FREE MOVEMENT WITHIN CARICOM: DECONSTRUCING MYRIE v BARBADOS[1]

"Never confuse movement with action": Ernest Hemingway

By

Hon. Mr Justice Winston Anderson, JCCJ
Former Professor of Law University of the West Indies

Introduction

Firstly, I would like to express my appreciation to the President and members of the Grenada Bar Association for this opportunity to return to the lecture room and address this OECS Bar Association Meeting in Grenada. I am pleased and honored to be here. I am advised that this lecture might help with the qualification for the issuance of a practising certificate for 2014 but I hasten to add that there is no truth to the rumor that the requirement for Continuing Legal Education is a conspiracy to satisfy the ambition of frustrated former university lecturers. And I promise there is no written exam afterwards.

Secondly, my instructions indicate that you wish to be addressed on the matter of freedom of movement within CARICOM in light of the **Myrie** decision.[2] May I commend you on the prescience of your instructions. The Caribbean Court

[1] I am grateful to Mrs Ria Mohammed-Davidson, Judicial Research Assistant of the CCJ's Legal Department, for producing the first draft of this speech.
[2] *Myrie v Barbados* [2013] CCJ 3 (OJ).

of Justice plays an important symbolic role to us as Caribbean people because, in its appellate jurisdiction, it represents the culmination of our journey towards independence, the severance of our ties from our former colonial masters, and a conscious decision to chart our own jurisprudential course. Equally, however, in the exercise of its original jurisdiction, the Court has a central role to play in the development of the Caribbean Single Market and Economy (the "CSME") and it is in this regard that I wish to commend the **Myrie** decision to this audience. Whilst being mindful of Ernest Hemmingway's adage that we should "never confuse movement with action" I proffer the **Myrie** decision as probative evidence of the CCJ's contribution towards realizing foundational aspirations of Caribbean integration.

Of course, in exercising its original jurisdiction the Court must 'bat within its own crease', so to speak. Its parameters are circumscribed by the Revised Treaty of Chaguaramas (the "RTC") and the Agreement Establishing the Court (the "CCJ Agreement").[3] In eight years, the Court has delivered 16 decisions in its original jurisdiction involving corporate actors and major conglomerates, demonstrating the Court's ability to resolve complex trade disputes. The **Myrie** decision has broken this corporate/commercial mould as it is the first instance in

[3] This does not detract from the inherent jurisdiction of a court which is derived from its very nature as a court of law: Jacob, I.H., *The Inherent Jurisdiction of the Court*, 23 Current Legal Problems 23 – 52 (1970).

which the Court has pronounced on the law governing free movement of persons with the CSME.

Free Movement and the CSME

George Santayana, the famed American philosopher once famously remarked that "those who cannot remember the past are condemned to repeat it."[4] In order to properly contextualize this address I consider it useful to say a word about the historical development of the right to free movement under the RTC before embarking on an analysis of **Myrie**.

The Caribbean region has a shared history of colonialism, slavery and indentureship; each of these historic eras being characterised by a movement of peoples: some voluntary; some forced; others out of necessity. During colonial times, persons resident in the British West Indies could *factually*, move, live and work in any of the Caribbean islands;[5] although there is some forensic evidence that there was no *legal* right to free movement.[6] The ideals of free movement *were* first reflected in the formation of the West Indies Federation in 1958 but this eventually became a sore point, contributing to the collapse of the venture. With

[4] George Santayana, *Reason in Common Sense* (1905).
[5] Wickham, Wharton et al, Freedom of Movement: The Cornerstone of the Caribbean Single Market And Economy(CSME), Paper Prepared For The Caribbean Policy Development Centre (2004) available at http://sta.uwi.edu/salises/workshop/papers/pwickham.pdf.
[6] See *Thornton v The Police* [1962] AC 339; *Margetson v Attorney General of Antigua* [1968] 12 WIR 469 --- in the latter, the Court of Appeals of the West Indian Associated States held that a Commonwealth citizen from Montserrat had no legal right to land and take up residence in the neighbouring island of Antigua.

