OVERSEAS DECISIONS BULLETIN

Produced by the Legal Research Officer,
High Court of Australia Library

Volume 19 Number 3 (1 June – 31 July 2022)

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

American Hospital Association v Becerra

Supreme Court of the United States: Docket No. 20–1114

Judgment delivered: 15 June 2022

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

Catchwords:

Administrative law – Judicial review – *Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, 42 USC §1395 ("Medicare statute") – Reimbursement rates – Prescription drugs – Where Medicare statute set out formula Department of Health and Human Services ("HHS") must employ to set reimbursement rates for certain outpatient prescription drugs provided by hospitals to Medicare patients (42 USC §1395l(t)(14)(A)(iii)) – Where HHS afforded two options: (1) agency may set reimbursement rates based on hospitals' "average acquisition cost" for each drug and may "vary" reimbursement rates "by hospital group", applying if HHS conducted survey of hospitals' acquisition costs for each covered outpatient drug; and (2) absent survey, HHS must set reimbursement rates based on "average price" charged by manufacturers for drug as calculated and adjusted by Secretary – Where, under option 2, HHS not authorised to vary reimbursement rates for different hospital groups – Where, from 2006 until 2018, HHS did not conduct surveys of hospitals' acquisition costs, relied on option 2, set reimbursement rates at

approximately 106 percent, and did not vary rates by hospital group – Where, for 2018 and 2019, HHS again did not conduct surveys, but issued final rule establishing separate reimbursement rates for hospitals that served low-income or rural populations ("340B hospitals") – Where American Hospital Association and other interested parties challenged 2018 and 2019 reimbursement rates in federal court – Where HHS contended various statutory provisions precluded judicial review of rates – Where District Court rejected HHS's argument statute precluded judicial review, concluded HHS acted outside statutory authority, and remanded case to HHS to consider appropriate remedy – Where DC Circuit reversed – Whether statute precludes judicial review of HHS's reimbursement rates – Whether HHS can vary reimbursement rates for 340B hospitals.

Held (9:0): Judgment of Court of Appeals for the District of Colombia Circuit reversed and remanded.

George v McDonough

Supreme Court of the United States: Docket No. 21–234

Judgment delivered: 15 June 2022

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

Catchwords:

Administrative law – Review – "Clear and unmistakable error" – Veterans Affairs – Benefits claim – Where petitioner joined Marine Corps in 1975, but failed to disclose history of schizophrenic episodes – Where petitioner medically discharged after suffering episode during training – Where petitioner applied to Department of Veterans Affairs ("VA") under 38 USC §1110 for veterans' disability benefits based on schizophrenia – Where regional office of VA denied petitioner's claim and VA's Board of Veterans' Appeals denied appeal in 1977 – Where, in 2014, petitioner asked Board to revise its final decision – Where, when VA denies benefits claim, decision generally becomes "final and conclusive" and "not be reviewed by any other official or by any court" after veteran exhausts opportunity for direct appeal (§511(a); §7104(a)) – Where petitioner sought collateral review under statutory exception allowing veteran to seek revision of final benefits decision at any time on grounds of "clear and unmistakable error" (§§5109A, 7111) – Where petitioner claimed Board clearly and unmistakably erred by applying later invalidated regulation to deny claim without holding VA to its burden of proof to rebut statutory presumption of sound condition on entry to service – Where Board denied petitioner's claim for collateral relief and Veterans Court affirmed – Where Federal Circuit also affirmed, concluding application of later invalidated regulation did not fall into category of "clear and unmistakable error" permitting revision of final decision – Whether invalidation of VA regulation after final veteran's benefits decision can support claim for collateral relief based on clear and unmistakable error.

Held (6:3): Judgment of Court of Appeals for the Federal Circuit affirmed.

Law Society of Saskatchewan v Abrametz
Supreme Court of Canada: [2022] SCC 29

Judgment delivered: 8 July 2022

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

Catchwords:

> Administrative law – Abuse of process – Delay – Where disciplinary proceedings brought by Law Society against member lawyer – Where lengthy delay in proceedings prompted member to apply for stay of proceedings on basis of inordinate delay amounting to abuse of process – Whether delay amounted to abuse of process – Whether stay of proceedings warranted.
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> Administrative law – Appeals – Standard of review – Proper standard of review applicable to questions of procedural fairness and to abuse of process in statutory appeals.

Held (8:1): Appeal allowed, judgment of Court of Appeal set aside and matter remitted to Court of Appeal.

Arbitration

CEF v CEH
Court of Appeal of Singapore: [2022] SGCA 54

Judgment delivered: 18 July 2022

Coram: Menon CJ, Prakash and Chong JJCA

Catchwords:

> Arbitration – Arbitral award – Setting aside – UNCITRAL Model Law on International Commercial Arbitration – Where parties engaged in construction of steel-making plant when relationship broke down and action taken against each other – Where award issued in favour of respondent – Where appellants applied to Singapore High Court to have award set aside – Where appellants asserted breach of natural justice under s 24(b) of *International Arbitration Act* (Cap 143A, 2002 Rev Ed) and invoked various grounds under Art 34(2) of Model Law – Where High Court dismissed appellants' application – Whether award uncertain, ambiguous, impossible and/or unenforceable and therefore not in accordance with parties'

agreement, ICC Rules and/or Model Law – Whether award contains decisions on matters beyond scope of submission to arbitration – Whether award obtained in breach of natural justice and/or without giving appellants an opportunity to present case – Whether award issued in breach of fair hearing rule and/or "no evidence rule" – Whether Tribunal breached duty to provide sufficient reasons on material issues.

Held (3:0): Appeal allowed in part.

Viking River Cruises, Inc v Moriana

Supreme Court of the United States: Docket No. 20–1573

Judgment delivered: 15 June 2022

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

Catchwords:

Arbitration – Federal Arbitration Act (9 USC §1) – Agreement to arbitrate – Contractual waivers – Right to assert representative claims – Where California's Labor Code *Private Attorneys General Act of 2004* ("PAGA") (Cal Lab Code §2698) authorised any "aggrieved employee" to initiate action against former employer "on behalf of himself or herself and other current or former employees" to obtain civil penalties that previously could have been recovered only by State in enforcement action brought by California's Labor and Workforce Development Agency – Where California precedent holds that PAGA suit "representative action" in which employee plaintiff sues as "agent or proxy" of State (*Iskanian v CLS Transp Los Angeles, LLC*, 59 Cal 4th 348, 380) – Where California precedent also interprets statute to contain effectively rule of claim joinder, allowing party to unite multiple claims against opposing party in single action – Where employee with PAGA standing may seek any civil penalties state, including penalties for violations involving employees other than PAGA litigant (*ZB, NA v Superior Court*, 8 Cal 5th 175, 185) – Whether FAA preempts rule of *Iskanian*, precluding division of PAGA actions into individual and non-individual claims through agreement to arbitrate.

Held (8:1): Judgments of Court of Appeal of California, Second Appellate District, reversed and remanded.

ZF Automotive US, Inc v Luxshare, Ltd; AlixPartners, LLP v Fund for Protection of Investors' Rights in Foreign States

Supreme Court of the United States: Docket No. 21–401 and No. 21–518

Judgment delivered: 13 June 2022

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

Catchwords:

Arbitration – Foreign or international tribunal – Evidence – Discovery – Where consolidated cases concerned arbitration proceedings abroad for which party sought discovery in United States pursuant to 28 USC §1782(a) – Where §1782(a) authorised District Court to order production of evidence for use in proceeding in "foreign or international tribunal" – Where cases concerned, respectively, arbitration under Arbitration Rules of German Institution of Arbitration eV ("DIS"), private dispute-resolution organization based in Berlin, and ad hoc arbitration in accordance with Arbitration Rules of United Nations Commission on International Trade Law – Where parties in both cases brought application under §1782 in federal court – Whether DIS panel and ad hoc arbitration panel "foreign or international tribunal" under §1782 or rather private adjudicative body.

Held (9:0): Judgments of Court of Appeals for the Sixth Circuit and Court of Appeals for the Second Circuit reversed.

