

THE COMING TIDE: PROTECTION OF THE RIGHTS OF REFUGEES IN THE COMMONWEALTH CARIBBEAN IN ABSENCE OF LEGISLATION

Westmin R. A. James, L.L.M.

Lecturer in Constitutional Law and Commonwealth Caribbean Human Rights, the University of the West Indies Cave Hill Campus; Judge, Caribbean Community Administrative Tribunal; Electoral Justice Specialist, OAS.

Abstract: *The article will discuss the rights of refugees in the Commonwealth Caribbean. It will first discuss the legal categorization of a “refugee” under international law and the extent to which the rights of the asylum seeker and a refugee particularly the principle of non-refoulement exist as customary international law. The article will then evaluate how Commonwealth Caribbean courts treat international law with respect to domestic law and within the State’s constitutional paradigm. Thereafter, the article will examine the ways in which Commonwealth Caribbean courts may appropriately use both international treaty law and customary international law not only as an interpretive tool but also as a means to restrict the scope of the statutory provision. The article will finally demonstrate how international law and customary international law can be used to establish substantial protection in domestic law for those seeking asylum or for refugees in a situation where there are no domestic refugee regulations but where there is a written constitution.*

INTRODUCTION AND BACKGROUND

The ‘Commonwealth Caribbean’ are those independent states in the Caribbean Sea and in Central and South America that were formally British colonies and include Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines and Trinidad and Tobago. Although recent focus from the regional and international community has been on the exodus of Venezuelans to other South American countries, the movement of Venezuelan nationals to Commonwealth Caribbean jurisdictions raises profound political and legal questions. The lack of implementing regulations or legislation on asylum policies in many Caribbean countries leaves the ever-increasing population of people claiming refugee status in a greater legal limbo. Yet the lack of formal implementation need not leave refugees without legal protection in Caribbean jurisdictions. This article aims to demonstrate that both international treaty law and customary international law may appropriately be used as aids to constitutional interpretations that can in turn protect asylum seekers or refugees from being repatriated to their home countries. The article will discuss the rights of refugees and discuss the legal categorization of a “refugee” under international law and the extent to which the rights of the

asylum seeker and refugee exist as customary law, particularly regarding the principle of *non-refoulement*. Furthermore, the article examines the way in which Caribbean courts treat international law with respect to domestic law and within the State's constitutional paradigm. That examination demonstrates that international law currently plays a role in two ways: as an interpretative tool, and of direct application. In this section, the article will explore the use of customary international law not only as an interpretive tool but also as a means to restrict the scope of the statutory provision, rather than to clarify the content. The article will then evaluate whether the customary international law can be used to establish substantial protection in domestic law for those seeking asylum or for refugees in a situation where there are no domestic refugee regulations but where there is a written constitution.

Regionally, the Commonwealth Caribbean is confronted with an increasingly complex phenomenon of mixed migration that includes asylum-seekers, refugees, victims of human trafficking and stateless persons. Several countries in the Commonwealth Caribbean are hosting increasing numbers of Venezuelans, in circumstances where the small size and limited absorption capacity of the concerned countries has particularly negatively impacted these host nations. Following global and regional trends, the number of new asylum-seekers in the Commonwealth Caribbean has significantly increased, with refugees from 32 countries from across the world, including Venezuela and Cuba, entering the Commonwealth Caribbean. The deteriorating situation in Venezuela has led to a significant increase in the number of Venezuelans seeking asylum in 2017 and the first half of 2018 in the Americas, including Trinidad and Tobago. The United Nations High Commissioner for Refugees (UNHCR) is working with an estimated 40,000 Venezuelans in Trinidad at the end of 2017.¹ The UNHCR considers all Venezuelans to be persons of concern and in need of protection.² The Commonwealth Caribbean, with their small populations and constrained economies, are challenged in facilitating the volume of people seeking asylum. This new state of affairs highlights the inadequacy of the domestic legal frameworks for refugee law in the region.

