



OVERSEAS DECISIONS BULLETIN

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Decisions of the Supreme Court of the United Kingdom, the Supreme Court of Canada, the Supreme Court of the United States, the Constitutional Court of South Africa, the Supreme Court of New Zealand and the Hong Kong Court of Final Appeal. Admiralty, arbitration and constitutional decisions of the Court of Appeal of Singapore.

Administrative Law

R (on the application of Association of Independent Meat Suppliers and another) v Food Standards Agency

Supreme Court of the United Kingdom: [\[2021\] UKSC 54](#)

Judgment delivered: 8 December 2021

Coram: Lady Hale, Lord Hodge, Lady Black, Lord Lloyd-Jones and Lord Sales

Catchwords:

Administrative law – Judicial review – Health and safety – Food safety – Where meat declared unfit for human consumption by Official Veterinarian (OV) – Where argued OV had to seize carcass under s 9 of *Food Safety Act 1990* – Where argued, having been declared unfit for human consumption, carcass should be disposed of as animal by-product – Where questions referred to Court of Justice of European Union – Whether s 9 procedure incompatible with EU food safety regime, specifically Regulation (EC) No 854/2004 and Regulation (EC) No 882/2004 – Whether appeal procedure required by article 54(3) of Regulation (EC) No 882/2004 capable of challenging OV's decision on full factual merits or whether more limited judicial review challenge required – Whether United Kingdom provides appropriate means to challenge decisions of OV.

Held (5:0): Appeal dismissed.

Admiralty

Alize 1954 & Anor v Allianz Elementar Versicherungs AG & Ors
Supreme Court of the United Kingdom: [\[2021\] UKSC 51](#)

Judgment delivered: 10 November 2021

Coram: Lord Reed, Lord Briggs, Lady Arden, Lord Hamblen and Lord Leggatt

Catchwords:

Admiralty – Unseaworthiness – Negligence – Due diligence – Navigational errors – Defective passage plan – Where appellants owners of cargo ship *CAM CGM LIBRA* and respondents cargo interests – Where article III rule 1 of *Hague-Visby Rules* required ship owner to make vessel seaworthy – Where ship ran aground due to navigational errors by ship Master following defective passage plan made before voyage – Where primary judge held appellants liable for errors made in passage plan and for resulting loss and damage – Where Court of Appeal dismissed appeal – Whether defective passage plan renders ship unseaworthy – Whether negligent navigation or management renders ship unseaworthy – Whether failure of Master to exercise due diligence can be imputed to ship owner.

Held (5:0): Appeal dismissed.

Bankruptcy and Insolvency

Montréal (City) v Deloitte Restructuring Inc.
Supreme Court of Canada: [\[2021\] SCC 53](#)

Judgment delivered: 10 December 2021

Coram: Wagner CJ and Moldaver, Karakatsanis, Côté, Brown, Rowe and Martin JJ

Catchwords:

Bankruptcy and insolvency — Stay of creditors' rights and remedies — Claims that may be dealt with by compromise or arrangement — Compensation between debt arising before and debt arising after initial order — Quebec Voluntary Reimbursement Program — Whether claim arising from agreement entered into under Quebec Voluntary Reimbursement Program is necessarily claim that relates to debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s 19(2)(d) of *Companies' Creditors Arrangement Act* — Whether supervising judge's discretion in restructuring context allows judge to stay right invoked by creditor to effect compensation between debt arising before and debt arising after

initial order — *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 11, 11.02, 19(2)(d), 21 — Act to ensure mainly recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts, CQLR, c. R-2.2.0.0.3 — Voluntary Reimbursement Program, CQLR, c. R-2.2.0.0.3, r. 1.

Held (6:1): Appeals dismissed.

Constitutional Law

Kwok Cheuk Kin v Director of Lands & Ors

Hong Kong Court of Final Appeal: [\[2021\] HKFCA 38](#)

Judgment delivered: 5 November 2021

Coram: Cheung CJ, Riberio, Fok PJJ, Chan and Lord Sumption NPJJ

Catchwords:

Constitutional law — New Territories Indigenous Inhabitants — *Ding* rights — Sex discrimination — Discrimination on basis of birth and social origin — Where New Territories Small House Policy provided male New Territories Indigenous Inhabitant may apply for grant to erect small house within own village — Where Policy provided for three kinds of grants: free building licence, private treaty grant, and exchanges — Where article 40 of Basic Law provided "lawful traditional rights and interests of indigenous inhabitants of New Territories shall be protected" — Where male New Territories Indigenous Inhabitants, prior to 1898 (when New Territories leased to British Empire), enjoyed *Ding* traditional property rights to erect small house in own village and, prior to 1990 (when Basic Law promulgated), enjoyed rights of private treaty and exchange — Where articles 25 and 39 of Basic Law and article 22 of Bill of Rights prohibited discrimination on basis of sex, birth and social origin — Where appellant unsuccessfully challenged constitutionality of Policy in Court of First Instance on basis of discrimination but succeeded in part on basis private treaty grants and exchanges not traditionally part of *Ding* rights prior to 1898 — Where Court of Appeal on appeal held Policy constitutional in entirety — Whether "lawful" rights in article 40 should be interpreted to be consistent with anti-discrimination provisions — Whether "traditional" rights refers to pre-1898 or to pre-1990 rights — Whether Policy constitutional in entirety.

Held (5:0): Appeal dismissed.