the demise of the Federation, "restricted movement became a firmly established feature of post-colonial Caribbean statehood."[7] Indeed, there was a deliberate de-linking of the concepts of free trade and free movement of persons with the formation of the Caribbean Community. This was made explicit in 1973 in the original Treaty of Chaguaramas which provided that:

> "Nothing 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."[8]

A shot in the arm for the free movement agenda came with the confluence of two seminal works: (1) Grand Anse Declaration and Work Programme for the Advancement of the Integration Movement (1989); and (2) *Time for Action*, the Report of the Independent West Indian Commission (1992). These reports signalled a return to the ideals of free movement focusing on the elimination of barriers to the free movement of skilled persons and professionals while aspiring to the goal of a CARICOM passport to facilitate the free travel of all CARICOM nationals.

The regional integration movement was further refined with the passage of the RTC in 2001. Importantly for present purposes, the RTC reflects the duality

[7] Wickham, Wharton et al, supra at pg. 19.
[8] Article 38 of the Treaty of Chaguaramas (1973).

inherent in the concept of free movement. Article 45 speaks of the goal of free movement of all Community nationals whereas Article 46 speaks of the free movement of skilled Community nationals. The Skilled Nationals regime applies to certain categories of persons such as university graduates, media workers, sportspersons, artistes and musicians.[9] The Conference of Heads of Government subsequently added the following groups of skilled persons: nurses, teachers, artisans with a Caribbean vocational qualification, holders of an associate's degree or comparable qualification, and domestic helpers.[10] Article 34 on the right of establishment, permits the free movement of managerial, technical and supervisory staff of economic enterprises. To be contrasted with this regime of skilled persons who move to pursue economic activity is the regime of Hassle Free Travel. Building upon the goal of free movement in Article 45, the Conference of Heads in 2007:

> *"**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."*

It was upon this regime of Hassle Free Travel that Ms **Myrie** founded her claim.

[9] See Article 46(1) of the RTC.

[10] Administrative Arrangements and Procedures for the Free Movement of Skills Based on Successive Decisions of The Conference of Heads of Government and Relevant Councils. Available at: www.caricom.org/jsp/single_market/skills_regime.pdf.

The Heart of the Matter: Free Movement under Myrie

Having set the historic background, I can now delve into the heart of the **Myrie** matter. At its core, the **Myrie** case traces the journey of a young Jamaican woman, Shanique Myrie and her short-lived trip to Barbados on 14th March 2011. She intended to spend two weeks with friends in Barbados and had US$300 with her. She was interviewed at the Grantley Adams Airport by Barbadian officials acting on suspicion that she was a drug courier. She was intensely interrogated, detained, and subjected to both a search of her luggage and a degrading intimate search of her person. Finally she was placed in a detention cell overnight and sent back to Jamaica the next day, without the opportunity to shower. Thus ended her ordeal and began her quest for justice to seek redress for the treatment meted out to her. Her quest took her to the steps of the CCJ where she filed an originating application on 17th May 2012 which alleged a breach of her right of free entry as contained in Article 45 of the RTC and the 2007 Conference Decision. She also claimed a violation of Articles 7 and 8 of the RTC, namely discrimination on the grounds of her Jamaican nationality.

In the end, Ms Myrie's application succeeded in part. The Court held that the right to free entry had been violated in an 'egregious manner', justifying an award of both pecuniary and non-pecuniary damages by way of compensation to the tune of $77,240.00. But the Court was not convinced that her treatment could be

characterised as discrimination on the basis of her nationality, so this aspect of the application failed.

Clarification of the right of free movement

In analysing the import of the decision in relation to the right of free movement, the Court clarified that Community nationals are entitled to a right of definite/hassle free entry and an automatic six month stay upon entry into another Member State consequent upon the combined effect of RTC Article 45 and the 2007 Conference Decision. The Court also went on to define the parameters of this right.