THE RIGHTS OF REFUGEES

The definition of “refugee” in the 1951 Refugee Convention has dominated the landscape of refugee law for the past three decades. The definition states that the term “refugee” applies to any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual

*residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*³

In 1984, this definition was expanded in the Americas by Conclusion III of the 1984 Cartagena Declaration. While it is technically non-binding, it is incorporated in the domestic legal framework of many countries in Central and South America. It adds to the definition of refugees:

*persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*⁴

In addition to the 1951 definition from the Refugee Convention, the UNHCR recognizes refugees as “individuals who are outside their country of origin and who are unable or unwilling to return there owing to serious threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.”⁵

One of the most fundamental principles of asylum and international refugee protection is the principle of *non-refoulement*.⁶ The 1951 Refugee Convention prohibits contracting states from expelling or returning a refugee in any manner to the frontiers or territories from which they seek protection.⁷

Being recognized as a refugee in international law is vital, as it brings a host of other internationally binding rights, including civil and socio-economic rights. These rights include the provision of housing, welfare and travel documents.⁸ A refugee has the same rights as any other foreigner who is a legal resident of the state.⁹ Human Rights Council Resolution 30 further outlined that states are obligated to guarantee equality between citizens and non-citizens to enjoy their civil, political, economic, social and cultural rights recognized under international law. These rights are articulated especially in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.¹⁰

In the Commonwealth Caribbean, there are three types of jurisdictions: countries with refugee legislation; countries that have signed the Refugee Convention but do not have any domestic refugee laws; and those who have not signed or ratified the Refugee Convention and have no domestic refugee laws. Only Belize has domestic legislation incorporating the Refugee Convention, while Trinidad and Tobago and Jamaica are parties to the Refugee Convention and the 1967 Protocol but never incorporated the Convention into domestic law but have refugee policies. Since Belize possesses effective legislation for the protection of

asylum seekers and refugees, this article will consider the second and third types of jurisdiction mentioned above. It is significant to note that in 2014, Trinidad and Tobago's government adopted a national policy to address asylum and refugee matters. The policy states that recognized refugees should be entitled to a series of rights including travel documents, identity papers, authorization to work, and right to education. In practice, those who apply for asylum or are granted refugee status are not allowed access to legal employment, leaving many vulnerable or destitute with limited access to the education system.¹¹ The question of the enforceability of this policy raises the intractable tensions that are present in dualist systems. The definition of the term "refugees" and the concept of *non-refoulement* taken from the Refugee Convention do not establish any direct rights in domestic law. The primary claims of refugees in these countries will rather have to be either that the Refugee Convention and the principle of *non-refoulement* is constitutionally guaranteed or that the concept of *non-refoulement* has become a norm of customary international law and has been incorporated into the law of the country.

COUNTRIES THAT HAVE SIGNED THE CONVENTION BUT HAVE NO DOMESTIC LEGISLATION

The countries in the Commonwealth Caribbean are dualist states, meaning unincorporated treaties do not automatically become part of domestic law. Further steps are needed to incorporate these international treaties into national law. Unlike monist legal systems, where international law is incorporated directly into the domestic legal system, in the Commonwealth Caribbean, the state normally needs to pass domestic legislation to change the domestic law to the rules of law accepted in treaties.¹² However, there are cases that have established that even if an international convention is not expressly incorporated into domestic law, its provisions are justiciable.¹³ In this regard, the Refugee Convention therefore can be used to construe the constitutional provisions or legislation regarding asylum and immigration and to review the policy and individual decisions of the immigration officials.

The constitutions in the Caribbean generally declare themselves to be the supreme law of the land and state specifically that any other law which conflicts with them is void to the extent of its inconsistency with the constitution.¹⁴ The constitutions of Commonwealth Caribbean countries also guarantee the enjoyment of various fundamental human rights. The fundamental rights under the various constitutions include the right to life, the prohibition against cruel, inhuman or degrading treatment or punishment, equality or non-discrimination, the right to private and family life, and protection of the law. The constitutions also provide that a person who alleges that any of his or her fundamental rights contained in the constitution has been, is being, or likely to be infringed upon in relation to him or her, may apply to the High Court for a remedy. The High Court is therefore given

the power under the constitutions to grant remedies for enforcing or securing the enforcement of the provisions of the constitution of which the person concerned is entitled.

The international community typically accepts the notion that constitutional rights are applicable to non-nationals who are subject to the jurisdiction of the state, especially regarding immigration matters. In *Naidike et al v. Attorney General of Trinidad and Tobago*, a Nigerian citizen had been employed as a doctor in Trinidad under a work permit that was successively renewed. When another work permit renewal application was refused, he was arrested and detained, pending deportation. The detention was made without a prior ministerial declaration required under the Immigration Act, that he had ceased to be a permitted entrant. He brought constitutional proceedings claiming that the non-renewal of his work permit and his unlawful arrest and detention violated his fundamental human rights and freedoms contrary to the Constitution of Trinidad and Tobago. The Judicial Committee of the Privy Council (Privy Council), the final appellate court for Trinidad and Tobago held that he had a legitimate expectation that the minister would not refuse the renewal of his work permit without good reason after he had been given a proper opportunity to be heard. Since that was not done, the refusal was unconstitutional. In short, no person under the authority and control of a state, regardless of his or her immigrant status, is devoid of legal protection for his or her fundamental and non-derogable human rights.