R v Albashir

Supreme Court of Canada: [\[2021\] SCC 48](#)

Judgment delivered: 19 November 2021

Coram: Wagner CJ and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

Catchwords:

Constitutional law — Declaration of invalidity — Temporal nature of declaration of invalidity — Where Supreme Court of Canada in *Bedford* declared void offence of living on avails of sex work and suspended declaration of invalidity for one year — Where accused charged after expiry of suspension period for committing offence of living on avails of sex work while declaration suspended — Where trial judge quashed charges on basis offence unconstitutional when committed — Where Court of Appeal held remedial legislation enacted by Parliament prior to expiry of suspension period pre-empted retroactive effect of declaration of invalidity — Whether provision prohibiting living on avails of sex work retroactively invalid such that it cannot ground conviction for offence committed prior to declaration taking effect — *Canadian Charter of Rights and Freedoms*, s 24(1) — *Constitution Act*, 1982, s 52(1) — *Criminal Code*, RSC 1985, c C-46, s 212(1)(j).

Held (7:2): Appeal dismissed.

Thubakgale & Ors v Ekurhuleni Metropolitan Municipality & Ors
Constitutional Court of South Africa: [\[2021\] ZACC 45](#)

Judgment delivered: 7 December 2021

Coram: Mogoeng CJ, Jafta, Khampepe, Madlanga, Majiedt, Mhlantla, Theron JJ, Tlaetsi AJ and Tshiqi J

Catchwords:

Constitutional law — Socio-economic rights – Right of access to adequate housing – Constitutional damages – Where applicants allocated housing subsidy and sites on which houses to be built – Where houses not handed over – Where municipality ordered to provide each applicant with house – Where municipality subsequently sought variation to order and applicants lodged counter-application seeking constitutional damages from municipality's failure to comply with order – Whether socio-economic rights enforceable by constitutional damages – Whether award of constitutional damages appropriate relief – Proper amount of constitutional damages for breach of socio-economic rights.

Held (9:0; 5:4): Leave to appeal granted; appeal dismissed.

Whole Woman's Health & Ors v Jackson & Ors
Supreme Court of the United States: [Docket No. 21-463](#)

Judgment delivered: 12 December 2021

Coram: Roberts CJ, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh and Barrett JJ

Catchwords:

Constitutional law – Sovereign immunity – Pre-enforcement judicial review – Private civil enforcement – Abortion – Where Texas Act outlaws abortions after detectable foetal heartbeat – Where, to evade pre-enforcement judicial review, state officials prohibited from enforcing Act but authorised private individuals to enforce Act by civil suit – Where petitioners abortion providers sought pre-enforcement judicial review of Act by suing certain Texas state officials, including judge, court clerk, Attorney-General and medical licensing officials – Where defendants moved to dismiss – Where District Court denied motions and Fifth Circuit allowed appeal – Whether any of state court judge, court clerk, Attorney-General and medical licensing officials proper defendants – Whether petitioners entitled to continue pre-enforcement judicial review lawsuit against state officials.

Held (8:1, 5:4): Affirmed in part; reversed in part; case remanded.

Criminal Law

HKSAR v Chan Hon Wing

Hong Kong Court of Final Appeal: [\[2021\] HKCFA 45](#)

Judgment delivered: 23 December 2021

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and Lord Hodge NPJ

Catchwords:

Criminal law – Jury – Jurors – Translation – Where trial conducted in English, with evidence in Chinese translated to English – Where, during trial, jury foreman sent note to judge requesting Cantonese translator for closing statements "to ensure no misunderstanding" – Where headsets provided to jurors for interpretation during closing submissions and summing up – Where "few" or "some" jurors used headsets – Whether continuing duty on trial judge imposed by section 4(2) of the Jury Ordinance (Cap.3) or otherwise to be satisfied members of jury understand proceedings in language they are being conducted – Proper approach to be taken by trial judge to ensure sufficient comprehension by jury of proceedings in language they are being conducted.

Held (5:0): Appeal allowed.

HKSAR v Tong Wai Hung & Ors; HKSAR v Lo Kin Man & Ors
Hong Kong Court of Final Appeal: [\[2021\] HKCFA 37](#)

Judgment delivered: 4 November 2021

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and Lord Sumption NPJ

Catchwords:

Criminal law – Unlawful assembly and riot – Complicity – Common purpose – Joint enterprise – Accessorial liability – Where Lo charged with and convicted of taking part in riot – Where Tong charged with and acquitted of taking part in riot – Where Secretary of Justice referred questions of law to Court of Appeal – Where defendants appealed to Court of Final Appeal – Whether requirement for proof of common purposes shared by defendant and other persons taking part in unlawful assembly or riot – Whether doctrine of joint enterprise applies to offence of unlawful assembly or riot – Whether liability may be established without defendant being present at scene – Whether defendant may be found guilty on basis of mere presence at scene – Whether defendants aiding, abetting or encouraging unlawful assembly or riot liable to same extent as principal offenders – Whether defects in indictment of Lo and Tong.

Held (5:0): Appeals dismissed.

R v Cowan

Supreme Court of Canada: [\[2021\] SCC 45](#)

Judgment delivered: 5 November 2021

Coram: Wagner CJ and Moldaver, Côté, Brown, Rowe, Martin and Kasirer JJ

Catchwords:

Criminal law — Parties to offence — Abetting — Counselling — Where accused acquitted of armed robbery as party or principal — Where Court of Appeal held trial judge erred in law in assessing accused's liability as party for having abetted or counselled commission of offence by requiring Crown to prove two specific individuals were principal offenders — Where Court of Appeal determined error had material bearing on acquittal, setting aside acquittal and ordering new trial limited to theory of party liability — Whether trial judge erred in assessment of accused's guilt as party on basis of abetting or counselling — If so, whether error had material bearing on acquittal such that new trial warranted — *Criminal Code*, RSC 1985, c C-46, ss 21(1)(c), 22(1).