Firstly, it noted that the right of definite entry is neither open-ended nor absolute. Rather, it is subject to the right of a Member State to refuse entry to undesirable persons or those likely to become a charge on public funds. However these exceptions fall to be narrowly construed and the burden lies on the State to justify their invocation against a Community national. *Secondly*, the Court proceeded to give some guidance as to the meaning to be ascribed to the term 'undesirable person', indicating that it refers to a Community national who actually poses or can reasonably be expected to pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society. *Thirdly*, the Court clarified that the determination as to whether someone will become a charge

on public funds does not fall to be assessed solely by the amount of cash in hand at the time of entry. Instead the issue should be approached in a common sense manner taking into account, for e.g., the availability of a credit card facility and whether the visitor's stay is to be at a private home or an establishment as a paying guest. *Fourthly*, the Court emphasised that the substantive right of free movement carried with it certain procedural rights: prompt notification in writing of the reasons for refusal of entry; right to access effective appeal or review procedures; and the opportunity to consult an attorney or a consular official of the visitor's own country.

In sum the Court's approach to the determination of Ms Myrie's application demonstrates its recognition of the significance of the right to free movement within the scheme of the CSME and the fostering of a sense of Community identity among us Caribbean people.

Free movement and Economic activity

I want to emphasise that the **Myrie** decision explores and to some extent explodes the dichotomy between free movement and movement for economic activity. The right to free movement had hitherto been understood in the context of the CARICOM Skilled Nationals Regime. An indelible feature of the Skilled Nationals Regime is that it covers activities which are patently grounded in

economic terms. **Myrie** recasts the mould, indicating that the right to free movement is not solely tied to employment. CARICOM nationals are entitled to travel freely throughout the region for both business and pleasure. It is admitted that travel can have a significant economic dimension, particularly given recent efforts to maximise the benefits of regional tourism. However, it may also have more pressing social dimensions such as visiting relatives and loved ones, reconnecting with old acquaintances or exploring the natural beauty of the Caribbean region. **Myrie** can serve as a catalyst to facilitate expansion of the notion of free movement beyond that of employment or other economic activity and thus contribute to the further evolution of that nascent virtue of 'Caribbean identity' which has already taken root in the field of education through the University of the West Indies and sport via the 'exploits' of the West Indies Cricket Team.

Broader Implications of Myrie

Thus far I have chosen to focus on the impact of the Myrie decision on the right to free movement but the case has other implications that are both proximate and wide ranging. I readily admit that the 'hassle free' principle is the part of the case which is historic and touches upon the lives of the ordinary Caribbean citizen in their day to day activities. However at a deeper level of abstraction, this decision makes important jurisprudential statements about such concepts as (1) evidence in

the original jurisdiction; (2) the relationship between Community law and national law; (3) the nature of jurisdiction of the CCJ vis-à-vis the human rights regime; (4) the award of damages for breach of a right arising under the RTC; and (5) the opportunity to intervene.

Burden and Standard of Proof

In **Myrie**, the Court was faced with two competing versions of events regarding the circumstances surrounding Ms Myrie's detention at the Grantley Adams Airport and subsequent return to Jamaica. Ms Myrie's version was flatly denied by Barbados. This case was highly fact intensive and therefore provides key insight into the approach of the Court to evidentiary matters in the original jurisdiction, in particular the burden and standard of proof. From the outset, it should be noted that the Court when sitting in its original jurisdiction is an international court and must, in the words of Article 217 of the RTC, apply "such rules of international law as may be applicable."[11] The principles surrounding the burden and standard of proof contained in domestic common law and civil law jurisdictions are therefore not apposite.