Bankruptcy

Siegel v Fitzgerald

Supreme Court of the United States: Docket No. 21–441

Judgment delivered: 6 June 2022

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

Catchwords:

Bankruptcy – Administration – Bankruptcy courts – Trustee Program – Administrator Program – Where Congress created United States Trustee Program as mechanism to transfer administrative functions previously handled by bankruptcy judges to US Trustees, part of Department of Justice – Where Congress permitted six judicial districts in North Carolina and Alabama to opt out of Trustee Program and bankruptcy courts continued to appoint bankruptcy administrators under Administrator Program – Where Trustee Program and Administrator Program handled same core administrative functions, but had different funding sources – Where Congress required Trustee Program be funded entirely by user fees paid to United States Trustee System Fund ("UST Fund"), largely paid by debtors who filed cases under Chapter 11 of *Bankruptcy Code* 28 USC §589a(b)(5) – Where Administrator Program funded by Judiciary's general budget – Where Congress permitted Judicial Conference of United States to require Chapter 11 debtors in Administrator Program districts to pay fees equal to those imposed in Trustee Program districts (§1930(a)(7)) – Where, from 2001 to 2017, all districts nationwide charged similarly situated debtors uniform fees, but in 2017 Congress enacted temporary increase in fee rates

applicable to large Chapter 11 cases to address shortfall in UST Fund (131 Stat 1229 ("2017 Act")) – Where 2017 Act provided fee rise would become effective in first quarter of 2018, would last only through 2022, and would be applicable to currently pending and newly filed cases – Where Judicial Conference adopted 2017 fee increase for Administrator Program districts, effective 1 October 2018, and applicable only to newly filed cases – Where Circuit City Stores, Inc, filed for Chapter 11 bankruptcy in 2008 in Trustee Program district – Where Circuit City's bankruptcy pending when Congress increased fees for Chapter 11 debtors in Trustee Program districts – Where petitioner filed for relief against Acting US Trustee contending fee increase non-uniform across Trustee Program districts and Administrator Program districts, in violation of Constitution's Bankruptcy Clause – Whether Congress' enactment of fee increase that exempted debtors in two States violated uniformity requirement of Bankruptcy Clause.

Constitutional law – Bankruptcy Clause – Article I, §8, cl 4 – Where Congress empowered to establish uniform laws on subject of bankruptcies throughout United States – Proper approach to requirement of uniformity.

Held (9:0): Judgment of Court of Appeals for the Fourth Circuit reversed and remanded.

Civil Procedure

Berger v North Carolina State Conference of the NAACP

Supreme Court of the United States: Docket No. 21–248

Judgment delivered: 23 June 2022

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

Catchwords:

Civil procedure – Intervention – Motion to intervene – Where, in 2018, North Carolina amended *Constitution* to provide "[v]oters offering to vote in person shall present photographic identification" (Art VI, §2(4)) – Where, to implement constitutional mandate, General Assembly approved Senate Bill 824 – Where Governor vetoed Bill, General Assembly overrode veto, and Bill went into effect – Where state conference of NAACP sued Governor and members of State Board of Elections – Where NAACP alleged Bill offends Federal Constitution – Where Board defended by State's attorney-general, who, like Governor, independently elected official – Where attorney-general at time former state senator who voted against earlier voter ID law and filed declaration in support of legal challenge against it – Where speaker of State House of Representatives and President *pro tempore* of State Senate ("legislative leaders") moved to intervene, arguing, without participation, important state interests would not be adequately represented in light of Governor's opposition to Bill, Board's

allegiance to Governor and defence of Bill in parallel State court proceedings, and attorney-general's opposition to earlier voter-ID efforts – Where District Court applied presumption legislative leaders' interests would be adequately represented by Governor, Board, and attorney-general and denied motion to intervene – Where, unsatisfied with Board's defence following denial of motion, legislative leaders sought to lodge amicus brief and accompanying materials, but District Court struck them from record and granted preliminary injunction barring enforcement of Bill – Where Fourth Circuit considered both District Court rulings in separate appeals before separate panels – Where on preliminary injunction ruling, panel held District Court had abused its discretion because record contained insufficient evidence to show Bill violated Federal Constitution – Where on intervention ruling, separate panel agreed with legislative leaders and held District Court had erred when denying leave to intervene – Where, subsequently, Fourth Circuit reheard matter *en banc* and ruled legislative leaders not entitled to intervene in District Court proceedings – Proper approach to motions to intervene – Whether legislative leaders entitled to intervene.

Held (8:1): Judgment of Court of Appeals for the Fourth Circuit reversed.

British Columbia (Attorney General) v Council of Canadians with Disabilities

Supreme Court of Canada: [2022] SCC 27

Judgment delivered: 23 June 2022

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

Catchwords:

Civil procedure – Parties – Standing – Public interest standing – Legality – Access to justice – Sufficient factual setting for trial – Where organisation working on behalf of persons with disabilities initiated constitutional challenge to certain provisions of provincial mental health legislation – Where Attorney General successfully applied to have claim dismissed for lack of standing – Where Court of Appeal remitted matter for fresh consideration of public interest standing in view of holding that principles of legality and access to justice merit particular weight in standing analysis and that application judge erred in finding that particular factual context of individual case required – Whether legality and access to justice merit particular weight in framework governing public interest standing – Whether individual plaintiff necessary for sufficient factual setting to exist at trial – Whether organisation should be granted public interest standing.

Held (9:0): Appeal dismissed, leave to cross appeal granted, cross-appeal allowed and organisation granted public interest standing.

Mamadi v Premier of Limpopo Province
Constitutional Court of South Africa: [2022] ZACC 26

Judgment delivered: 6 July 2022

Coram: Zondo ACJ, Kollapen, Madlanga, Majiedt, Mathopo, Mhlantla JJ, Mlambo AJ, Theron, Tshiqi JJ and Unterhalter AJ

Catchwords:

> Civil procedure – Review proceedings – Evidence – Reasonably foreseeable disputes of fact irresoluble on papers – Where applicants applied to High Court for review of decision of Premier of Limpopo Province to recognise fifth respondent as acting Kgoshi (traditional leader) of Mamadi Community and applied for review of recommendations of Commission on Traditional Leadership Disputes and Claims, which found first applicant did not have claim to position of Kgoshi – Where High Court dismissed application, holding: matter involved disputes of fact, irresoluble on papers; disputes of fact were reasonably foreseeable and application should have been brought as action; applicants failed timeously to apply for referral to oral evidence and no referral warranted because oral evidence unlikely to disturb balance of probabilities in favour of applicants – Proper approach by court where disputes of fact, irresoluble on papers, arise in review application – Proper approach to rule 6(5)(g) of *Uniform Rules of Court*.

Held (9:0): Leave to appeal granted, appeal upheld and matter remitted to High Court.

Class Action

Garland v Gonzalez
Supreme Court of the United States: Docket No. 20–322

Judgment delivered: 13 June 2022

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

Catchwords:

> Class action – Jurisdiction – Class-wide injunctive relief – Aliens – Detention – Where respondents aliens who were detained by Federal Government pursuant to *Immigration and Nationality Act* (8 USC §1231(a)(6)) – Where respondents, Gonzalez and Sanchez, natives and citizens of Mexico who were detained under §1231(a)(6) after re-entering United States illegally – Where respondents filed putative class action in District Court, alleging aliens detained under §1231(a)(6) entitled to bond hearings after six months' detention – Where District Court certified class of similarly situated plaintiffs and enjoined Government from detaining respondents and class

members pursuant to §1231(a)(6) for more than 180 days without providing each bond hearing – Where divided panel of Ninth Circuit affirmed – Where respondent, Tejada, native and citizen of El Salvador re-entered country illegally and detained under §1231(a)(6) – Where respondent filed suit in Western District of Washington, alleging §1231(a)(6) entitled him to bond hearing – Where District Court certified class, granted partial summary judgment against Government, and entered class-wide injunctive relief – Where divided panel of Ninth Circuit – Whether District Courts had jurisdiction to entertain respondents' requests for class-wide injunctive relief under *Immigration and Nationality Act*.

Held (9:0; 6:3 (Breyer, Sotomayor and Kagan JJ dissenting in part)): Judgments of Court of Appeals for the Ninth Circuit reversed and remanded.