Criminal law — Appeals — Powers of Court of Appeal — Where accused acquitted of armed robbery as party or principal — Where Court of Appeal set aside acquittal and ordered new trial limited to theory of party liability — Whether Court of Appeal erred in restricting scope of new trial to

question of whether accused guilty as party on basis of abetting or counselling — *Criminal Code*, RSC 1985, c C-46, s 686(8).

Held (5:2): Crown appeal allowed; defendant appeal dismissed.

R v Parranto

Supreme Court of Canada: [\[2021\] SCC 46](#)

Judgment delivered: 12 November 2021

Coram: Wagner CJ and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

Catchwords:

Criminal law — Sentencing — Starting points — Sentencing ranges — Standard of review in sentencing appeals — Where accused sentenced for offence of wholesale trafficking in fentanyl — Where Crown appealed sentences — Where Court of Appeal set starting point for sentence for offence and increasing sentences — Whether Court of Appeal applied proper role of starting points and sentencing ranges in appellate review of sentences — Whether accused's sentences demonstrably unfit.

Held (7:2): Appeal dismissed.

Discrimination

Fratila and another v Secretary of State for Work and Pensions

Supreme Court of the United Kingdom: [\[2021\] UKSC 53](#)

Judgment delivered: 1 December 2021

Coram: Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Sales and Lord Hamblen

Catchwords:

Discrimination – Social security – Benefits – Where *Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019* (2019 Regulations) prevented leave to remain in United Kingdom arising from pre-settled status granted under EU Settlement Scheme from constituting right of residence for purposes of eligibility for relevant benefits – Where article 18 of Treaty on the Functioning of the European Union (TFEU) prohibits discrimination on grounds of nationality – Where respondents, Romanian nationals whose right to reside in United Kingdom arose from their pre-settled status, made applications for Universal Credit which were refused – Whether respondents are entitled to rely on article 18 of TFEU by virtue of pre-settled status – Whether 2019 Regulations breach article 18 of TFEU.

Held (5:0): Appeal allowed.

Employment and Labour Law

National Union of Metalworkers of South Africa v Commission for Conciliation, Mediation and Arbitration & Ors

Constitutional Court of South Africa: [\[2021\] ZACC 47](#)

Judgment delivered: 10 December 2021

Coram: Khampepe ADCJ, Jafta, Madlanga, Majiedt, Mhlantla JJ, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Catchwords:

Employment and labour law – Demarcation dispute – Leave to appeal from judgment of Labour Appeal Court – Where commissioner of Commission for Conciliation, Mediation and Arbitration (CCMA) issued demarcation award concerning whether certain respondents fell within jurisdiction of Motor Industry Bargaining Council (MIBCO) or Metal and Engineering Industries Bargaining Council (MEIBC) – Where Labour Court reviewed and set aside demarcation award – Whether Labour Court has authority to determine demarcation disputes – Whether matter should be remitted to CCMA or whether Labour Court can substitute its decision for that of commissioner – Whether judgment of Labour Appeal Court can be faulted.

Held (9:0; 8:1): Leave to appeal granted; appeal dismissed.

Pizza Limited v A Labour Inspector (Ministry of Business, Innovation and Employment)

Supreme Court of New Zealand: [\[2021\] NZSC 184](#)

Judgment delivered: 21 December 2021

Coram: William Young, Glazebrook, O'Regan, Ellen France and Williams JJ

Catchwords:

Employment and labour law – Employment status – Jurisdiction – Employment Court – Employment Relations Authority (Authority) – Where Labour Inspector commenced action in Authority to recover wages and holiday pay entitlements said to be owed by two Pizza Hut franchisees – Where appellants argued Authority did not have jurisdiction to determine whether delivery drivers were employees; rather, issue had to be determined by Employment Court under s 6(5) of *Employment Relations Act 2000* – Where s 6(5) provided Court may declare whether persons are

employees upon application – Whether, if defendant asserts no employment relationship, Labour Inspector must first seek a declaration of employment status from Employment Court under s 6(5).

Held (5:0): Appeal dismissed.

Environmental Law

Mississippi v Tennessee

Supreme Court of the United States: [Docket No. 143 Orig](#)

Judgment delivered: 22 November 2021

Coram: Roberts CJ, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh and Barrett JJ

Catchwords:

Environmental law – Water resources – Equitable apportionment – Interstate aquifer – Where Tennessee pumped water from underground aquifer that runs beneath several States – Where Mississippi argued Tennessee's pumping of groundwater amounted to tortious taking of water owned by Mississippi – Where Mississippi expressly disclaimed equitable apportionment remedy – Where Special Master appointed by Supreme Court to assess claim found Tennessee unlawfully took interstate water resource but held equitable apportionment exclusive judicial remedy – Where Special Master recommended Supreme Court dismiss complaint but grant Mississippi leave to amend complaint – Whether Mississippi and Tennessee challenged recommendation – Whether equitable apportionment exclusive judicial remedy for taking of interstate water resources – Whether leave to amend should be given.

Held (9:0): Exceptions overruled in part and sustained in part; case dismissed.

