2) Antigua and Barbuda could have intervened in the case, if those nations had intended that their reservations rendered the 2007 Conference Decision to be nonbinding; and (3) “the Conference, the CARICOM Secretariat and the various Organs of the Community have all regarded and treated the 2007 Conference Decision as valid and binding.”<sup>181</sup>

Next, the Court addressed the impact of Community law on domestic law in Barbados. The court noted that nations “with a dualist approach to international law” are typically required to enact municipal law to transform treaty law into enforceable domestic law.<sup>182</sup> This process is reflected in Article 240 of the RTC which provides that “the relevant constitutional procedures of the Member States” determine the creation of “legally binding rights and obligations for nationals of such states.”<sup>183</sup>

The Court indicated that in the absence of Community law, Barbados would have the right under its Immigration Act to restrict the entry of “persons who are not citizens or permanent residents of Barbados.”<sup>184</sup> The Court further noted that

The RTC, however, and more particularly the 2007 Conference Decision brought about a fundamental change in the legal landscape of immigration throughout the Community. In contradistinction to foreigners in general, Community nationals now do have a right to enter the territory of Barbados and that of other Member States unless they qualify for refusal under the two exceptions mentioned above.<sup>185</sup>

After making this statement on the supremacy of Community law, the Court applied the concept of dualism to its discussion on the

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<sup>181</sup> Myrie, *supra* note 1, at ¶ 47.

<sup>182</sup> *Id.* at ¶ 51.

<sup>183</sup> RTC, *supra* note 13, art. 240.

<sup>184</sup> Myrie, *supra* note 1, at ¶ 50.

<sup>185</sup> *Id.* As noted in the 2007 Conference Decision, the two exceptions are undesirable persons and persons who may become a charge on public funds.

impact of domestic law on freedom of movement in CARICOM. The Court stated:

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.<sup>186</sup>

The Court then explained the inapplicability of the Saving provision in Article 240 of the RTC requiring that Community law be “subject[ed] to the relevant constitutional procedures of the Member States before creating legally binding rights and obligations for nationals of such States.”<sup>187</sup> The Court also clarified that Article 240 did not impact Community law, but instead dealt with enacting domestic laws that will “enable Community nationals to enforce their rights at the national level and in the municipal courts.”<sup>188</sup> The Court reasoned that invalidating Community law due to the failure of a CARICOM Member State to implement conforming domestic law would essentially return CARICOM to “the pre-2001 voluntary system” of regional integration.<sup>189</sup> The Court also observed that: “It is the 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.”<sup>190</sup> Moreover, the Court maintained that requiring the incorporation of Community law into domestic law in order to make that Community law enforceable at the regional level leads to an absurdity of logic and “would destroy the uniformity, certainty and predictability of Community law” if some Member States failed to enact the appropriate legislation.<sup>191</sup>

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<sup>186</sup> Myrie, *supra* note 1, at ¶ 51.

<sup>187</sup> RTC, *supra* note 13, art. 240.

<sup>188</sup> Myrie, *supra* note 1, at ¶ 52.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at ¶ 53.

Thus, the Court explained that the Member States are not required to enact legislation to create Community law, but only to give “domestic effect” to binding decisions that create Community law.<sup>192</sup> Further, the Court expounded that legislation is not required to give domestic effect where Constitutional provisions or existing legislation sanction the use of executive or judicial actions to grant domestic effect to such decisions.<sup>193</sup> Accordingly, “in the absence of any indication to the contrary a valid decision of a Community Organ or Body taken in fulfilment or furtherance of the RTC or to achieve the objectives of the Community is immediately binding at the Community level.”<sup>194</sup> The Court expanded on this remark by indicating that such decisions should include a time frame for implementation, but that without those time frames, Member States still have an obligation under Article 240(2) to “act expeditiously” to implement decisions of a Community Organ or Body.<sup>195</sup>

To limit the application of Article 45, Barbados also argued that the activities of its immigration and customs officials are not subject to judicial review by the Court according to Article 30 of the RTC.<sup>196</sup> Barbados asserted that, under Article 30(2), the activities of these officials were excluded from the operation of Chapter Three of the RTC which includes Article 45 on free movement of Nationals. According to Barbados, these activities concerned “the exercise of governmental authority” because they formed “part of a system of national security” or involved “the establishment or maintenance of public order.”<sup>197</sup> The Court set aside these arguments stating:

The purpose of Article 30 is to allow Member States as part of the exercise of their sovereignty to reserve certain public service positions strictly for their own nationals. . . . It is, however, not intended to limit the right to free movement as such nor can it be invoked

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<sup>192</sup> Myrie, *supra* note 1, at ¶ 54.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at ¶ 55 (citing *Hummingbird Rice Mills Limited v Suriname and the Caribbean Community* [2012] CCJ 1 (OJ)).