On the international plain, the creation of a formalised system of evidentiary rules has proved elusive, leading to the lament that "despite over one hundred years of international adjudication … we cannot point to any well-established set

[11] See Article 217 of the RTC.

of rules in international law."[12] However there is broad consensus on certain foundational principles. In this regard the *actori incumbit onus probandi* rule relating to the burden of proof has been widely accepted. There is also consensus regarding the general approach to the standard of proof, with the adoption of a variable standard which is tied to the nature of the allegation. This approach is best understood by use of a continuum ranging from proof on a balance of probabilities (usually applied to boundary disputes) to the sufficiency of the evidence (governing claims of international responsibility) to fully conclusive or convincing evidence (for charges of exceptional gravity).[13]

The **Myrie** case demonstrates that the CCJ held fast to these foundational principles of international law. The Court noted that the circumstances surrounding Ms Myrie's body cavity search and overnight stay in a detention cell involved "charges of notable gravity and assertions of international liability." Thus the cardinal rule, 'he who alleges must prove' applied. In relation to the standard of proof, it is true that the decision is devoid of any express formulation of a particular standard. However this is hardly unusual given the general trend in international law to eschew the formulation of a precise framework of rules on this issue in the interests of fostering a flexible standard. The Court in **Myrie** was

[12] O'Connell, Mary, *Evidence of Terror*, 7(1) J Conflict Security Law 19 (2002)
[13] This tripartite categorisation is properly attributed to Ridell, Anna and Plant, Brendan, *Evidence Before the International Court of Justice*, British Institute of International and Comparative Law (2009).

satisfied to simply note that the standard of proof must be lower than proof beyond a reasonable doubt but in the analysis of the evidence the Court used terms such as "clear", "cogent", and "consistent". These labels are apt in light of its earlier observations surrounding the gravity of the allegations which place Ms Myrie's claim on the extreme end of the spectrum alluded to earlier.

Thus, from the foregoing, it is evident that the CCJ in its original jurisdiction has adopted the general rules developed by international courts and tribunals to govern issues of evidence, rather than attempting to re-invent the wheel.

The Relationship Between Community Law and National Law

Most CARICOM member states cling fast to the doctrine of incorporation whereby a Treaty has no effect in domestic law unless it is first transformed or incorporated by an Act of Parliament. The **Myrie** decision contains an important rider to this principle. Ms Myrie sought to ground her claim on the combined effect of the RTC and the 2007 Conference Decision. In response, the State of Barbados argued that this latter instrument could not give rise to enforceable legal rights as it had not been enacted into domestic law based on Article 240 of the RTC. The CCJ rejected that contention outright emphasising the distinctions between national law and Community Law. It noted that the RTC is a creature of Community law whereas

national Immigration Laws fall under the rubric of domestic law. I commend to you the following observations which make the matter plain:

> "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… If domestic incorporation were a condition precedent to the creation of Community rights, an anomalous situation would be created when some States incorporated the Decision and others had not. This would be untenable as it would destroy the uniformity, certainty and predictability of Community law."[14]

From this extract, it is evident that the Court has signalled that incorporation is not a condition precedent to the *creation* of Community Law. Community law is *created* through the decision making machinery established by the RTC, namely the Bodies and Organs of CARICOM. Article 240 of the RTC which provides that "Member States undertake to act expeditiously to give effect to decisions of competent Organs and Bodies in their municipal law" is therefore to be properly understood as requiring Member States to give domestic *effect* to the decisions of the Community subject to their constitutional procedures, not as a requirement for the creation of any rights and obligations which follow naturally from Community law. This jurisprudential approach represents a fundamental shift in our legal landscape. It has opened the door for the old dichotomy between incorporation and

[14] See *Myrie*, supra at [51] to [52].

direct effect (which features heavily in the EU) to be revisited. However such an endeavour is beyond the scope of my address; suffice it to say that the observations of the Court that the movement towards Caribbean integration has resulted in the creation of a "new legal order" should not fall on deaf ears.