Compensation

Gallardo v Marstiller

Supreme Court of the United States: Docket No. 20-1263

Judgment delivered: 6 June 2022

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

Catchwords:

Compensation – Medical expenses – Settlement monies – Reimbursement – *Medicaid Act* – Where, following injury from being struck by truck stepping off school bus, Florida's Medicaid agency paid petitioner $862,688.77 to cover initial medical expenses and continues to pay medical expenses – Where petitioner sued truck's owner, driver and County School Board seeking compensation for past medical expenses, future medical expenses, lost earnings and other damages, resulting in settlement for $800,000, with $35,367.52 designated as compensation for past medical expenses – Where *Medicare Act* requires participating States to pay for certain persons' medical costs and to make reasonable efforts to recoup costs from liable third parties (42 USC §1396k(a)(1)(A)) – Where, under Florida's *Medicaid Third-Party Liability Act*, beneficiaries who accepted medical assistance from Medicaid automatically assigned to state agency any right to third-party payments for medical care (Fla Stat §409.910(6)(b)) – Where, applied to petitioner's settlement, Florida's statutory framework entitled State to $300,000, being 37.5% of $800,000, percentage set as presumptively representing portion of tort recovery for "past and future medical expenses", absent clear and convincing rebuttal evidence (§§409.910(11)(f)(1), (17)(b)) – Where petitioner challenged presumptive allocation – Whether *Medicaid Act* prevents State from seeking reimbursement from settlement monies allocated for future medical care.

Held (7:2): Judgment of Court of Appeals for the Eleventh Circuit affirmed.

Constitutional Law

Carson v Makin

Supreme Court of the United States: Docket No. 20–1088

Judgment delivered: 21 June 2022

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

Catchwords:

Constitutional law – First Amendment – Establishment Clause – Free Exercise Clause – Fourteenth Amendment – Equal Protection Clause – Nonsectarian – Where Maine enacted program of tuition assistance for parents who live in school districts that neither operate own secondary school nor contract with particular school in another district – Where program enables parents to designate secondary school for child to attend, and school district transmits payments to school to help defray tuition costs – Where participating private schools must meet certain requirements to be eligible to receive tuition payments, including either accreditation from New England Association of Schools and Colleges ("NEASC") or approval from Maine Department of Education – Where Maine limited tuition assistance payments to "nonsectarian" schools – Where petitioners sought tuition assistance to send children to Bangor Christian Schools ("BCS") and Temple Academy – Where BCS and Temple Acadmy both NEASC accredited but not "nonsectarian" and therefore ineligible to receive tuition payments under Maine's tuition assistance program – Where petitioners sued commissioner of Maine Department of Education alleging "nonsectarian" requirement violated *Constitution* – Whether Maine's "nonsectarian" requirement violates Free Exercise Clause and Establishment Clause in First Amendment, and Equal Protection Clause in Fourteenth Amendment.

Held (6:3): Judgment of Court of Appeals for the First Circuit reversed and remanded.

Kennedy v Bremerton School District

Supreme Court of the United States: Docket No. 21–418

Judgment delivered: 27 June 2022

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

Catchwords:

Constitutional law – First Amendment – Free speech – Free exercise – Religious expression – Prayer – Where petitioner lost job as high school football coach after kneeling at midfield after games in prayer – Where petitioner sued in Federal Court, alleging District's actions violated First Amendment's Free Speech and Free Exercise Clauses – Where petitioner moved for preliminary injunction for reinstatement, which District Court denied and Ninth Circuit affirmed – Where District Court found "sole reason" for District's decision to suspend petitioner perceived "risk of constitutional liability" under Establishment Clause for "religious conduct" after three games in October 2015 (443 F Supp 3d 1223, 1231) – Where Ninth Circuit denied petition to rehear case *en banc* over dissents of 11 judges (4 F 4th 910, 911), with several dissenters arguing panel applied flawed understanding of Establishment Clause reflected in *Lemon v Kurtzman*, 403 US 602, and that Court abandoned *Lemon*'s approach to discerning Establishment Clause violations (4 F 4th, at 911, and n 3) – Whether Free Exercise and Free Speech Clauses of First Amendment protect individual engaging in personal religious observance from government reprisal.

Held (6:3): Judgment of Court of Appeals for the Ninth Circuit reversed.

New York State Rifle & Pistol Assn, Inc v Bruen

Supreme Court of the United States: Docket No. 20–843

Judgment delivered: 23 June 2022

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

Catchwords:

Constitutional law – Second Amendment – Fourteenth Amendment – Right to keep and bear arms – Guns – License – Where, in New York State, crime to possess firearm without license, whether inside or outside home – Where individual who wants to carry firearm outside home may obtain unrestricted license to "have and carry" concealed "pistol or revolver" if proven "proper cause exists" (NY Penal Law Ann §400.00(2)(f)) – Where applicant satisfies "proper cause" requirement only if "demonstrate special need for self-protection distinguishable from that of general community" – Where petitioners both applied for unrestricted licenses to carry handgun in public based on generalised interest in self-defence – Where State denied both applications for unrestricted licenses for failure to satisfy "proper cause" requirement – Where petitioners sued respondents, state officials who oversaw processing of licensing applications, for declaratory and injunctive relief, alleging respondents violated Second and Fourteenth Amendment rights by denying unrestricted-license applications for failure to demonstrate unique need for self-defence – Where District Court dismissed petitioners' complaint and Court of Appeals affirmed – Where both courts relied on Second Circuit's prior decision in *Kachalsky v County of Westchester*, 701 F 3d 81, which sustained New York's proper-cause standard, holding requirement "substantially related to achievement of

important governmental interest" – Whether New York's proper-cause requirement violates Fourteenth Amendment by preventing citizens from exercising Second Amendment right to keep and bear arms in public for self-defence.

Held (6:3): Judgment of Court of Appeals for the Second Circuit reversed and remanded.

R v JJ; AS v The Queen

Supreme Court of Canada: [2022] SCC 28

Judgment delivered: 30 June 2022

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

Catchwords:

Constitutional law – Charter of Rights – Fundamental justice – Right to silence – Self-incrimination – Right to fair hearing – Right to make full answer and defence – Evidence – Sexual offences – Where *Criminal Code* provisions set out record screening regime to determine admissibility of records relating to complainant in possession or control of accused – Whether record screening regime infringes accused's Charter-protected rights – Whether, if so, infringement justified – *Canadian Charter of Rights and Freedoms*, ss 1, 7, 11(c), 11(d) – *Criminal Code*, RSC 1985, c C-46, ss 276, 278.1, 278.92 to 278.94.

Held (6:3): Sections 278.92 to 278.94 of *Criminal Code* are constitutional, as they apply to both s 276 evidence applications and private record applications. Crown's appeal allowed, J's cross-appeal dismissed, S's appeal allowed and application judges' rulings quashed.

R v Lafrance

Supreme Court of Canada: [2022] SCC 32

Judgment delivered: 22 July 2022

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

Catchwords:

Constitutional law – Charter of Rights – Detention – Right to counsel – Where police entered suspect's home in early morning to execute search warrant and drove to police station for interview without advising of right to counsel – Where police later arrested suspect and conducted second interview after legal aid lawyer consulted – Where suspect requested during second interview to call father for assistance in obtaining legal advice but

request refused – Where suspect confessed during second interview to killing victim but sought exclusion of confession at trial on basis that police breached right to counsel – Whether police detained suspect and breached right to counsel on day of execution of warrant – Whether police breached suspect's right to counsel on day of arrest by refusing to allow further consultation with lawyer – Whether, if so, admission of evidence would bring administration of justice into disrepute warranting its exclusion – *Canadian Charter of Rights and Freedoms*, ss 10(b), 24(2).

Held (5:4): Appeal dismissed.