The principle of *non-refoulement*, as articulated in Article 33 of the Refugee Convention, is broad in scope, offering expansive protection to refugees. The scope of the principle under relevant human rights law treaties is even broader than that contained in the Refugee Convention. In international human rights law, the principle applies to numerous instances including torture and other cruel, inhumane, or degrading treatment the rights to life and integrity as well as grave forms of sexual and gender-based violence.¹⁵ The prohibition of *non-refoulement* has also been interpreted to include instances regarding lack of medical treatment.¹⁶

The European context provides an important parallel legal situation as many of the Caribbean bills of rights are modelled after the European Convention of Human Rights. The European Convention on Human Rights (ECHR) does not contain any explicit reference to the right to asylum. However, the European Court on Human Rights (ECtHR) has provided protection to asylum seekers through interpretation of Article 3, the prohibition against cruel, inhuman, or degrading treatment or punishment of the Convention. This right has been interpreted by the Court as providing an effective means of protection against return to places where there is a risk that an individual would be subjected to torture or to inhuman or degrading treatment or punishment.¹⁷ While asylum cases were most frequently considered under Article 3 of the ECHR, *non-refoulement* has also been contemplated

for protection under other provisions within the ECHR, such as the right to life, prohibition of slavery, servitude and compulsory labour, right to liberty and security, right to a fair trial, right to respect for private and family life, right to freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, prohibition of discrimination in the enjoyment of ECHR rights.¹⁸

Analogously, the lack of incorporation of the agreement regulating asylum claims does not absolve a state from its constitutional responsibilities. Therefore, it is argued that the domestic courts can use international law to likewise interpret the constitutional rights under Caribbean constitutions to include the notion that non-citizens must not be returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses.

THE USE OF INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

The use of international law in domestic courts has a long and storied history in Commonwealth Caribbean jurisprudence. It is well established in the Commonwealth Caribbean that international human rights norms and commitments play an important role in the interpretation of domestic constitutional provisions. As then President of the Caribbean Court of Justice (CCJ) de la Bastide and former Justice of the CCJ, now President of the CCJ, Justice Saunders explained in their joint judgment in *AG v. Joseph and Boyce*:

*There is a distinct, irreversible tendency towards confluence of domestic and international jurisprudence. At the domestic level, the jurisprudence of international bodies is fully considered and applied. In determining the content of a municipal right, domestic courts may consider the judgments of international bodies.*¹⁹

In the joint judgment the judges emphasized that international law was not mere window dressing and that the court would not treat internationally accepted standards in human rights as being capable of simply being ignored on the domestic plane.²⁰

In *Cal v. Attorney General of Belize*, a formative case on indigenous rights, former Chief Justice Conteh explained the value of the pronouncements of international human rights tribunals interpreting treaties within their remit, noting that while the pronouncements of an international tribunal like the Inter-American Commission on Human Rights do not bind the Court, where appropriate they can be persuasive.²¹ In *Reyes v. R*, the Privy Council endorsed the dicta of then Justice of Appeal of the Eastern Caribbean Supreme Court Saunders, to the effect that the countries of the Caribbean are not unique in that the Courts cannot consider

the standards adopted by humankind in other jurisdictions.²² The Courts see the constitutions as imposing an obligation upon the state to conform to certain “irreducible” standards that can be measured in degrees of universal approbation and ought to be considered.²³ Therefore, there is a strong interdependence between the domestic constitutional provisions and international human rights norms with the greater recognition of “universal standards of human rights, accepted at the domestic and international level.”²⁴

In *Minister of Home Affairs v. Fisher*, Lord Wilberforce of the Privy Council stated that the ECHR and other international human rights instruments were antecedents to the Caribbean Bills of Rights and so provided the framework for the drafting of Commonwealth Constitutions and as a result call for their generous interpretation.²⁵ The constitutions of the Caribbean are also considered to be living instruments that are always speaking and are subject to interpretation in order to accommodate changing social realities in light of evolving international human rights standards.²⁶ As a result, where the Constitution uses broad and general language in relation to fundamental rights, judges have a duty to give interpretations that prevail in the contemporary period.²⁷