Human Rights and the Jurisdiction of the CCJ

As is often the case in litigation, **Ms Myrie** cast a wide net seeking to ground her application not only on the provisions of the RTC but also in international human rights principles. Thus her application relied on, *inter alia*, a violation of her human rights under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights, occasioned by the body cavity search and her overnight stay in a detention cell. She sought wide ranging relief in the form of an official apology as well as an undertaking to hold the relevant officials criminally responsible.

The CCJ did not take the bait. Instead the Court held that this feature of her application was misconceived, emphasising that the CCJ is not a human rights court *per se*. Its jurisdiction is interpreting and applying the RTC and other forms of secondary legislation as set out by the parameters of Article 211 of the RTC and

Article XII of the Agreement Establishing the Court. It is therefore apparent that whilst a claim regarding a breach of a right under the RTC may involve a human rights dimension, the Court in its original jurisdiction is not to be understood as constituting a tribunal within the scheme of international human rights law. As the Court observed most international treaties and conventions provide for "their own dispute resolution mechanism, which must be the port of call for an aggrieved person who alleges a breach of those treaties."[15]

Damages

The region has already witnessed a paradigm shift in the law of damages in the realm of constitutional law with the advent of the decision of the Judicial Committee of the Privy Council in **Romauld James v the Attorney General of Trinidad and Tobago.**[16] This case crystalised the concept of vindicatory damages. An award of such damages can be made separate and apart from compensatory or exemplary damages in face of a breach of constitutional rights. The purpose of which is to "mark the fact that a *constitutional* breach has occurred."[17]

In a similar vein, the historic import of the **Myrie** decision also extends to the law of damages. This was the first case in the original jurisdiction where non-pecuniary damages were sought in relation to a breach of a right conferred by the

[15] See *Myrie,* supra at [10].
[16] [2010] UKPC 23, [2011] 2 LRC 217.
[17] Supra at [26].

RTC. Non-pecuniary damages also known as 'moral damages' feature heavily in international law[18] and the premise of such awards is to provide compensation for a violation of international law which has resulted in mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to reputation. The issue of moral damages has even arisen in the context of an international arbitration in

Lemire v. Ukraine[19] which identified three criteria to be examined in awarding damages, namely:

> (1) whether the State's actions imply physical threat, illegal detention, or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act; (2) whether the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and (3) whether both cause and effect are grave or substantial.

Moral damages can now been taken to form a constituent element of Community law as being developed by the CCJ in performance of their interpretative function in relation to the RTC. It closely parallels the concept of general damages known throughout the common law system. I would further suggest that there are parallels between the concept of vindicatory damages in

[18] *Case Concerning the Factory at Chorzow (Claim for Indemnity) (Germany v Poland)*, Judgment on the Merits dated September 13, 1928, PCIJ Rep Ser A, No 17.
[19] ICSID Case No. ARB (AF)/98/1.

constitutional law and moral damages under the RTC in that both are granted on the basis of the insufficiency of declaratory relief to adequately address the breach of a fundamental right. The award of moral damages in this case flowed naturally from the 'egregious' manner in which Ms Myrie's right to hassle free travel was breached. The Court was disturbed about the circumstances surrounding the body cavity search and the concomitant mental anguish occasioned by the ordeal. It marked its disapproval by an award of Bds$75,000.00 in addition to the pecuniary damages amounting to Bds$7,500.00 to cover the cost of Ms Myrie's damaged slippers, her airline ticket and her medical expenses. Importantly it rejected the somewhat technical objection taken by Barbados that the body cavity search, which was conducted by police officers as opposed to immigration officials, was not sufficiently connected to the exercise of the right to hassle free travel. To quote from the judgment:

> "The fact that the cavity search was conducted by police and not immigration officers is of no relevance. The Court notes as significant in this respect that the Community appears to be in the process of developing a "Point of Entry and Departure Complaints Procedure" which would cover "treatment" of Community nationals not only by immigration and customs officers but also police and security officers and "others"."[20]