<sup>195</sup> RTC, *supra* note 13, art. 240; Myrie, *supra* note 1, at ¶ 55.

<sup>196</sup> Myrie, *supra* note 1, at ¶ 56.

<sup>197</sup> RTC, *supra* note 13, art. 30(2); Myrie, *supra* note 1, at ¶ 56.

to prevent the Court from subjecting to judicial scrutiny the actions of functionaries in those areas in the exercise of their duties in the context of the RTC.<sup>198</sup>

## 2. Unrestricted Right of Entry Under Articles 45 and 46 of the RTC

Following its discussion of judicial review, the Court addressed Barbados's arguments that Ms. Myrie had a restricted right of entry under the RTC and that Barbados was justified in refusing her entry. The Court disagreed with this argument and stated "[a]lthough Article 45 RTC embodies that concept in aspirational terms, the right [to free movement of Nationals] has to a great extent already been enshrined and fleshed out in the RTC itself."<sup>199</sup> To address this issue, the Court examined the provisions of Article 46 of the RTC on the "Movement of Skilled Community Nationals." This RTC article was "undertake[n] as a first step towards achieving the goal set out in Article 45."<sup>200</sup> To reach that goal, Article 46(2) requires that "Member States . . . establish appropriate legislative, administrative and procedural arrangements to . . . provide for movement of Community nationals into and within their jurisdictions without harassment or the imposition of impediments."<sup>201</sup> Rejecting Barbados's arguments the Court declared:

From Article 46(3) RTC it can be deduced that the concept of free movement entails the right of Community nationals to have unrestricted access to, and movement within, the jurisdictions of the Member States "subject to such conditions as the public interest may require." The fourth paragraph of Article 46 RTC charges the Conference, *inter alia*, with the duty "to enlarge, as appropriate, the classes of persons entitled to move and work freely in the Community."<sup>202</sup>

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<sup>198</sup> Myrie, *supra* note 1, at ¶ 56.

<sup>199</sup> *Id.* ¶ 58.

<sup>200</sup> RTC, *supra* note 13, art. 46(1); Myrie, *supra* note 1, at ¶ 59.

<sup>201</sup> RTC, *supra* note 13, art. 46(2); Myrie, *supra* note 1, at ¶ 59.

<sup>202</sup> Myrie, *supra* note 1, at ¶ 59.



Along these lines, the Court's discussion of freedom of movement went beyond the objections raised by Barbados. To bolster its opinion, the Court also addressed the need for unrestricted travel in order for CARICOM Nationals to provide the services envisioned in the CSME. The Court explained that in certain approved service sectors under the RTC, Community Nationals should not only have the right to unrestricted permission to enter other Members States for business purposes, but Nationals should also have a corollary right to enter other Members States to receive those services "without being obstructed by unreasonable restrictions."<sup>203</sup> In the Court's view, free movement of persons is critical to the provision and use of services by Community Nationals.

### 3. The 2007 Conference Decision and Freedom of Movement under the RTC

The Court next explored the implications of the 2007 Conference Decision on freedom of movement under the RTC. The Court opened by noting that the decision conferred an "automatic stay" or "definite stay" of up to six months for Nationals upon entry into a Member State.<sup>204</sup> Noting the historical importance of hassle-free travel, the Court acknowledged that "the full extent of the right is that both entry and stay of a Community national in another Member State must not only be 'definite' but also 'hassle[-]free' or 'without harassment or the imposition of impediments'".<sup>205</sup>

The Court further studied the impact of the stated exceptions to this right – undesirability and potential to become a charge on public funds—on the right of a definite stay. While Barbados contended that the determination of these exceptions was a condition precedent to the right of entry, the Court disagreed stating "[t]he wording of the Decision where it speaks about 'automatic stay' or 'definite entry' upon arrival, suggests that the right does not depend on discretionary

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<sup>203</sup> Myrie, *supra* note 1, at ¶ 61.