Therefore, it is suggested that the provisions of the right to life, prohibition against cruel, inhumane, or degrading punishment or treatment among others under the Caribbean constitutions should be interpreted consistent with international law so as to provide protection to those seeking refugee protection. It is suggested that this approach will more fully reflect the generous approach called for in *Minister of Home Affairs v Fisher*, avoiding the oft-quoted “austerity of tabulated legalism.”²⁸

Ambiguity

Caribbean courts directly and indirectly bridge the gap between international law and domestic law by interpretive processes, thereby incorporating these otherwise unincorporated international treaties. In *Boyce v. R*,²⁹ the Privy Council elaborated on the principle sometimes called the rule of “*harmonious construction*”³⁰ that where the domestic law, including the Constitution, is ambiguous—in that it is capable of an interpretation that conforms and conflicts with the state’s international legal obligations under a human rights convention—the court should choose the meaning that accords with the obligations that the treaty imposes. More recently, in *Maurice Tomlinson v. The State of Belize & The State of Trinidad and Tobago*, the CCJ assessed the importance of international law in interpreting the domestic law of Belize and Trinidad and Tobago to be consistent with its international obligations.³¹ The CCJ stated that in common law jurisdictions, like the Caribbean, there is a sacrosanct rule that statutory provisions should if at all possible be interpreted as compliant with the State’s treaty obligation. This rule of construction applies to all statutes, as a general canon of statutory interpretation. This principle of

statutory interpretation applies equally in the realm of constitutional interpretation. The constitutional provisions for the protection of fundamental rights are often drafted vaguely, with details left to interpretation by the courts. Such rights include due process of law and life and personal liberty, which are expressly enumerated in constitutions across the Caribbean. In the recent case of *Caleb Orozco v. the AG of Belize*,³² the Court extended the protections of the equality and other fundamental rights in the Belizean Constitution to gay men. The Court relied on the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) to conclude that discrimination on the ground of sex under the Belizean Constitution includes discrimination on the ground of sexual orientation. Likewise, in relation to the constitutional right to life, courts may give effect to the state's international law obligation to act consistently with the objects and purpose of the Refugee Convention. States like Trinidad and Tobago and Jamaica have signed the convention but have not incorporated it into domestic legislation.

Legitimate Expectation

In an effort to minimize the pitfalls of dualism, another way in which Commonwealth Caribbean courts use unincorporated treaties was set out in the CCJ decision *AG v. Joseph and Boyce*.³³ The CCJ held that, in some circumstances, ratification of a treaty could give rise to the legitimate expectation that the treaty would partially apply in the domestic plane, even if legislation had not brought the treaty into force locally. The fact that Barbados had ratified the American Convention on Human Rights and had acted in a manner which was compliant with the Convention, created a legitimate expectation. The legitimate expectation that resulted was that a convicted man must be afforded a reasonable time for the filing and completion of their international petition proceedings. A failure to act in accordance with that legitimate expectation was a denial of their right to protection of the law. In *British Caribbean Bank v. AG*³⁴ the CCJ indicated that the belief that unincorporated treaties were incapable of conferring rights in domestic law is rejected. They held that at a minimum, these unincorporated treaties could yield legitimate expectations cognizable under domestic law. While there has been a withdrawal from the approach adopted in *Minister for Immigration and Ethnic Affairs v. Teoh*³⁵ in Australia with regards to legitimate expectation,³⁶ the Caribbean courts have continued to apply and develop this line of jurisprudence.

There is also some support for this position in the United Kingdom. In *Ahmed v. Secretary of State for the Home Department*³⁷ Lord Woolf and Lord Justice Hobhouse accepted that the act of entering into a treaty could give rise to a legitimate expectation on which the public could rely. They also held that it could amount to a representation that the Secretary of State would act in compliance with any obligations undertaken in the treaty. In *R v. Uxbridge Magistrates' Court ex p. Adimi*,³⁸ Simon Brown LJ approved the statements by Lord Woolf in *Ahmed* and

accepted the contention that the UK's ratification of a treaty could, in itself, create a legitimate expectation that its provisions would be followed.

Therefore, the acceptance of Trinidad and Tobago and Jamaica of the Refugee Convention and even more with the adoption of a policy by the two governments means that asylum seekers have a legitimate expectation that the state will protect them and as such is enforceable under the constitution.