In my view this disposition is another instance of the Court's concern for public accountability and good governance; a subject which has previously engaged the

[20] See Myrie, supra at [99].

attention of the court, in particular through the development of the accountability principle[21] and the decision in **Florencio Marin and Jose Coye v the Attorney General of Belize**.[22]

Intervention

Finally, the **Myrie** case is also interesting from a procedural standpoint, namely the rules governing intervention in the original jurisdiction. Intervention, as the name suggests, refers to the procedure by which a non-party (the 'intervenor') is allowed to join on-going litigation with the permission of the court, on the premise that the decision of the court may affect their rights and therefore they ought to be given an opportunity to be heard. The process can be usefully contrasted with an 'amicus curiae' brief which features heavily in the jurisprudence of the US Supreme Court. Such briefs are usually filed by civic minded persons or organisations in proceedings with a public interest flavour. The *amicus curiae* is not a party to the case, but rather is able to address the court on a specific point of law which has fallen for resolution. It is even possible for the invitation to participate to originate with the court itself.[23]

[21] *Trinidad Cement Limited v The Caribbean Community*[2009] CCJ 4 (0J), (2009) 75 WIR 194at [39]-[41];*Hummingbird Rice Mills v The Caribbean Community*[2012] CCJ 1 (OJ), (2012) 79 WIR 448 at [31]-[32].

[22] [2011] 78 WIR 51.

[23] As occurred where Harvard Law School Professor Vicky Jackson, upon request, filed an amicus brief on the jurisdiction of the Supreme Court in relation to the challenge mounted to the Defence of Marriage Act in *United States v Windsor*570 U.S. _ (2013) available at http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf

At first blush, the decision of the court to allow Jamaica to intervene in **Myrie**, appears perplexing. Jamaica previously indicated its agreement that Ms Myrie could file a claim under Article 222 of the RTC which allows private individuals to access the CCJ where the RTC has granted them a direct right, they have been prejudiced in the enforcement of that right and the State has refused to bring a claim or has agreed that the private individual should be allowed to espouse the claim. However the CCJ allowed the intervention on the basis that all the decisions of the Court constitute legally binding precedents not only on the parties themselves but also on all Member States of CARICOM.[24] Therefore Jamaica had a substantial interest of a legal nature in the case which would impact on both the State's legal obligations as a member of the CSME and the rights of its citizens. Neither could Jamaica be taken to have waived its right to intervene based on its consent to Ms Myrie's application. The CCJ thereby signalled its generous interpretation of the rules governing intervention as set out in Article XVIII of the CCJ Agreement and Part 14 of the Rules of Court, but the Court made clear that Jamaica's intervention would not be allowed to widen the litigation beyond the case presented by the parties. It seems fair to assume that the development of CCJ jurisprudence will not be isolated from the persons and States it is designed to serve and therein lies the crucial role to be played by intervention process.

[24] See Article 221 of the RTC

Conclusion

By way of conclusion I consider it fair to say that by any academic or societal test, the **Myrie** decision is of historic import. 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. The **Myrie** decision shows that we are moving apace with the integration project. *This* movement has become action, despite Mr Hemingway's sage advice. It is no idle boast that this case represents a watershed moment in the jurisprudence of the Court and with the passage of time will go down in the annals of Caribbean jurisprudence. I leave you with the some related gems of wisdom borrowed from Sir Shridath Ramphal:

> "Historic forces and the Caribbean Sea have divided us; yet unfolding history and that same Sea, through long centuries of struggle against uneven odds, have been steadily making us one. Now West Indies have emerged with an identity clearly recognisable not only to ourselves and our wider Caribbean but also to the world beyond the Caribbean Sea … oneness has replaced separateness …That oneness is the basic reality of our West Indian condition."[25]

Thank you.

[25] Time For Action, Report of the West Indian Commission (1992).