Equity

Crown Prosecution Service v Aquila Advisory Ltd

Supreme Court of the United Kingdom: [\[2021\] UKSC 49](#)

Judgment delivered: 3 November 2021

Coram: Lord Lloyd-Jones, Lord Sales, Lord Burrows, Lord Stephens and Lady Rose

Catchwords:

Equity – Remedies – Constructive trust – Breach of fiduciary duty – Priority – Interaction with proceeds of crime – Confiscation order – Where directors of company used company to commit criminal offence and also breached fiduciary duty by obtaining secret profit – Where directors prosecuted and subject to confiscation orders over assets proceeds of crime – Where respondent assignee of company's rights – Where constructive trust over same assets in favour of respondent because of breach of fiduciary duty – Where primary judge ordered transfer of assets under confiscation orders to respondent and Court of Appeal dismissed appellant's appeal – Whether constructive trust has priority over confiscation order – Whether illegality of directors can be attributed to company so as to render constructive trust unenforceable.

Held (5:0): Appeal dismissed.

Evidence

HKSAR v Ng Fan Ying

Hong Kong Court of Final Appeal: [\[2021\] HKCFA 44](#)

Judgment delivered: 17 December 2021

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and Lord Hodge NPJ

Catchwords:

Evidence – Cross-examination – Credibility – Where appellant convicted of two charges of aiding, abetting, counselling, or procuring the breach of conditions of stay by foreign domestic helper employed by her – Where domestic helper, under conditions of stay, could only perform work at specific address – Where, during cross-examination of helper, it emerged helper was instructed by appellant to work at non-domestic locations – Where counsel sought to cross-examine on non-domestic work to explore credibility of helper and show allegations were fabricated – Where magistrate ruled it unnecessary for counsel to go into details of non-domestic work – Whether magistrate unduly restricted defence in cross-examination on non-domestic work – Whether appellant suffered injustice resulting from restrictions – Proper distinction between cross-examination on primary issue and on credit.

Held (5:0): Appeal dismissed.

Family Law

Association de médiation familiale du Québec v Bouvier

Supreme Court of Canada: [\[2021\] SCC 54](#)

Judgment delivered: 17 December 2021

Coram: Wagner CJ and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

Catchwords:

Family law — Mediation — Confidentiality — Summary of mediated agreements — Proof of settlement — Exception to settlement privilege — Where former spouses undertook family mediation process — Where mediator prepared summary of agreements arising from mediation — Where summary of mediated agreements relied on in subsequent judicial proceedings to prove existence of settlement — Where admissibility of summary of mediated agreements and other mediation communications challenged on ground that they were protected by confidentiality of mediation process — Proper legal status of summary of mediated agreements — Whether exception to settlement privilege that allows existence or scope of settlement to be proved applies in family mediation context.

Held (9:0): Appeal dismissed.

Bwanya v Master of the High Court, Cape Town & Ors
Constitutional Court of South Africa: [\[2021\] ZACC 51](#)

Judgment delivered: 17 December 2021

Coram: Mogoeng CJ, Jafta, Khampepe, Madlanga, Majiedt, Mhlantla JJ, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Catchwords:

Family law – Succession – Definition of "survivor", "spouse" and "marriage" – Where Ms Bwanya and Mr Ruch were in relationship with most characteristics of marriage – Where Mr Ruch passed away – Where Ms Bwanya sought maintenance in terms of *Maintenance of Surviving Spouses Act 27 of 1990* and inheritance in terms of *Intestate Succession Act 91 of 1987* – Where Court held in *Volks N.O. v Robinson* [2005] ZACC 2 that exclusion of permanent heterosexual life partners from benefit afforded by section 2(1) of *Maintenance of Surviving Spouses Act* did not constitute unfair discrimination and was not unconstitutional – Whether surviving partner in permanent heterosexual life partnership is entitled to claim maintenance under *Maintenance of Surviving Spouses Act* – Whether surviving partner of permanent opposite-sex life partnership is entitled to inherit from estate of deceased partner under *Intestate Succession Act* – Whether decision in *Volks* is clearly wrong.

Held (6:4): Application for confirmation of an order of constitutional invalidity granted.

Preston v Preston & Anor

Supreme Court of New Zealand: [\[2021\] NZSC 154](#)

Judgment delivered: 9 November 2021

Coram: Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ

Catchwords:

Family law – Divorce settlement – Nuptial settlement – Trusts – Where s 182 of *Family Proceedings Act 1980* provided court may vary terms of nuptial settlement when marriage comes to end – Where, in 2010, Mr Preston amended trust deed for Grant Preston Family Trust to add Mrs Preston as discretionary beneficiary soon after marriage – Where marriage broke down after five years, Mr and Mrs Preston had no children together but each had children from previous relationships, and Trust assets settled prior to marriage with primary beneficiaries being Mr Preston's children – Where Mrs Preston sought orders under s 182 for share of assets owed by Trust – Where Court of Appeal held 2010 amendment nuptial settlement for purposes of s 182, but exercised discretion not to make s 182 order due to countervailing factors – Proper test for determining respective contributions – Whether Court of Appeal erred in exercise of discretion.

Held (5:0): Appeal allowed.

Guardianship and Protection

A Local Authority v JB (by his Litigation Friend, the Official Solicitor)

Supreme Court of the United Kingdom: [\[2021\] UKSC 52](#)

Judgment delivered: 24 November 2021

Coram: Lord Briggs, Lady Arden, Lord Burrows, Lord Stephens and Lady Rose

Catchwords:

Guardianship and protection – Mental capacity – Sexual relations – Capacity to consent – Consent – Where Local Authority commenced proceedings in Court of Protection seeking declaration JB lacked capacity to consent to sexual relations – Where evidence showed JB lacked capacity to understand that partner must consent to sexual activity – Where primary judge held this not relevant information for purposes of determining whether JB had capacity to consent – Where Court of Appeal allowed appeal – Whether, in determining whether individual has capacity to consent to sexual relations, individual needs to understand other person must have capacity to consent to sexual activity and must in fact consent.