<sup>204</sup> *Id.* at ¶ 62.

<sup>205</sup> *Id.* at ¶ 63.

evaluations of immigration officers or other authorities at the port of entry.”<sup>206</sup>

The Court explained that this conclusion is based upon the integration of the 2007 Conference Decision with the RTC’s freedom of movement provisions. Hence, the RTC’s security and general exceptions in Articles 225 and 226 allows Member States to “justifiably” restrict or curtail the right of entry under the RTC as implemented by the 2007 Conference Decision. However, these permissible limitations in the RTC and the 2007 Conference Decision “must equally be construed as exceptions to, and restrictions on, the right of Community nationals from other Member States to enter into and move around the receiving State ‘without harassment or the imposition of impediments.’”<sup>207</sup>

To understand the effects of the exceptions to and restrictions on freedom of movement in CARICOM, the Court referenced Article 48 of the EEC Treaty<sup>208</sup> and a European Court of Justice case.<sup>209</sup> Based on this authority, the Court concluded that the exceptions should not be considered a condition precedent to the right of entry, but a restriction imposed with sufficient evidence of the applicability of the exception.<sup>210</sup> To illustrate these points, the Court turned to the exceptions in the 2007 Conference Decision for undesirable persons or persons who may become a charge on public funds and stated that there were two consequences of applying these exceptions. First, the scope of each exception to the “fundamental principle of freedom of movement” and its corresponding rationale “must be interpreted narrowly and strictly in order to avoid an unjustified watering down of the importance” of the rights constrained by the exceptions.<sup>211</sup> Second, “being an exception to this fundamental principle, the burden of proof

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<sup>206</sup> Myrie, *supra* note 1, at ¶ 64.

<sup>207</sup> *Id.* at ¶ 65.

<sup>208</sup> Treaty Establishing the European Economic Community (1957), 298 U.N.T.S. 11 (the E.E.C. Treaty), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20298/v298.pdf>.

<sup>209</sup> Case 48/75 Royer, 1976 E.C.R. 498, 512, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61975CJ0048&from=EN>.

<sup>210</sup> Myrie, *supra* note 1, at ¶ 66.

<sup>211</sup> *Id.* at ¶ 67.

must rest on the Member State that seeks to invoke either ground for refusing entry.”<sup>212</sup> The Court then discussed the procedural consequences for a refusal of entry.<sup>213</sup> In addition to having adequate grounds for refusal of entry, the Member State who denies entry must promptly provide the reason for that denial in writing to the affected Community National.<sup>214</sup>

Having established the fundamental principles of freedom of movement, the Court went through the remaining issues in the case concerning Ms. Myrie’s claim of discrimination based on her nationality and her claim of a breach of the right to Most Favoured Nation treatment. Earlier in the decision, the Court had opined that it had “no jurisdiction to adjudicate violations of international human rights treaties and conventions” and noted that “[t]hose instruments generally provide for their own dispute resolution mechanism.”<sup>215</sup> However, the Court recognized that as an international court it was authorized under Article 217 of the RTC to “apply such rules of international law as may be applicable.”<sup>216</sup> As a result, the Court concluded that it was able and required to “take into account principles of international human rights law when seeking to shape and develop relevant Community law.”<sup>217</sup> Ultimately, the Court dismissed the discrimination claim stating that it was “not possible properly to discern a pattern of discrimination” based on the “weaknesses in the statistical material and the insufficiency of the other evidence” to support this claim.<sup>218</sup> For similar reasons, the Court also dismissed Ms. Myrie’s claim of breach of Most Favoured Nation treatment.<sup>219</sup> Despite the dismissal of the last two claims, the Court ordered Barbados to pay

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<sup>212</sup> Myrie, *supra* note 1, at ¶ 67.

<sup>213</sup> *Id.* at ¶¶ 77-83.

<sup>214</sup> *Id.* at ¶ 77.

<sup>215</sup> *Id.* at ¶ 10.

<sup>216</sup> RTC, *supra* note 13, art. 217; Myrie, *supra* note 1, at ¶ 10.

<sup>217</sup> Myrie, *supra* note 1, at ¶ 10.

<sup>218</sup> *Id.* at ¶ 91.

<sup>219</sup> *Id.* at ¶ 92.