Social Justice Coalition v Minister of Police

Constitutional Court of South Africa: [2022] ZACC 27

Judgment delivered: 19 July 2022

Coram: Kollapen, Madlanga, Majiedt, Mathopo, Mhlantla, Theron, Tshiqi JJ and Unterhalter AJ

Catchwords:

Constitutional law – Unfair discrimination – Allocation of policing resources – Where applicants sought declarators in Equality Court of South Africa that: (1) police resources in Western Cape unfairly discriminated against Black and poor people; (2) system employed by South African Police Services to determine allocation of police resources unfairly discriminated against Black and poor people on basis of race and poverty; and (3) Provincial Commissioner had power to determine distribution of police resources – Where, following judgment on 14 December 2018, Equality Court made orders in terms of first two declarators – Where subsequent delay and matter not set down for hearing on remedy – Where applicants sought declaratory relief that Equality constructively refused to grant remedy – Whether Court has power to grant declaratory relief of constructive refusal in incomplete proceedings before another court where unreasonable delay in finalising proceedings in conflict with s 34 of *Constitution*, which provides right of access to court – Whether case been made for declaratory relief of constructive refusal of remedy.

Held (7:1): Leave to appeal refused.

Torres v Texas Department of Public Service

Supreme Court of the United States: Docket No. 20–603

Judgment delivered: 29 June 2022

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

Catchwords:

Constitutional law – Article I – Sovereign immunity – States – Congress – Power to "raise and support Armies" – Power to "provide and maintain Navy" – Where, pursuant to authority in Article I, §8, cls 1, 12–13, Congress enacted *Uniformed Services Employment and Reemployment Rights Act of 1994* ("USERRA"), giving returning service members right to reclaim prior jobs with state employers and authorising suit if employers refuse to accommodate veterans' service-related disabilities (38 USC §4301) – Where petitioner deployed to Iraq and, while serving, exposed to toxic burn pits – Where petitioner received honourable discharge, but returned home with constrictive bronchitis, rendering petitioner unable to work old job as state trooper – Where petitioner asked former employer, respondent, to accommodate condition by reemploying in different role, but respondent refused – Where petitioner sued respondent in state court to enforce rights under USERRA (§4313(a)(3)) – Where respondent tried to have suit dismissed by invoking sovereign immunity – Where trial court denied respondent's motion, but intermediate appellate court reversed, reasoning that, under Supreme Court's case law, Congress not authorised private suits against non-consenting States pursuant to Article I powers except under Bankruptcy Clause, citing *Central Va Community College v Katz*, 546 US 356 – Where Supreme Court of Texas denied discretionary review, but after decision below, Supreme Court issued *PennEast Pipeline Co v New Jersey*, 594 US ___ (2021), holding States waived sovereign immunity as to federal eminent domain power pursuant to plan of Convention – Whether, in light of intervening ruling in *PennEast*, USERRA's damages remedy against state employers constitutional – Whether States may invoke sovereign immunity as legal defence to block suits brought pursuant to USERRA.

Held (5:4): Judgment of Court of Appeals of Texas, Thirteenth District, reversed and remanded.

United States v Washington

Supreme Court of the United States: Docket No. 21–404

Judgment delivered: 21 June 2022

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

Catchwords:

Constitutional law – Supremacy Clause – Discrimination – Federal Government – Where Washington enacted workers' compensation law applying only to certain workers at federal facility in State who were "engaged in performance of work, either directly or indirectly" for United States (Wash Rev Code §51.32.187(1)(b)) – Where most workers at facility were federal contract workers, people employed by private companies under contract with Federal Government – Where smaller number of workers involved included State employees, private employees, and federal employees who worked directly for Federal Government – Where, as

compared to Washington's general workers' compensation scheme, law made it easier for federal contract workers to establish entitlement to workers' compensation, thus increasing workers' compensation costs for Federal Government – Where United States brought suit against Washington, arguing Washington's law violated Supremacy Clause by discriminating against Federal Government – Where District Court concluded law constitutional because it fell within scope of federal waiver of immunity contained in 40 USC §3172 – Where Ninth Circuit affirmed – Whether Washington's law facially discriminates against Federal Government and its contractors – Whether law unconstitutional.

Held (9:0): Judgment of Court of Appeals for the Ninth Circuit reversed and remanded.

Vega v Tekoh
Supreme Court of the United States: Docket No. 21–499

Judgment delivered: 23 June 2022

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

Catchwords:

Constitutional law – Fifth Amendment – *Miranda* rights – *Miranda v Arizona*, 384 US 436 – Where petitioner, Los Angeles County Sheriff, questioned respondent at medical centre where respondent worked regarding reported sexual assault of patient – Where petitioner did not inform respondent of *Miranda* rights – Where respondent provided written statement apologising for inappropriately touching patient – Where respondent prosecuted for unlawful sexual penetration – Where written statement admitted against respondent at trial – Where, after jury returned verdict of not guilty, respondent sued petitioner under 42 USC §1983, seeking damages for alleged violations of constitutional rights – Where §1983 provides cause of action against any person acting under colour of state law who "subjects" person or "causes [person] to be subjected… to deprivation of any rights, privileges, or immunities secured by *Constitution* and laws" – Where Ninth Circuit held use of un-*Mirandized* statement against defendant in criminal proceeding violated Fifth Amendment and may support §1983 claim against officer who obtained statement – Whether violation of *Miranda* rules provides basis for §1983 claim.

Held (6:3): Judgment of Court of Appeals for the Ninth Circuit reversed and remanded.

Consumer Law

Hastings v Finsbury Orthopaedics Ltd
Supreme Court of the United Kingdom: [2022] UKSC 19

Judgment delivered: 29 June 2022

Coram: Lord Reed, Lord Kitchin, Lord Stephens, Lady Rose, Lord Lloyd–Jones

Catchwords:

Consumer law – Defective product – Where appellant underwent metal-on-metal total hip replacement – Where prosthetic hip manufactured by respondents, each making separate parts – Where appellant claimed replacement hip used in 2009 defective and seeks damages under section 2 of *Consumer Protection Act 1987* ("CPA") – Where s 3 of CPA defined defect as arising in product if safety of product not such as persons generally entitled to expect – Whether certain propensities and risks inherent in prosthetic hip rendered particular combination of components used in Hastings' operation defective within meaning of s 3 of CPA.

Held (5:0): Appeal dismissed.

Contract

Transnet SOC Limited v Total South Africa (Pty) Limited
Constitutional Court of South Africa: [2022] ZACC 21

Judgment delivered: 21 June 2022

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

Catchwords:

Contract law – Interpretation – Variation agreement – Termination – Contractual damages – Recovery of overcharges – Where agreement concluded in 1967 for transportation of crude oil did not expressly provide for termination – Where agreement entailed "neutrality principle" whereby agreement contained contractual undertaking such that inland refinery not disadvantaged by cost of transporting crude oil to inland refinery – Where variation of 1967 agreement concluded in 1991 – Where variation agreement maintained neutrality principle on cost of transporting crude oil to inland refinery – Where variation agreement made provision for any party to give at least three years' notice of intention to "disregard contents of variation agreement" subject to certain arrangements" – Where, in September 2017, Transnet SOC Ltd ("Transnet"), which had since stepped into shoes of government, one of original parties to 1967 agreement, gave three-year notice terminating variation agreement – Whether variation agreement which, when looked at cumulatively with 1967 agreement, had been in existence for some 50 years, terminable – Whether, if so,

agreement lawfully terminated – Whether, absent cancellation, claims for contractual damages disclose cause of action where refund sought in respect of amounts allegedly overcharged.

Held (9:0): Leave to appeal granted on limited grounds and appeal allowed.

Tuv v Chief of New Zealand Defence Force
Supreme Court of New Zealand: [2022] NZSC 69

Judgment delivered: 3 June 2022

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

Catchwords:

Contract – Settlement agreement – Voidable – Setting aside – Lack of capacity – *Employment Relations Act 2000* ("ERA"), s 149 – Where appellant entered into settlement agreement with respondent to settle claim for unjustified dismissal – Where settlement agreement signed pursuant s 149(1) of ERA – Where s 149(3) provides agreement "final and binding" – Where appellant sought to have settlement agreement set aside on basis she lacked capacity – Where Employment Court and Court of Appeal held s 149 agreement could be set aside on basis of lack of capacity, applying *O'Connor v Hart* [1985] 1 NZLR 159 – Where *O'Connor v Hart* established contract not voidable for mental incapacity unless other contracting party has actual or constructive knowledge of incapacity – Whether test in *O'Connor v Hart* applies to settlement agreement certified under s 149 of ERA and, if not, what relevant test – Whether s 108B of *Protection of Personal and Property Rights Act 1988*, requiring approval of court of settlement of claims by person incapable of managing own affairs, applies.