PROTECTION OF THE LAW & DUE PROCESS

While the state is not obliged to incorporate treaties into national law, international law requires, particularly in respect to treaties designed to protect human rights, that the state's obligations are effectively implemented. Domestic courts can utilize the Refugee Convention as part of the constitutional right of the litigant to due process or protection of the law as it has been developed in the Commonwealth Caribbean. In *R (Isiko) v. Secretary of State for the Home Department*,³⁹ the court insisted that, where fundamental rights were involved, a decision-maker would be required to respect those rights. This argument is not without merit, since the CCJ has repeatedly emphasized that the right to the protection of the law is a broad and expansive right. In *AG v. Joseph and Boyce*, in the joint judgment of then President de la Bastide and former Justice Saunders the Court observed:

*... the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of the constitution all the ways in which it may be invoked or can be infringed... The protection which the right was afforded by the Barbados Constitution would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of section 18.*⁴⁰

Justice Wit of the CCJ, in a separate judgment, considered that the right to protection of the law was far-reaching in its scope and that the multi-layered concept of the rule of law infuses the Constitution with other fundamental safeguards such as rationality, reasonableness, fundamental fairness and the duty to protect against abuse and arbitrary exercise of power. He noted that:

*...It is clear that this concept of the rule of law is closely linked to, and broadly embraces, concepts like the principles of natural justice, procedural and substantive "due process of law" and its corollary, the protection of the law. It is obvious that the law cannot rule if it cannot protect.*⁴¹

Similarly, through the use of international law and a more expansive interpretation of the protection of the law, the CCJ protected the rights of indigenous peoples in

Belize, where there was no domestic legislation, save for preambular references in the Constitution and non-incorporated international treaties. In *The Maya Leaders Alliance et al v. AG of Belize*,⁴² the CCJ directly related the evolving concept of protection of law with the responsibility of the state to comply with its international obligations. The CCJ has recognized that a subset of the rule of law, which is a part of the constitutional right to the protection of the law, is the obligation of the state to honor its international commitments.⁴³ The CCJ concluded that the right to the protection of the law was not only a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. But they held that it goes further to include adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power; and the availability of effective remedies.⁴⁴ As Justice Wit said it “*the law cannot rule if it cannot protect.*” Justice Wit adopted Lord Bingham’s opinion that:

*the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.*⁴⁵

The CCJ found that the Government of Belize breached Maya community members’ rights to protection of the law by failing to ensure that the existing land law system recognized and protected Maya land rights as required under their international law obligations. The Court has not utilized this expansive framing since the Maya Leaders Alliance, though the opportunity has arguably existed.⁴⁶

The concept of the rule of law is closely linked to, and broadly embraces, concepts like the principles of natural justice, procedural and substantive due process of law, and its corollary, the protection of the law.⁴⁷ In the CCJ’s recent landmark decision in *Nervais v. R* and *Severin v. R*, the Court noted that protection of the law is one of the underlying core elements of the rule of law which, while not expressed, is inherent to the Constitution.⁴⁸ Therefore, the courts, in keeping with the rule of law, must engage in a more generous interpretation of the constitutional provisions and adapt its interpretation with contemporary understandings and realities.

Such decisions are perhaps most wide-ranging and may be the vehicle which transforms, or at least renders more porous, the distinction between monism and dualism. The *Maya Alliance* case signifies that not only must a person have a right, but that they must have mechanisms to enforce that right. Therefore, a failure to provide domestic procedures to give effect to the rights under the Refugee Convention, it is submitted, is itself a breach of the constitutional provision of protection of the law. This is arguably the result if a state fails to provide a remedy to those seeking protection in that state in compliance with that state’s international obligations.

COUNTRIES WHO HAVE NOT SIGNED OR RATIFIED THE REFUGEE CONVENTION.

For those jurisdictions that have not ratified the Refugee Convention, a constitutional claim may still be brought with respect to the removal of any asylum seeker by the government arguing that it violates the customary law principle of *non-refoulement*. If considered a principle of customary international law, it is argued that a refugee or person seeking asylum may approach the Court under the constitution to prevent deportation and to take steps for the recognition of their rights in the Caribbean.

Non-Refoulement as a Norm of Customary International Law

The first step in cases such as this, where a relevant rule of customary international law is being ascertained, is to establish the existence of the rule. It has been asserted that the principle of *non-refoulement* today is not only a fundamental principle of international law,⁴⁹ but also is considered a rule of customary international law.⁵⁰ Recent commentators go as far as to assert that the principle of *non-refoulement* has acquired the status of *jus cogens*.⁵¹ Furthermore, common law authorities seem to support this view. In the UK Supreme Court case *R (European Roma Rights Centre and others) v. Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)*⁵² Lord Bingham held that it was a generally accepted principle that a person seeking asylum in another state should not be rejected or returned without the appropriate investigation of the alleged persecution. Lord Bingham's acknowledgment of the principle as being of "general acceptance" further confirms the view that the concept of *non-refoulement* of refugees has developed into customary international law. This was applied in another common law country, Hong Kong, in *C and Others v. Director of Immigration and Another*,⁵³ which comprehensively recognized customary international law principle of *non-refoulement* of refugees.