Ms. Myrie Bds\$2240.00 for pecuniary damages, and Bds\$75,000.00 for non-pecuniary damages.<sup>220</sup>

#### IV. CONCLUSION

The choice of the CCJ as the forum for Ms. Myrie's claim was critical to the success of her case. If Ms. Myrie had sued in Barbados, the case would have applied the Barbados immigration law instead of the RTC.<sup>221</sup> By bringing suit in the CCJ to enforce Article 45 of the RTC on Movement of Community Nationals, Ms. Myrie invoked the original jurisdiction of the CCJ through the application of the RTC.<sup>222</sup> At the same time, the choice of this forum limited Ms. Myrie's recovery to Community law.<sup>223</sup> Her resort to the CCJ to assert her freedom of movement rights under the RTC sustained her claims in the CCJ even though Barbados had not harmonized its domestic laws with Community law. Thus, Ms. Myrie's choice of forum determined the outcome of her case.

This exploration of the historical roots of freedom of movement and its development in *Myrie v. Barbados* indicates two important markers in the establishment of freedom of movement. The first marker, an attempt to address freedom of movement in the WIF constitution, failed in part due to the highly sensitive politics involved in freedom of movement. The second marker, a construction of the parameters of freedom of movement based on Community law, has now enhanced the ability of Caribbean Nationals to secure their freedom of movement rights.

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<sup>220</sup> The pecuniary amount equals US \$1105.71 and the non-pecuniary amounts is equal to US \$37021.70. Thus, her total damages were US \$38127.41. Myrie, *supra* note 1, at ¶¶ 95, 100, 101.

<sup>221</sup> *Id.* ¶ 52. See also Patrick Robinson, *The Myrie Judgement: Community Law vs National Law*, JAMAICA OBSERVER (Oct. 16, 2013), [http://www.jamaicaobserver.com/columns/The-Myrie-judgement--Community---law-vs-national-law---p---\\_15253513](http://www.jamaicaobserver.com/columns/The-Myrie-judgement--Community---law-vs-national-law---p---_15253513).

<sup>222</sup> RTC, *supra* note 13, art. 211.

<sup>223</sup> More particularly, the Court indicated that it had jurisdiction "to interpret and apply the RTC and secondary 'legislation' emanating from the Treaty." Myrie, *supra* note 1, at ¶ 10.

Notwithstanding this progress, the claimants in three ensuing cases on freedom of movement brought subsequent to *Myrie v. Barbados* did not prevail.<sup>224</sup> The failure of these cases was not due to a change in Community law regarding the right of freedom of movement. Instead, the cases failed due to lack of evidence to substantiate a claim of breach of freedom of movement rights.

Nonetheless, *Myrie v. Barbados* remains a historical watershed in the development of Community law and the expanding role of the CCJ. As Justice Winston Anderson of the CCJ noted about *Myrie*:

It demonstrates the ability of the Court to touch the lives of the ordinary Caribbean citizen. It contains important guidance not only on the meaning of the right to free movement under the RTC but also provides a glimpse into the jurisprudential philosophy of the Court when sitting in its original jurisdiction. It proves that the Court understands its responsibility as the guardians of the RTC.<sup>225</sup>

Above all, the *Myrie v. Barbados* case effects a critical closing of the implementation gap for hassle-free travel in the Caribbean. The case clearly elucidates how, with the CCJ's astute interpretation, the 2007 Conference Decision has transformed Article 45 from an aspirational goal to an applied fundamental right of freedom of movement under the RTC.

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<sup>224</sup> Tomlinson v. Belize, [2016] CCJ 1 (OJ) (claiming breach of right of freedom of movement due to laws that prohibit entry of homosexuals); Gilbert v. Barbados, [2019] CCJ 2 (OJ) (alleging violation of freedom of movement rights due to detention by police); and Bain v. Trinidad & Tobago, [2019] CCJ 3 (OJ) (attempting to enforce a right to freedom of movement without sufficient documentation to establish Grenadian citizenship).

<sup>225</sup> Winston Anderson, *Free Movement Within CARICOM: Deconstructing Myrie v. Barbados*, Address at the OECS Bar Association Meeting, St. Georges, Grenada 20 (Dec. 7, 2013), <http://www.caribbeancourtjustice.org/wp-content/uploads/2013/12/FREE-MOVEMENT-WITHIN-CARICOM-DECONSTRUCTING-MYRIE-V-BARBADOS.pdf>.