Held (5:0): Appeal dismissed.

Van Zyl NO v Road Accident Fund

Constitutional Court of South Africa: [\[2021\] ZACC 44](#)

Judgment delivered: 19 November 2021

Coram: Mogoeng CJ, Jafta, Khampepe, Madlanga, Majiedt, Mhlantla JJ, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Catchwords:

Guardianship and protection – Curatorship – Unsound mind – Statute of limitations – Prescription – Statutory interpretation – Inconsistent statutes – Where Jacobs injured in motor vehicle collision and sustained severe head injuries rendering him of unsound mind – Where mother lodged claim for compensation with respondent seven years after incident – Where respondent dismissed claim because s 23(1) of *Road Accident Fund Act 56 of 1996* prescribed claims lodged after three years after incident – Where s 23(1) allowed exception only if person detained pursuant to mental health legislation or placed under curatorship – Where applicant Jacobs' curator appointed seven years after incident because Jacobs' disability did not allow for earlier appointment – Where s 13(1)(a) of *Prescription Act 68 of 1969* provided exception in cases of incapacity such that claims prescribed one year after impediment ceases to exist – Where High Court and Supreme Court of Appeal held s 13 of *Prescription Act* inconsistent with s 23 of *Road Accident Fund Act* and held latter Act prevailed and Jacobs' claim time barred – Whether Jacobs could have brought claim earlier – Whether prescription runs from time of appointment of curatorship – Whether s 13 of *Prescription Act* and s 23 of *Road Accident Fund Act* can be reconciled – Whether Jacobs's claim time barred.

Held (8:0): Leave to appeal granted; appeal allowed.

Human Rights

Abore v Minister of Home Affairs & Anor

Constitutional Court of South Africa: [\[2021\] ZACC 50](#)

Judgment delivered: 30 December 2021

Coram: Zondo ACJ, Madlanga J, Madondo AJ, Majiedt, Mhlantla JJ, Pillay, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

Catchwords:

Human rights – Refugee law – Application for leave to appeal directly against order of High Court – Where High Court dismissed applicant's application for order interdicting respondents from deporting applicant until status under *Refugees Act 130 of 1998*, alternatively under *Refugees Amendment Act 11 of 2017*, finally determined – Where applicant illegal foreigner claiming to have fled to South Africa fearing persecution – Whether leave for direct appeal be granted – Whether amendments to Refugees Act apply to applicant – Whether illegal foreigner who claims to be refugee, and expresses intention to apply for asylum, should be permitted to apply in terms of Refugees Act – Whether delay between illegal foreigner's arrival and expression of intention to apply for asylum bars application for refugee status – Whether applicant's detention unlawful or whether limitation of his freedom justified under section 36 of *Constitution*.

Held (9:0): Leave for direct appeal granted; appeal upheld.

In the matter of an application by Margaret McQuillan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3); In the matter of an application by Francis McGuigan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3); In the matter of an application by Mary McKenna for Judicial Review (Northern Ireland) (Nos 1 and 2)

Supreme Court of the United Kingdom: [\[2021\] UKSC 55](#)

Judgment delivered: 15 December 2021

Coram: Lord Hodge, Lord Lloyd-Jones, Lord Kitchin, Lord Sales, Lord Hamblen, Lord Leggatt and Lord Burrows

Catchwords:

Human rights – Judicial review – Events during Troubles of 1971 and 1972 – Where fatal shooting during Troubles (McQuillan case) – Where Hooded Men detained and subjected to serious ill-treatment during Troubles (Hooded Men case) – Where, following discovery of new evidence, Chief Constable of Police Service of Northern Ireland (PSNI) proposed further investigation into McQuillan case – Where PSNI alleged insufficiently independent – Where PSNI decided no evidence to warrant investigation into allegation that UK Government authorised and used torture in Hooded Men case – Where *Human Rights Act 1998* (HRA) came into force on 2 October 2000, requiring public authorities to act compatibly with European Convention on Human Rights (Convention), including articles 2 (right to life) and 3 (prohibition of torture) – Whether, applying test in *Brecknell v United Kingdom* (2008) 46 EHRR 42, new evidence in Hooded Men case revives investigative obligation under article 2 – Whether obligation on UK Government to investigate death or allegation of torture or inhuman or degrading treatment under articles 2 and 3 requires "genuine connection", including close temporal connection, between death or ill-treatment and coming into force of HRA – Proper test to assess independence of investigations by PSNI.

Held (7:0): Appeal allowed.

R (on the application of Elan-Cane) v Secretary of State for the Home Department

Supreme Court of the United Kingdom: [\[2021\] UKSC 56](#)

Judgment delivered: 15 December 2021

Coram: Lord Reed, Lord Lloyd-Jones, Lady Arden, Lord Sales and Lady Rose

Catchwords:

Human rights – Gender rights – Where appellant identified as non-gendered – Where Her Majesty's Passport Office's policy required passport applicant to state gender on application form as male or female – Where *European Convention on Human Rights* (Convention) provided for right to respect for private and family life under article 8 and prohibition against discrimination, including on ground of sex, under article 14 – Whether article 8 of Convention, in isolation or read with article 14, imposes obligation on contracting state, when issuing passports, to respect private lives of individuals who identify as non-gendered, by including nongendered marker ("X") – Whether obligation to issue appellant with "X" marked passport nevertheless imposed by *Human Rights Act 1998*.

Held (5:0): Appeal dismissed.