Once a rule of customary international law is identified, the question arises as to how it is actually applied as part of constitutional law in the Commonwealth Caribbean. Beyond the use of international law as mentioned above as an interpretative tool for constitutional rights, a domestic tribunal can refer to and apply customary international law as long as statutory or judicial authority does not contradict it as customary international law forms part of the common law.⁵⁴ It is a recognized principle of constitutional interpretation that the principle of customary international law may be used to interpret domestic statutes, provided they are not in conflict with domestic laws. An interesting use of customary international law as an interpretative tool occurs when the international rule is used to restrict the scope, rather than to clarify the content, of the statutory provision. A more recent case in which customary international law was used to limit the scope of a domestic

statute is in *Maurice Tomlinson*. In its assessment of the domestic law of Trinidad and Tobago, the CCJ, albeit sitting in its international law capacity, used customary international law to help interpret and restrict the provisions of the Trinidad and Tobago immigration laws. The CCJ said:

[44] ... it is relevant to point out that there are human rights materials that could support the domestic court of Trinidad and Tobago in taking a more liberal approach to the interpretation of section 8(1)(e) than the one advanced by Tomlinson and conceded by the State. The Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man are among the important international instruments that recognize the human dignity of every person. Sexual orientation is protected from discrimination (Article 2) and protected by the guarantee of equality before the law (Article 26) in the International Covenant on Civil and Political Rights (1966): Toonen v. Australia. International human rights which have crystallized into customary international law form part of the common law of Trinidad and Tobago.⁵⁵

This conclusion was reached despite the fact that nowhere in the statute did such an interpretation occur. The Court, in considering the proper construction of the Immigration Act, appears to move away from the traditional two-step approach of finding an ambiguity and then drawing on international law to resolve it; rather, it seems to have approached the issue as though international law is one of the tools available to assist with the interpretative process. Given the clear words of the statute in that case, the decision does appear to indicate that the courts may be willing to adopt an expansive approach to using customary international law in interpreting statutes to provide for a more robust understanding of rights.

CONCLUSION

In this brief article, insight into the various ways in which international law can be used within the dualist tradition in the Caribbean has been provided, with a demonstration of the potential scope of justiciability of rights arising under the Refugee Convention. Incorporation via legislation undoubtedly provides the strongest bulwark. The courts in the Commonwealth Caribbean have a stronger capacity to harmoniously interpret domestic law and international law due to recent jurisprudential developments. In doing so, any petitioner who wishes to approach the Court under the Constitution to prevent their deportation of other refugees in the Caribbean can use these mechanisms. Furthermore, these mechanisms will take steps for the recognition of rights of petitioners in the Commonwealth Caribbean in keeping with the constitutional guarantees. How the Court will actually develop its jurisprudence is indeed a question in waiting. While the interpretive sketches above are hopeful and positive, it is important to note that Caribbean Courts have

been loath to interfere with Executive determinations of measures with significant cost implications, affording the state a significant margin of appreciation and deference. In the coming tide, it is hoped that Caribbean judiciaries continue the development of more meaningful engagements with international law.

Westmin R.A. James, LL.M. (Cantab) is a Lecturer in Law and Commonwealth Caribbean Human Rights at the Faculty of Law, the University of the West Indies Cave Hill Campus, Barbados. He is also the Litigation Specialist for the University of the West Indies Rights Advocacy Project (U-Rap) which engages in human rights litigation in the Caribbean, a Judge of the Caribbean Community Administrative Tribunal (CCAT) and Electoral Justice consultant for the Organization of American States (OAS).

NOTES

1 “Venezuela Situation: Responding to the Needs of People Displaced from Venezuela,” UNCHR, last modified March 2018, <http://reporting.unhcr.org/sites/default/files/unhcr%20venezuela%20situation%202018%20supplementary%20appeal.pdf>.

2 “Guidance Note on the Outflow of Venezuelans,” UNCHR, last modified March 2018, <https://data2.unhcr.org/en/documents/download/63243>.