Held (3:2): Appeal dismissed.

Corporations Law

Shandong Chenming Paper Holdings Limited v Arjowiggins HKK 2 Limited
Hong Kong Court of Final Appeal: [2022] HKCFA 11

Judgment delivered: 14 June 2022

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

Catchwords:

Corporations Law – Winding up order – Foreign-incorporated company – Benefit – Where Court in *Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501 identified three requirements for statutory jurisdiction to wind

up foreign-incorporated company in Hong Kong: (1) sufficient connection to Hong Kong; (2) reasonable possibility that winding-up order would benefit applicants; and (3) court must be able to exercise jurisdiction over one or more persons in distribution of company's assets – Whether "benefit" under second requirement made out if "benefit" does not arise rise as consequence of winding-up order, but rather only realised if winding-up order either avoided or discharged – Whether leverage created by prospect of winding up legitimate "benefit" for second requirement.

Held (5:0): Appeal dismissed.

Courts

AIC Ltd v Federal Airports Authority of Nigeria
Supreme Court of the United Kingdom: [2022] UKSC 16

Judgment delivered: 15 June 2022

Coram: Lord Hodge, Lord Briggs, Lord Sales, Lord Hamblen, Lord Leggatt

Catchwords:

Courts – Judges – Entry of orders – Finality – Reconsideration of judgment – Where AIC Ltd held foreign arbitral award against Federal Airports Authority of Nigeria ("FAAN") for US$48.13 million – Where FAAN challenged award and challenge pending in Nigerian Supreme Court – Where AIC commenced proceedings in England seeking to enforce award and obtained preliminary order – Where preliminary order set aside and adjourned AIC's application to enforce award on condition FAAN provided security – Where deadline and further extended deadlines not met and judge made order permitting AIC to enforce award – Where, before order sealed, FAAN obtained guarantee and applied to judge seeking to re-open judgment and relief from sanctions imposed for late provision of guarantee – Where judge set aside enforcement order, extended time for provision of guarantee, granted relief from sanctions and adjourned application for enforcement of award pending outcome of Nigerian proceedings – Where Court of Appeal allowed AIC's appeal seeking re-instatement of enforcement order – Proper process to adopt, and principles to apply, in deciding whether or not to exercise power to re-open judgment and order.

Held (5:0): Appeal allowed.

In the matter of H-W (Children); In the matter of H-W (Children) (No 2)
Supreme Court of the United Kingdom: [2022] UKSC 17

Judgment delivered: 15 June 2022

Coram: Lord Hodge, Lord Kitchin, Lord Burrows, Lord Hughes, Dame Siobhan Keegan

Catchwords:

> Courts – Appellate courts – Review – Proportionality – Where M and partner cared for 3 children at home, C, D and E – Where care orders made approving care plan of removal of C, D and E – Where Court of Appeal affirmed orders – Proper approach by appellate court when considering judge's conclusions as to disposal – Whether appellate court should undertake fresh assessment of issue of proportionality and necessity of any orders.

Held (5:0): Appeals allowed and cases remitted for rehearing.

Criminal Law

Concepcion v United States

Supreme Court of the United States: Docket No. 20–1650

Judgment delivered: 27 June 2022

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

Catchwords:

> Criminal law – Sentencing – Drug offences – Where *Fair Sentencing Act of 2010* enacted to correct disparity between crack and powder cocaine sentencing – Where §2 increased amount of crack cocaine needed to trigger 5-to-40-year sentencing range from 5 grams to 28 grams (§2(a)(2), 124 Stat 2372) – Where *Fair Sentencing Act* did not apply retroactively, but in 2011, Sentencing Commission amended Sentencing Guidelines to lower Guidelines range for crack-cocaine offenses and applied reduction retroactively for some defendants – Where, in 2018, *First Step Act* enacted, authorising District Courts to impose "reduced sentence" on defendants serving sentences for certain crack-cocaine offenses "as if sections 2 and 3 of *Fair Sentencing Act*… were in effect at time covered offense committed" (Pub L 115–391, §404(b), 132 Stat 5222) – Where petitioner pleaded guilty to one count of distributing five or more grams of crack cocaine – Where petitioner filed *pro se* motion for sentence reduction under *First Step Act* – Whether *First Step Act* allows District Courts to consider intervening changes of law or fact in exercising discretion to reduce sentence.

Held (5:4): Judgment of Court of Appeals for the First Circuit reversed and remanded.

Denezpi v United States
Supreme Court of the United States: Docket No. 20–7622

Judgment delivered: 13 June 2022

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

Catchwords:

Criminal law – Constitutional law – Fifth Amendment – Double Jeopardy Clause – Where officer with federal Bureau of Indian Affairs filed criminal complaint against petitioner, member of Navajo Nation, charging petitioner with three crimes alleged to have occurred at house located within Ute Mountain Ute Reservation: assault and battery, in violation of 6 Ute Mountain Ute Code §2; terroristic threats, in violation of 25 Code of Federal Regulations ("CFR") §11.402; and false imprisonment, in violation of 25 CFR §11.404 – Where complaint filed in CFR court, court which administered justice for Indian tribes in certain parts of Indian country "where tribal courts have not been established" §11.102 – Where petitioner pleaded guilty to assault and battery charge and sentenced to time served – Where, six months later, federal grand jury in District of Colorado indicted petitioner on one count of aggravated sexual abuse in Indian country, offense covered by federal Major Crimes Act – Where petitioner moved to dismiss indictment, arguing Double Jeopardy Clause barred consecutive prosecution – Where District Court denied petitioner's motion – Where petitioner convicted and sentenced to 360 months' imprisonment and Tenth Circuit affirmed – Whether Double Jeopardy Clause bars successive prosecutions of distinct offenses arising from single act, even if single sovereign prosecutes.

Held (6:3): Judgment of Court of Appeals for the Tenth Circuit affirmed.

Nance v Ward
Supreme Court of the United States: Docket No. 21–439

Judgment delivered: 23 June 2022

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

Catchwords:

Criminal law – Criminal procedure – Capital Punishment – Method of execution – Where prisoner challenging State's proposed method of execution under Eighth Amendment must identify readily available alternative method that would significantly reduce risk of severe pain – Where, if prisoner proposes method already authorised under state law, Supreme Court held that claim can go forward under 42 USC §1983, rather than in habeas (*Nelson v Campbell*, 541 US 637, 644–647) – Where

prisoner not confined to proposing method already authorised under state law and may ask for method used in other States (*Bucklew v Precythe*, 587 US, ___ (2019)) – Whether prisoner who proposes alternative method not authorised by State's death penalty statute may proceed under §1983.

Constitutional law – Eighth Amendment – Prohibition on "cruel and unusual" punishment – Capital punishment – Method of execution – Lethal injection – 42 USC §1983 – Where §1983 authorises suit against state officials for "deprivation of any rights" secured by *Constitution*.

Held (5:4): Judgment of Court of Appeals for the Eleventh Circuit reversed and remanded.

R v Goforth

Supreme Court of Canada: [2022] SCC 25

Judgment delivered: 10 June 2022

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

Catchwords:

Criminal law – Charge to jury – Where accused charged with second degree murder and unlawfully causing bodily harm in relation to two foster children – Where charges predicated on accused's failure to provide necessaries of life to children – Where accused convicted by jury of manslaughter and unlawfully causing bodily harm – Where Court of Appeal set aside convictions on basis that errors in jury charge may have misled jury – Whether jury properly instructed.

Held (9:0): Appeal allowed and convictions restored.

R v Kirkpatrick

Supreme Court of Canada: [2022] SCC 33

Judgment delivered: 29 July 2022

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

Catchwords:

Criminal law – Sexual assault – Consent – Where complainant consented to sexual intercourse on condition that accused wear condom – Where complainant realized after intercourse that accused failed to wear condom – Whether accused's failure to wear condom when complainant's consent conditional on its use results in there being no voluntary agreement of complainant to engage in sexual activity in question – Whether,

alternatively, such failure can constitute fraud vitiating complainant's consent – *Criminal Code*, RSC 1985, c C-46, ss 265(3)(c), 273.1(1).

Held (9:0): Appeal dismissed.