Industrial Law

Association of Mineworkers and Construction Union & Ors v Anglo Gold Ashanti Ltd & Ors

Constitutional Court of South Africa: [\[2021\] ZACC 42](#)

Judgment delivered: 12 November 2021

Coram: Khampepe ADCJ, Jafta, Madlanga, Majiedt, Mhlantla JJ, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Catchwords:

Industrial law – Secondary strike – Protection – Proportionality – Where applicant commenced primary strike against company – Where applicant served notice of secondary strike on respondents, being mining companies unrelated to primary company and in different mineral sectors – Where respondents launched applications under s 66 of *Labour Relations Act 66 of 1995* to declare secondary strikes unprotected – Where Labour Court held reasonableness test to be applied under s 66(2) proportionality assessment as to whether harm caused by secondary strike to secondary

employer proportional to impact on primary employer – Where Labour Court held secondary strikes not protected as secondary employers could not influence primary employer – Whether secondary strikes protected by Act – Whether proportionality test correct test to apply.

Practice and procedure – Mootness – Where, by time of appeal to Labour Appeal Court, primary strike had been resolved – Where Labour Appeal Court dismissed appeal on basis of mootness – Whether exceptional circumstances exist to clarify interpretation of s 66 despite mootness.

Held (8:1): Leave to appeal granted; appeal dismissed.

Tourism Holdings Ltd v A Labour Inspector of the Ministry of Business, Innovations and Employment

Supreme Court of New Zealand: [\[2021\] NZSC 157](#)

Judgment delivered: 15 November 2021

Coram: William Young, Glazebrook, O'Regan, Ellen France and Williams JJ

Catchwords:

Industrial law – Holiday pay – Calculation – Commission payments – Meaning of "ordinary weekly pay" – Where *Holidays Act 2003* conferred on employees right to minimum of four weeks paid holidays after 12 months continuous employment – Where holiday pay calculated by reference to "ordinary weekly pay" – Where employee tour company bus driver guide work determined by length of bus tours rather than calendar week and remuneration included commission depending on length of tour – Where s 8(2) provided in these circumstances, "ordinary weekly pay" calculated by employee's gross earnings in previous four weeks minus "productivity or incentive-based payments not regular part of employee's pay", divided by four to obtain average – Where Employment Court held "regular part" should be construed as "regular part of employee's pay for ordinary working week" and held commissions earned by driver guides not part of pay for ordinary working week – Where Court of Appeal allowed Labour Inspector's appeal and rejected Employment Court's construction – Proper construction of "regular part of employee's pay" – Whether driver guide commission "regular part of employee's pay" and therefore part of "ordinary weekly pay" for calculation of holiday pay.

Held (5:0): Appeal dismissed.

Insurance

Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada

Supreme Court of Canada: [\[2021\] SCC 47](#)

Judgment delivered: 18 November 2021

Coram: Wagner CJ and Moldaver, Karakatsanis, Côté, Brown, Rowe and Kasirer JJ

Catchwords:

Insurance – Motor vehicle insurance – Promissory estoppel – Third party claim – Where insured killed in motorcycle accident – Where insured had alcohol in his system at time of accident in breach of insurance policy – Where insurer became aware of insured's policy breach three years after accident and after having defended insured's estate in lawsuits relating to accident – Where insurer ceased to defend insured's estate and denying coverage – Where third party injured in accident seeking to recover judgment against insured's estate from insurer – Whether insurer estopped from denying coverage by its conduct before it had actual knowledge of material facts that constituted breach.

Held (7:0): Appeal dismissed.

International Law

"Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela

Supreme Court of the United Kingdom: [\[2021\] UKSC 57](#)

Judgment delivered: 20 December 2021

Coram: Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Hamblen and Lord Leggatt

Catchwords:

International law – Recognition of government – Recognition of foreign head of state – Foreign act of state doctrine – "One voice" doctrine – Where both claimants, "Maduro Board" and "Guaidó Board", claimed to be entitled to represent Central Bank of Venezuela (BCV) and give instructions to financial institutions within United Kingdom on BCV's behalf – Where Maduro Board claimed to be only validly appointed board of BCV, appointed by Mr Maduro as President of Venezuela – Where Guaidó Board claimed to be ad hoc board of BCV, appointed by Mr Guaidó as interim President of Venezuela – Where, on 4 February 2019, then Foreign Secretary issued statement that "United Kingdom now recognises Juan Guaidó as constitutional interim President of Venezuela, until credible presidential elections can be held" – Whether Mr Guaidó or Mr Maduro is recognised as President of Venezuela – Whether, if Mr Guaidó is recognised as President, Mr Guaidó's appointment of Guaidó Board and of Special Attorney General is valid.

Held (5:0): Appeal allowed in part; cross-appeal dismissed.

Practice and Procedure

Bester N.O. & Ors v Quintado 120 (Pty) Ltd

Constitutional Court of South Africa: [\[2021\] ZACC 49](#)

Judgment delivered: 13 December 2021

Coram: Madlanga J, Madondo AJ, Majiedt, Mhlantla JJ, Pillay, Rogers AJJ, Theron J, Tlaletsi AJ and Tshiqi J

Catchwords:

Practice and procedure – Leave to appeal – Jurisdiction – Discharge of provisional liquidation order – Where Mr Louw defrauded clients of R110 million – Where funds transferred into bank account of Quintado – Where, following sequestration of Mr Louw's estate, estate's joint trustees brought proceedings for order placing Quintado under provisional liquidation – Where provisional liquidation order made by High Court – Where provisional order subsequently discharged – Where Supreme Court refused leave to appeal – Whether Court's jurisdiction engaged.