3 “Convention Relating to the Status of Refugees,” opened for signature July 28, 1951, *United Nations Treaty Series* 189 UNTS 137, Art. 1, para. A(2).

4 Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984.

5 Note on International Protection, Thirty-sixth Session of the Executive Committee of the High Commissioner’s Programme, para. 6, UN Doc. A/AC.96/660 (1985).

6 See, e.g., UNHCR, Executive Comm. Programme, *Non-Refoulement, Conclusion No. 6 (XXVIII)*, October 12, 1977, <https://www.unhcr.org/en-us/excom/exconc/3ae68c43ac/non-refoulement.html>.

7 “Convention Relating to the Status of Refugees,” Art. 33.

8 “Convention Relating to the Status of Refugees,” Arts 2-34; see also James Hathaway and Michelle Foster, *The Law on Refugee Status, 2nd Edition* (Cambridge: Cambridge University Press, 2014), 1.

9 Kate Jastram and Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law* (Geneva: Inter-Parliamentary Union, 2001), 46.

10 Office of the United Nations High Commissioner for Human Rights, *CERD General Recommendation 30, Discrimination Against Non-Citizens*, Sixty-Fourth Session, 2004, UN Doc. CERD/C/64/Misc.11/rev.3.

11 Melanie Teff, “Forced into Illegality: Venezuelan Refugees and Migrants in Trinidad and Tobago, Field Report,” last modified January 2019, <https://reliefweb.int/sites/reliefweb.int/files/resources/Trinidad%2Band%2BTobago%2BReport%2B-%2BJanuary%2B2019%2B-%2B2.0.pdf>.

12 *Chung Chi Cheung v. R*, (1939) AC 160; *J.H. Rayner (Mincing Lane) Ltd v. The Department of Trade and Industry*, [1990] 2 AC 418, 476.

13 *The Maya Leaders Alliance v. The Attorney General of Belize* [2015] CCJ 15.

14 E.g. Constitution of Trinidad and Tobago section 2: “This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency.” Jamaica does not have a supreme law clause but one has been implied from the provisions of the Constitution.

15 Prohibition of torture and other cruel, inhumane, or degrading treatment see: *Othman (Abu Qatada) v. UK*, (2012) 55 EHRR 1, 235, 258; the right to life see: UN Human Rights Committee, *General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant*, May 26 2004, 12, CCPR/C/21/Rev.1/Add.13; the right integrity see: “American Convention on Human Rights,”

ratified November 22, 1969, *Inter-American Commission on Human Rights*, art. 22(8); *Pacheco Tineo Family v. Bolivia*, (2013) IACtHR,135; prohibition of sexual and gender-based violence see: *Njamba and Balikosa v Sweden*, Communication No. 322/2007 CAT, para. 9.5 (2010); UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, November 5, 2014, para. 23, CEDAW/C/GC/32.

16 *C v. Australia*, No. 900/1999 HRC (1999); *Paposhvili v. Belgium*, ECHR 41738/10, IACtHR, Advisory Opinion OC-21/14, para 229 (2017).

17 *Soering v. UK*, (1989)11 EHRR 439; *Cruz Varas and Others v. Sweden*, (1991) 14 EHRR 1 paras. 69–70; *Vilvarajah and Others v. UK*, (1991) 14 EHRR 248.

18 The applicant in *H.L.R. v. France* (1997) ECHR 24573/94 alleged that his right to life would be at risk if returned to Colombia, the matter was however examined under Article 3. The Commission declared *D. v. UK* (1997) 24 EHRR 423 admissible under the right to life but examined it under Article 3 as did the Commission in *Bader and Kanbor v. Sweden*, (2008) 46 EHRR 197,42; *V.F. v. France*, No. 7196/10 (2011); *Othman v. UK*, (2012) 55 EHRR 1; right to respect for private and family life was considered alongside the right to life and Article 3; see: *D. v. UK* (1997) 24 EHRR 423; *Sufi and Elmi v. UK*, (2012) 54 EHRR 9,199.

19 *AG v. Joseph*, (2006) 69 WIR 104 at para [106]; The Caribbean Court of Justice is the final appellate Court for the Commonwealth Caribbean countries save for Barbados, Belize, Dominica and Guyana whose final appellate court is the Caribbean Court of Justice.

20 *AG v. Joseph*, (2006) 69 WIR 104 at para [107].

21 Supreme Court of Belize (Claims No. 171 and 172 of 2007) (18 Oct 2007); *AG v. Joseph*, (2006) 69 WIR 104 at para [21]-[22].

22 *AG v. Joseph*, (2006) 69 WIR 104 at para [33].