R v Luckhurst

Supreme Court of the United Kingdom: [2022] UKSC 23

Judgment delivered: 20 July 2022

Coram: Lord Hodge, Lord Kitchin, Lord Hamblen, Lord Burrows, Lord Stephens

Catchwords:

Criminal law – Proceeds of crime – Confiscation order – Restraint order – Freezing of assets – *Proceeds of Crime Act 2002* ("POCA"), s 41(4) – Where s 41(3) provides restraint order may be made subject to exceptions, including "provision for reasonable living expenses and reasonable legal expenses" – Where s 41(4) provides exception under s 41(3) must not make provision for any legal expenses which relate to offence which precipitated restraint order or legal expenses incurred by defendant or recipient of tainted gift – Whether s 41(4) precludes exception to restraint order to make provision for reasonable legal expenses incurred by defendant or recipient of tainted gift where those expenses incurred in respect of civil proceedings founded on same or similar allegations, alleged facts and/or evidence as those of offences which gave rise to making of restraint order.

Held (5:0): Appeal dismissed.

R v Sundman

Supreme Court of Canada: [2022] SCC 31

Judgment delivered: 21 July 2022

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

Catchwords:

Criminal law – First degree murder – Unlawful confinement – Elements of offence – Where accused convicted of second degree murder in death of victim shot during chase after escaping from moving truck where confined – Where trial judge found that victim no longer unlawfully confined at time of murder – Where Court of Appeal held that death caused while victim still unlawfully confined and substituted first degree murder conviction – Whether victim unlawfully confined after escape from truck – Whether unlawful confinement and murder formed part of same transaction

justifying conviction for first degree murder – *Criminal Code*, RSC 1985, c C-46, s 231(5).

Held (9:0): Appeal dismissed.

Shoop v Twyford

Supreme Court of the United States: Docket No. 21–511

Judgment delivered: 21 June 2022

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

Catchwords:

Criminal law – Habeas corpus – Evidence – Admissibility – "Necessary or appropriate in aid of" – Where *All Writs Act* authorised federal courts to "issue all writs necessary or appropriate in aid of" respective jurisdictions and agreeable to usages and principles of law (28 USC §1651(a)) – Where respondent moved for order compelling State to transport him to medical facility, arguing that neurological testing plausibly lead to development of evidence to support claim of neurological defects – Where District Court granted motion under *All Writs Act* and Court of Appeal affirmed, holding unnecessary to consider admissibility of any resulting evidence prior to ordering State to transport respondent to gather evidence – Whether transportation order allowing prisoner to search for new evidence "necessary or appropriate in aid of" federal court's adjudication of habeas corpus action when prisoner not shown desired evidence admissible in connection with claim for relief.

Held (5:4): Judgment of Court of Appeals for the Sixth Circuit reversed and remanded.

United States v Taylor

Supreme Court of the United States: Docket No. 20–1459

Judgment delivered: 21 June 2022

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

Catchwords:

Criminal law – Robbery – "Crime of violence" – *Hobbs Act*, 18 USC §1951 – Where *Hobbs Act* makes it federal crime to commit, attempt to commit, or conspire to commit robbery with interstate component (§1951(a)) – Where enhanced punishments authorised for those using firearm in connection with "crime of violence" as defined in either §924(c)(3)(A) ("elements clause") or §924(c)(3)(B ("residual clause") – Where, before District Court,

government argued Taylor's *Hobbs Act* offense qualified as "crime of violence" under §924(c) – Where Taylor ultimately pleaded guilty to one count each of violating *Hobbs Act* and §924(c) – Where District Court sentenced Taylor to 30 years in federal prison, being decade more than maximum sentence for *Hobbs Act* conviction alone – Where Taylor later filed federal habeas petition focused on §924(c) conviction, predicated on admission Taylor committed both conspiracy to commit *Hobbs Act* robbery and attempted *Hobbs Act* robbery – Where Taylor argued neither *Hobbs Act* offense qualified as "crime of violence" for purposes of §924(c) after *United States v Davis*, 588 US ___ (2019), where Court held §924(c)(3)(B)'s residual clause unconstitutionally vague – Where, Taylor asked Court to apply *Davis* retroactively and vacate §924(c) conviction and sentence – Where Fourth Circuit held attempted *Hobbs Act* robbery does not qualify as crime of violence under §924(c)(3)(A) – Whether *Hobbs Act* robbery qualifies as "crime of violence" under §924(c)(3)(A).

Held (7:2): Judgment of Court of Appeals for the Fourth Circuit affirmed.

Xiulu Ruan v United States; Kahn v United States
Supreme Court of the United States: Docket No. 20–1410 and No. 21–5261

Judgment delivered: 27 June 2022

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

Catchwords:

Criminal law – *Mens rea* – Controlled substances – Where petitioners medical doctors licensed to prescribe controlled substances – Where each tried for violating 21 USC §841, rendering it federal crime, "[e]xcept as authorised[,]… for any person knowingly or intentionally… to manufacture, distribute, or dispense… controlled substance" – Where federal regulation authorises registered doctors to dispense controlled substances via prescription, but only if prescription "issued for legitimate medical purpose by individual practitioner acting in usual course of professional practice" (21 CFR §1306.04(a)) – Where, at issue in petitioners' trials, *mens rea* required to convict under §841 for distributing controlled substances not "authorised" – Where petitioners each contested jury instructions pertaining to *mens rea* given at trials and each ultimately convicted under §841 for prescribing in unauthorised manner – Where convictions separately affirmed by Courts of Appeals – Whether §841's "knowingly or intentionally" *mens rea* applies to "except as authorised" clause.

Held (9:0): Judgments of Court of Appeals for the Eleventh Circuit vacated and remanded.

Employment Law

Harpur Trust v Brazel

Supreme Court of the United Kingdom: [2022] UKSC 21

Judgment delivered: 20 July 2022

Coram: Lord Hodge, Lord Briggs, Lady Arden, Lord Burrows, Lady Rose

Catchwords:

> Employment law – Leave – Statutory entitlements – Part-year workers – Pro-rata – Where part-year workers work varying hours only certain weeks of year but have continuing contract throughout year – Where s 224 of *Employment Rights Act 1996* (UK) defines "week's pay" – Where reg 16 of *Working Time Regulations 1998* (SI 1998/1833) provides for entitlement to pay during statutory leave – Whether part-year workers' leave entitlements calculated on same principle, proportionally, as full-time employees, meaning that weeks not worked reduce entitlement or whether leave calculated ignoring those weeks.

Held (5:0): Appeal dismissed.

Southwest Airlines Co v Saxon

Supreme Court of the United States: Docket No. 21–309

Judgment delivered: 6 June 2022

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

Catchwords:

> Employment law – Class action – Wage dispute – "Class of workers engaged in foreign or interstate commerce" – Where respondent ramp supervisor for Southwest Airlines, trained and supervised teams of ramp agents who physically loaded and unloaded cargo on and off airplanes that travel across country – Where respondent frequently loaded and unloaded cargo alongside ramp agents – Where respondent came to believe Southwest failing to pay proper overtime wages to ramp supervisors and brought putative class action against Southwest under *Fair Labor Standards Act of 1938* – Where, because respondent's employment contract required arbitration of wage disputes individually, Southwest sought to enforce arbitration agreement and moved to dismiss – Where, respondent claimed ramp supervisors "class of workers engaged in foreign or interstate commerce" and therefore exempt from Federal Arbitration Act's coverage: 9 USC §1 – Where District Court disagreed, holding only those involved in "actual transportation," and not those who merely handled goods, fell within §1's exemption – Where Court of Appeals reversed – Whether respondent belongs to "class of workers engaged in foreign or interstate commerce to which §1's exemption applies.

Held (8:0): Judgment of Court of Appeals for the Seventh Circuit affirmed.

Family Law

BJT v JD

Supreme Court of Canada: [2022] SCC 24

Judgment delivered: 3 June 2022

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

Catchwords:

> Family law – Child protection – Custody – Best interests of child – Standard of appellate review for disposition decisions pursuant to child protection legislation – Where child found in need of protection from mother – Where maternal grandmother and father submitted competing parenting plans at disposition hearing – Where custody of child awarded to grandmother – Where father successfully appealed order – Whether appellate intervention warranted – Whether hearing judge erred in determination of child's best interests – Whether natural or biological parent factor should be considered in determination of best interests of child – *Child Protection Act*, RSPEI 1988, c C-5.1, s 2(2).