Held (9:0): Leave to appeal refused.

Burger N.O. & Ors v Bester N.O. & Ors

Constitutional Court of South Africa: [\[2021\] ZACC 48](#)

Judgment delivered: 13 December 2021

Coram: Madlanga J, Madondo AJ, Majiedt, Mhlantla JJ, Pillay, Rogers AJJ, Theron J, Tlaletsi AJ and Tshiqi J

Catchwords:

Practice and procedure – Leave to appeal – Jurisdiction – Sequestration order – Where Mr Louw defrauded clients and misappropriated R110 million – Where misappropriated monies had been transferred to Trust of which Mr Louw was trustee – Where, following sequestration of Mr Louw's estate, estate's joint trustees brought proceedings for sequestration of Trust to recover monies advanced to Trust – Where High Court placed Trust under final sequestration – Where Supreme Court refused leave to appeal – Whether Court's jurisdiction engaged.

Held (9:0): Leave to appeal refused.

Her Majesty's Attorney General v Crosland
Supreme Court of the United Kingdom: [\[2021\] UKSC 58](#)

Judgment delivered: 20 December 2021

Coram: Lord Briggs, Lady Arden, Lord Kitchin, Lord Burrows and Lady Rose

Catchwords:

Practice and procedure – Contempt of court – Jurisdiction – Where appellant disclosed outcome of Court's judgment while judgment in draft and embargoed – Where appellant believed draft judgment contained errors and breach of embargo was proportionate response – Where appellant ordered by panel of Supreme Court justices to pay fine for contempt and pay Attorney General's costs of committal application – Whether Supreme Court has jurisdiction to hear appeal against order made by another panel of justices of Supreme Court in exercise of Court's jurisdiction to punish for contempt of court – Whether Supreme Court ignored appellant's motivations, intentions and beliefs and whether relevant to Court's proportionality assessment – Whether finding of contempt was made by independent and impartial tribunal as required by article 6(1) of *European Convention on Human Rights* – Whether costs order was unjust and oppressive.

Held (4:1; 5:0): Appeal competent; appeal dismissed.

Lloyd v Google LLC
Supreme Court of the United Kingdom: [\[2021\] UKSC 50](#)

Judgment delivered: 10 November 2021

Coram: Lord Reed, Lady Arden, Lord Sales, Lord Leggatt and Lord Burrows

Catchwords:

Practice and procedure – Representative claim – Service outside jurisdiction – *Data Protection Act 1998* – Meaning of 'damage' – Where s 13 of Act provided individual who suffers damage by reason of contravention of Act entitled to compensation – Where respondent filed compensation claim alleging appellant breached its duties as data controller under Act on his own behalf and on behalf of class of 4 million others – Where respondent claimed uniform sum of £750 per affected person – Where respondent applied to serve claim on appellant outside jurisdiction – Where primary judge refused leave for service on basis pleaded facts did not disclose basis for compensation – Where Court of Appeal allowed appeal – Whether s 13 requires proof breach of Act caused each individual actual damage, or whether claim for uniform sum of damages per person sufficient – Whether pleadings disclose proper basis for compensation under s 13 of Act – Whether leave for service outside jurisdiction be granted.

Held (5:0): Appeal allowed.

Member of the Executive Council for Cooperative Governance and Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality & Ors
Constitutional Court of South Africa: [\[2021\] ZACC 39](#)

Judgment delivered: 8 December 2021

Coram: Khampepe ADCJ, Jafta, Madlanga, Majiedt, Mhlantla JJ, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Catchwords:

Practice and procedure – Leave to appeal – Interests of justice – Mootness – Where s 54A(2) of *Local Government Municipal Systems Act 32 of 2000* required municipal managers to have "skills, expertise, competencies and qualifications as prescribed" – Where appointments of municipal managers to local municipalities challenged by applicant – Where delay occasioned by failure of applicant to act within time frames in Systems Act and delay in bringing review applications – Where Court in *South African Municipal Workers' Union v Minister of Co-operative Governance & Traditional Affairs* [2017] ZACC 7 held that s 54A was invalid and unconstitutional – Whether leave to appeal be granted – Whether application is moot – Proper test for leave to appeal.

Held (9:0): Leave to appeal refused.

Mtolo & Anor v Lombard & Ors
Constitutional Court of South Africa: [\[2021\] ZACC 39](#)

Judgment delivered: 8 November 2021

Coram: Madlanga J, Madondo AJ, Majiedt, Mhlantla JJ, Pillay, Rogers AJJ, Tlaletsi AJ and Tshiqi J

Catchwords:

Practice and procedure – Urgency – Irreparable harm – Where applicants live in property owned by fourth respondent, and sold to third respondent – Where applicant assured residence in property until secured alternative accommodation – Where first respondent removed roof and windows of property, forcing applicants to live in open – Where applicant obtained order from High Court enjoining respondents to restore property to state fit for human occupation and granted leave to approach it on urgent basis in event of non-compliance – Where applicant subsequently brought urgent High Court application alleging house remained unfit for human occupation – Where respondents averred compliance – Where primary

judge struck matter from roll for lack of urgency – Whether applicants would suffer irreparable harm if made to wait for ordinary procedure – Whether applicants' matter urgent.

Held (8:0): Leave to appeal granted; appeal allowed.