23 *Reyes v. R*, (2002) 2 LRC 531, 214.

24 *AG v. Joseph*, (2006) 69 WIR 104 at para [106].

25 *Minister of Home Affairs v. Fisher*, (1980) AC 319, 328.

26 *R v. Lewis*, [2007] CCJ 3 (AJ), para [74], Pollard J.

27 *Boyce v. R*, [2004] UKPC 32, para [24].

28 *Minister of Home Affairs v. Fisher*, (1980) AC 319, 328.

29 *Boyce v R*, [2004] UKPC 32.

30 *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, 485.

31 *Maurice Tomlinson v. The State of Belize & The State of Trinidad and Tobago*, (2016) CCJ 1 OJ.

32 *Caleb Orozco v. the AG of Belize*, (2016) 90 WIR 161.

33 *AG v. Joseph*, (2006) 69 WIR 104 at 106 .

34 *British Caribbean Bank v. AG*, [2013] CCJ 4 (AJ) at para [19].

35 *Minister for Immigration and Ethnic Affairs v. Teoh*, (1995)183 CLR 273.

36 Greg Weeks, “What Can We Legitimately Expect from the State?” in *Legitimate Expectations in the Common Law World*, eds. Matthew Groves and Greg

Weeks (Oxford: Hart Publishing, 2016).

37 *Ahmed v. Secretary of State for the Home Department*, (1999) Imm AR 22 at 36-37, 40.

38 *R v. Uxbridge Magistrates' Court ex p. Adimi*, (2001) QB 667 at 686.

39 *R (Isiko) v. Secretary of State for the Home Department*, (2001) UKHRR 385, 31.

40 *AG v. Joseph*, (2006) 69 WIR 104 at 60.

41 *AG v. Joseph*, (2006).69 WIR 104 at 20.

42 *The Maya Leaders Alliance et al v. AG of Belize*, [2015] CCJ 15.

43 *The Maya Leaders Alliance et al v. AG of Belize*, [2015] CCJ 15, 52.

44 *The Maya Leaders Alliance et al v. AG of Belize*, [2015] CCJ 15, 47.

45 Lord Bingham, 'The Rule of Law' (2006) 66(1) C.L.J 67, 81.

46 *Nervais v. R and Severin v. R*, [2018] CCJ 19 (AJ).

47 *Nervais v. R and Severin v. R*, [2018] CCJ 19 (AJ), 20.

48 *Nervais v. R and Severin v. R*, [2018] CCJ 19 (AJ), 45.

49 See Sir Elihu Lauterpacht QC and Daniel Bethlehem QC, "The Scope and Content of the Principle of *Non-Refoulement*" in *Refugee Protection in International Law*, eds. Feller, Türk and Nicholson (Cambridge: Cambridge University Press, 2003), 140-159; The International Law Association, meeting in New Delhi in April 2002, Resolution 6/2002: available at: <https://www.refworld.org/docid/4280b2404.html> [accessed 22 November 2019].

50 UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, January 16 2002, HCR/MMSP/2001/09; San Remo Declaration on the Principle of *Non-Refoulement*; UNHCR Global Consultations on International Protection, Cambridge Expert Roundtable, 'Summary Conclusions – Supervisory Responsibility', 9–10 July 2001 available at: <https://www.unhcr.org/protection/globalconsult/4a1ba1aa6/refugee-protection-international-law.html> [accessed 22nd November 2019].

51 Jean Allain, "The Jus Cogens Nature of *Non-Refoulement*" *International Journal of Refugee Law* 13, no. 4 (October 2001): 533; See also General Conclusion on International Protection General Conclusion on International Protection No. 25 (XXXIII) – 1982 Executive Committee 33rd session. Contained in United Nations General Assembly Document No. 12A (A/37/12/Add.1) Executive Committee, Conclusion No. 25 (XXXIII), 1982, para. b.

52 *R (European Roma Rights Centre and others) v. Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)*, [2005] 2 AC 1.

53 *C and Others v. Director of Immigration and Another*, Civil Appeals No. 132-137, (2008).

54 *R v. Keyn*, 2 Ex. D., 63 (1876); *Trendtex v. The Central Bank of Nigeria*, (1977) Q.B. 529; *Triquet v. Bath*, (1764) 3 Burr 1478; *Heathfield v. Chilton*, (1767) 4 Burr 2016.

55 *Maurice Tomlinson v. The State of Belize & The State of Trinidad and Tobago*, [2016] CCJ 1 (OJ).