Held (9:0): Appeal allowed and order of hearing judge restored.

Golan v Saada

Supreme Court of the United States: Docket No. 20–1034

Judgment delivered: 15 June 2022

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

Catchwords:

> Family law – *Hague Convention on the Civil Aspects of International Child Abduction – International Child Abduction Remedies Act* ("ICARA") – Where Convention requires judicial or administrative authority of Contracting State to order child returned to child's country of habitual residence if authority finds child has been wrongfully removed to or retained in Contracting State – Where authority "not bound" to order return of child, however, if authority finds return would expose child to "grave risk" of "physical or psychological harm" or otherwise place child in "intolerable situation" – Where ICARA implements Convention in United States, granting federal and state courts jurisdiction over Convention actions and directing courts to decide cases in

accordance with Convention – Whether court required to examine all possible ameliorative measures before denying Convention petition for return of child to foreign country once court has found return would expose child to grave risk of harm.

Held (9:0): Judgments of Court of Appeals for the Second Circuit vacated and remanded.

Women's Legal Centre Trust v President of the Republic of South Africa
Constitutional Court of South Africa: [2022] ZACC 23

Judgment delivered: 28 June 2022

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

Catchwords:

Family law – Marriage – Muslim marriages – *Sharia* law – Where marriages solemnised in accordance with tenets of *Sharia* law not recognised – Where Supreme Court of Appeal held *Marriage Act 25 of 1961* and *Divorce Act 70 of 1979* inconsistent with ss 9, 10, 28 and 34 of *Constitution* insofar as they do not recognise Muslim marriages – Where Supreme Court of Appeal declared ss 6, 7(3) and 9(1) of *Divorce Act*, concerning division of assets, spousal maintenance and interests of minor children during divorce, unconstitutional for being inconsistent with sections of *Constitution* – Whether Supreme Court of Appeal's order of constitutional invalidity be confirmed – Whether, if order confirmed, retrospective effect of order should be limited – Whether state obligated to enact legislation recognising and regulating Muslim marriages.

Constitutional law – Constitutional rights – Unfair discrimination – Dignity – Equality before law – Children's rights – Whether provisions of *Marriage Act* and *Divorce Act* unjustifiably discriminate against spouses in Muslim marriages and children born of such marriages, and infringe right to dignity, access to court and principle of best interests of child.

Held (8:0): Order of constitutional invalidity confirmed.

Foreign Immunity

Basfar v Wong
Supreme Court of the United Kingdom: [2022] UKSC 20

Judgment delivered: 6 July 2022

Coram: Lord Briggs, Lord Hamblen, Lord Leggatt, Lord Stephens and Lady Rose

Catchwords:

Foreign immunity – Diplomatic immunity – Diplomatic agents – Article 31(1)(c) *Vienna Convention on Diplomatic Relations 1961* – Human rights – Human trafficking – Domestic workers – Principles of immunity in *Al-Malki v Reyes* [2017] UKSC 61; [2019] AC 735 – Where Ms Wong migrant domestic worker who worked in household of Mr Basfar, member of diplomatic staff of mission of Kingdom of Saudi Arabia in United Kingdom – Where Ms Wong claimed to be victim of human trafficking, exploited by Mr Basfar by being forced into circumstances of modern slavery – Where Ms Wong brought claim in employment tribunal for wages and breaches of employment rights – Where Mr Basfar sought to have claim struck out on ground of immunity from suit based on diplomatic status – Where, under *Convention*, diplomatic agents generally enjoy immunity, but exception for civil claims relating to "professional or commercial activity exercised by diplomatic agent in receiving state outside official functions" – Where employment tribunal held Ms Wong's claim fell within commercial activity exception in *Convention* but Employment Appeal Tribunal allowed Mr Basfar's appeal – Whether exploiting domestic worker in manner alleged constitutes "exercising" "commercial activity" within exception in *Convention*.

Held (3:2): Appeal allowed.

Intellectual Property

Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association

Supreme Court of Canada: [2022] SCC 30

Judgment delivered: 15 July 2022

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

Catchwords:

Intellectual property – Copyright – Communication to public by telecommunication – Making available online – On-demand transmissions – Where amendment to *Copyright Act* clarifying that communication of work to public by telecommunication includes making it available to public in way that allows members of public to have access to it from place and at time they have individually chosen – Where Copyright Board concluded that amendment required users to pay one royalty when work made available to public online and another royalty when work downloaded or streamed by member of public – Whether amendment creates new compensable making-available right – *Copyright Act*, RSC 1985, c C-42, ss 2.4(1.1), 3(1)(f).

Administrative law – Judicial review – Standard of review – Proper standard of review applicable where administrative body and courts share concurrent first instance jurisdiction over questions of law.

Held (9:0): Appeal dismissed.

Migration

Biden v Texas

Supreme Court of the United States: Docket No. 21–954

Judgment delivered: 30 June 2022

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

Catchwords:

Migration – Aliens – *Immigration and Nationality Act* – Migrant Protection Protocols – Where, in January 2019, Department of Homeland Security began implementing Migrant Protection Protocols ("MPP") – Where, under MPP, certain non-Mexican nationals arriving from Mexico were returned to Mexico to await results of removal proceedings under §1229a of *Immigration and Nationality Act* ("INA") – Where MPP implemented pursuant to provision of INA that applied to aliens "arriving on land… from foreign territory contiguous to United States" and provided Secretary of Homeland Security may return alien to territory pending proceeding under §1229a (8 USC §1225(b)(2)(C)) – Where, following change in Presidential administrations, Biden administration announced it would suspend program, and on 1 June 2021, Secretary of Homeland Security issued memorandum officially terminating MPP ("June Memorandum") – Where respondents brought suit in Northern District of Texas against Secretary, asserting June Memorandum violated INA and *Administrative Procedure Act* ("APA") – Where District Court entered judgment for respondents, concluding terminating MPP violated INA, as §1225 of INA "provides government two options" with respect to illegal entrants: mandatory detention (§1225(b)(2)(A)) or contiguous-territory return (§1225(b)(2)(C)) (554 F Supp 3d 818, 852) – Where, because Government unable to meet mandatory detention obligations under §1225(b)(2)(A) due to resource constraints, Court reasoned terminating MPP would necessarily lead to systemic violation of §1225 as illegal entrants released into United States – Whether Government's rescission of MPP violated §1225 of INA.

Held (5:4): Judgment of Court of Appeals for the Fifth Circuit reversed and remanded.

HA (Iraq) v Secretary of State for the Home Department; RA (Iraq) v Secretary of State for the Home Department; AA (Nigeria) v Secretary of State for the Home Department

Supreme Court of the United Kingdom: [2022] UKSC 22

Judgment delivered: 20 July 2022

Coram: Lord Reed, Lord Hamblen, Lord Leggatt, Lord Stephens, Lord Lloyd–Jones

Catchwords:

Migration – Deportation – Foreign criminals – Unduly harsh test – Very compelling circumstances test – Proper approach to s 117C of *Nationality, Immigration and Asylum Act 2002* – Meaning of "unduly harsh" – Where "foreign criminal", pursuant to s 32(1) of *UK Borders Act 2007*, person without British citizenship, convicted in UK of offence and sentenced to period of imprisonment of at least 12 months – Where foreign criminal sentenced to term of imprisonment of less than four years (referred to as "medium offenders") can avoid deportation by establishing effect on qualifying child or partner would be "unduly harsh" – Where meaning of "unduly harsh" considered by Supreme Court in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273 – Where medium offender unable to satisfy unduly harsh test can nevertheless seek to show very compelling circumstances test met – Where compelling circumstances test requires full proportionality assessment, weighing interference with rights of potential deportee and family to private and family life under Art 8 of *European Convention on Human Rights* – Whether Court of Appeal erred by failing to follow guidance in *KO (Nigeria)* – Whether unduly harsh test requires assessing degree of harshness by reference to comparison with what necessarily involved for any child faced with deportation of parent – Proper approach to assessing seriousness of offending and relevance of and weight to be given to rehabilitation in relation to very compelling circumstances test.