Te Warena Taua & Ors v Tahī Enterprises Limited
Supreme Court of New Zealand: [\[2021\] NZSC 182](#)

Judgment delivered: 15 December 2021

Coram: Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ

Catchwords:

Practice and procedure – Representation orders – Where claims brought in relation to joint venture agreement and other dealings between Tahī Enterprises Ltd and members of Te Kawerau ā Maki – Where proceedings stalled while parties sought to resolve issues about who is entitled to speak for whom – Where respondents sought order for disclosure of names – Where High Court ordered disclosure of names of iwi members over age of 18 when joint venture agreement was entered into – Where orders upheld on appeal to Court of Appeal – Where leave granted to appeal to Supreme Court – Whether representation orders should be made – Proper form of representation orders.

Held (5:0): Appeal allowed, with substituted orders made by consent.

Private International Law

HMB Holdings Ltd v Antigua and Barbuda
Supreme Court of Canada: [\[2021\] SCC 44](#)

Judgment delivered: 4 November 2021

Coram: Wagner CJ and Karakatsanis, Côté, Rowe and Kasirer JJ

Catchwords:

Private international law – Foreign judgments – Reciprocal enforcement – Registration – Carrying on business – Where foreign judgment awarded compensation to judgment creditor for expropriation of lands by judgment debtor – Where judgment creditor successfully obtained default judgment in British Columbia to enforce foreign judgment – Where judgment creditor then applied for registration of default judgment in reciprocating jurisdiction of Ontario – Where application dismissed on basis judgment debtor not carrying on business in British Columbia – Whether judgment

creditor precluded from having default judgment registered in Ontario – *Reciprocal Enforcement of Judgments Act*, RSO 1990, c R.5, s 3(b).

Held (5:0): Appeal dismissed.

Taxation

Canada v Alta Energy Luxembourg SARL

Supreme Court of Canada: [\[2021\] SCC 49](#)

Judgment delivered: 26 November 2021

Coram: Wagner CJ and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

Catchwords:

Taxation – Income tax – Tax avoidance – Application of general anti-avoidance rule – Where large capital gain realised by corporate resident of Luxembourg on sale of shares whose value derived principally from immovable property situated in Canada – Where corporation claimed exemption from Canadian tax on basis shares were protected property under tax treaty between Canada and Luxembourg – Whether general anti-avoidance rule applicable to deny requested exemption – *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 245 – *Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, Can TS 2000 No 22, art 13.

Held (6:3): Appeal dismissed.

Canada v Loblaw Financial Holdings Inc.

Supreme Court of Canada: [\[2021\] SCC 51](#)

Judgment delivered: 3 December 2021

Coram: Wagner CJ and Moldaver, Karakatsanis, Côté, Brown, Martin and Kasirer JJ

Catchwords:

Taxation – Income tax – Assessment – Foreign accrual property income – Financial institution exception – Arm's length requirement – Conducting business – Where Canadian corporate taxpayer did not include income earned by foreign subsidiary in Canadian tax return for several taxation years – Where taxpayer claimed foreign subsidiary's activities covered by financial institution exception to rules for foreign accrual property income

– Where Tax Court held that exception does not apply because foreign subsidiary dealing principally with non-arm's length persons – Whether foreign subsidiary's business conducted principally with persons with whom it deals at arm's length – Whether parent corporation's injection of capital or corporate oversight relevant to arm's length test – *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 95(1) "investment business".

Held (7:0): Appeal dismissed.

Traditional Affairs

Langa v Premier of Limpopo & Ors

Constitutional Court of South Africa: [\[2021\] ZACC 38](#)

Judgment delivered: 5 November 2021

Coram: Khampepe ADCJ, Jafta, Madlanga, Majiedt, Mhlantla JJ, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi JJ

Catchwords:

Traditional affairs – Senior traditional leader – Removal by Premier – Wrongful appointment and recognition – Where s 13(3) of *Limpopo Traditional Leadership and Institutions Act 6 of 2005* provided Premier may remove traditional leader from office under certain circumstances – Where applicant recognised as senior traditional leader – Where Royal Family disputed applicant's claim and identified fifth respondent as legitimate senior traditional leader – Where Premier removed applicant from office as senior traditional leader on basis applicant wrongfully recognised – Where applicant unsuccessfully applied for judicial review in High Court – Whether Premier authorised by s 13(3) to remove senior traditional leader on basis of wrongful appointment only.

Held (9:0): Leave to appeal granted; appeal allowed.

Mphephu-Ramabulana & Anor v Mphephu & Ors

Constitutional Court of South Africa: [\[2021\] ZACC 43](#)

Judgment delivered: 12 November 2021

Coram: Khampepe, Jafta, Majiedt, Mhlantla JJ, Pillay AJ, Theron J, Tlaletsi AJ, and Tshiqi J

Catchwords:

Traditional affairs – King of VhaVenda community – Recognition by President – Judicial review – Remedies – Stay of order – Where first applicant identified as suitable person to ascend to Venda Throne by Royal

Family Council – Where President of South Africa recognised first applicant as King of VhaVenda – Where first respondent asserted recognition as sole Queen of VhaVenda and launched judicial review proceedings of identification decision and recognition decision – Where High Court dismissed application – Where first applicant's appeal to Supreme Court of Appeal substantially successful – Where Supreme Court of Appeal held Royal Family Council decision amendable to judicial review and set aside identification decision and recognition decision for unconstitutionality, but remitted matters to High Court for further adjudication – Where Supreme Court of Appeal stayed order setting aside decision and removal of first applicant from office pending final determination of remitted matters – Whether decisions of Royal Family Council amenable to judicial review – Whether, if decision found to be invalid and unconstitutional, Supreme Court of Appeal has power to make stay order.

Held (8:0): Leave to appeal dismissed; leave to cross-appeal allowed; cross-appeal allowed.