Held (5:0): Appeals dismissed.

Johnson v Arteaga-Martinez

Supreme Court of the United States: Docket No. 19–896

Judgment delivered: 13 June 2022

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

Catchwords:

Migration – Asylum – Reasonable fear of persecution or torture – *Immigration and Nationality Act*, 8 USC §1231 – *Convention Against Torture* – Where respondent citizen of Mexico removed in July 2012 and re-entered United States in September 2012 – Where US Immigration and Customs

Enforcement ("ICE") issued warrant respondent's arrest – Where ICE reinstated respondent's earlier removal order and detained respondent (8 USC §1231(a)) – Where respondent applied for withholding of removal under §1231(b)(3), as well as relief under regulations implementing *Convention Against Torture*, based on fear of persecution or torture if respondent returned to Mexico – Where asylum officer determined respondent established reasonable fear of persecution or torture, and Department of Homeland Security referred respondent for withholding-only proceedings before immigration judge – Where, after 4 months detention, respondent filed petition for writ of habeas corpus in District Court challenging, on both statutory and constitutional grounds, continued detention without bond hearing – Where Government conceded respondent would be entitled to bond hearing after six months of detention based on Circuit precedent holding that non-citizen facing prolonged detention under §1231(a)(6) entitled by statute to bond hearing before immigration judge and must be released unless Government establishes non-citizen poses risk of flight or danger to community – Where District Court granted relief for respondent's statutory claim and ordered bond hearing – Where, at bond hearing, immigration judge considered respondent's flight risk and dangerousness and ultimately authorised release pending resolution of application for withholding of removal – Whether §1231(a)(6) requires Government to provide non-citizens detained for six months with bond hearing in which Government bears burden of proving, by clear and convincing evidence, noncitizen poses flight risk or danger to community.

Held (9:0; 8:1 (Breyer J dissenting in part)): Judgment of Court of Appeals for the Third Circuit reversed.

Secretary of State for the Home Department v SC

Supreme Court of the United Kingdom: [2022] UKSC 15

Judgment delivered: 15 June 2022

Coram: Lord Reed, Lord Lloyd-Jones, Lady Arden, Lord Hamblen, Lord Stephens

Catchwords:

Migration – Deportation – Real risk of inhuman or degrading treatment – Internal relocation – Where SC granted indefinite leave to remain in UK as refugee from Jamaica with mother in 2003 – Where SC committed several criminal offences and, as result, fell within definition of "foreign criminal" in s 32(1) of *UK Borders Act 2007* – Where Secretary of State for Home Department ("SSHD") made deportation order against SC as foreign criminal – Where statutory appeal available to First-tier Tribunal ("F-tT") under s 82 of *Nationality, Immigration and Asylum Act 2002* ("NIAA"), with permissible grounds of appeal relevantly including that removal of appellant from UK in consequence of immigration decision would be unlawful under s 6 of *Human Rights Act 1998* as being incompatible with appellant's rights under *European Convention on Human Rights* ("ECHR") – Where accepted SC faced real risk of inhuman or degrading treatment, in contravention of

Article 3 of ECHR, in urban parts of Jamaica – Where deportation would be unlawful unless SC could "reasonably be expected to stay" in rural areas of Jamaica ("internal relocation") – Where, in allowing appeal from deportation order made by SSHD, F-tT judge held SC could not reasonably be expected to internally relocate in Jamaica – Whether SC's criminal conduct in UK factor relevant in determining if SC could reasonably be expected to stay in rural area of Jamaica – Whether SC can reasonably be expected to stay in rural area of Jamaica – Whether, under s 117C(4)(b)-(c) of NIAA and para 399A(b)-(c) of Immigration Rules, SC socially and culturally integrated in UK and there would be significant obstacles to integration in Jamaica – Proper approach to assessment under article 8 of ECHR concerning SC's right to respect for private and family life, home and correspondence.

Held (5:0): Appeal allowed.

Partnership Law

Deng v Zheng
Supreme Court of New Zealand: [2022] NZSC 76

Judgment delivered: 20 June 2022

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

Catchwords:

Partnership law – Partners – Business relationship – Nature of – Social and cultural context – Where appellant and respondent in working relationship which commenced in 1990s – Where association ended in 2015 – Where arrangement between two Chinese parties whose business relationship conducted in Mandarin – Whether parties in partnership.

Held (5:0): Appeal dismissed.

Private International Law

Employees Compensation Assistance Fund Boar v Fong Chak Kwan
Hong Kong Court of Final Appeal: [2022] HKCFA 12

Judgment delivered: 21 June 2022

Coram: Ribeiro, Fok, Lam PJJ, Bokhary and Lord Collins NPJJ

Catchwords:

Private international law – Jurisdiction – Assumption of – Service – Jurisdictional "gateways" – *Rules of the High Court* (Cap 4A), Order 11 rule

1 – Where plaintiff/respondent, Mr Fong, Hong Kong permanent resident who claimed to be employee of two companies, Ascentic Limited, Hong Kong company ("D1") and 2nd defendant, Brentwood Industries, Inc, company incorporated in Pennsylvania, United States ("D2") – Where Mr Fong claimed to have suffered serious personal injuries while working for employers in mainland China, after which Mr Fong returned to Hong Kong for treatment – Where Mr Fong obtained leave to serve writ on D2, relying on three jurisdictional "gateways" in Order 11 rule 1 of Cap 4A, including Order 11 rule 1(1)(f) ("Gateway F") which allows writ to be served on defendant situated outside Hong Kong, and Hong Kong courts to assume jurisdiction, if claim founded on tort and damage sustained within jurisdiction – Where interlocutory judgment in default entered againt D2 – Where, after D1 settled Mr Fong's claim, 3rd defendant/appellant, Employees Compensation Assistance Fund Board ("Board"), which administers fund ("Fund") constituted under *Employees Compensation Assistance Ordinance* (Cap 365), granted leave to join in proceeding, considering itself at risk of having to satisfy claim against D2 – Where Board applied to set aside order granting leave to serve D2 and interlocutory judgment – Where s 33(d) of Cap 365 provides no claim lies in respect of compensation or damages for injury to employee engaged outside Hong Kong by employer outside of Hong Kong and with no place of business in Hong Kong – Whether s 33(d) applies – Whether, on proper interpretation of phrase "damage sustained ... within jurisdiction" in Gateway F, "damage" limited to damage directly caused by alleged tortious act, or whether it extends to indirect or consequential damage sustained within jurisdiction.

Held (5:0): Appeal dismissed.

Statutory Interpretation

Becerra v Empire Health Foundation, For Valley Hospital Medical Center

Supreme Court of the United States: Docket No. 20–1312

Judgment delivered: 24 June 2022

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

Catchwords:

Statutory interpretation – Health – Medicare – "Disproportionate-patient percentage" – Where person who turns 65 or receives federal disability benefits for 24 months becomes "entitled" to benefits under Part A of Medicare (42 USC §§426(a)–(b)), including inpatient hospital treatment (§1395d(a)) – Where Medicare pays hospitals fixed rate for such treatment based on patient's diagnosis, regardless of hospital's actual cost and subject to certain adjustments (§§1395ww(d)(1)–(5)) – Where one adjustment "disproportionate share hospital" ("DSH") adjustment, which provides higher than usual rates to hospitals that serve higher than usual of low-

income patients – Where, to calculate DSH adjustment, Department of Health and Human Services (HHS) adds together two statutorily described fractions: Medicare fraction, which represents proportion of hospital's Medicare patients who have low incomes, and Medicaid fraction, which represents proportion of hospital's total patients not entitled to Medicare and have low incomes – Where, together fractions produce "disproportionate-patient percentage", which determines whether hospital will receive DSH adjustment, and how large it will be – Where not all patients who qualify for Medicare Part A have hospital treatment paid for by program and non-payment may occur, for example, if patient's stay exceeds Medicare's 90-day cap (§1395d) or patient covered by private insurance plan (§1395y(b)(2)(A)) – Whether patients whom Medicare insures but do not pay for on given day are patients "who (for such days) were entitled to [Medicare Part A] benefits" for purposes of computing hospital's disproportionate-patient percentage.

Held (5:4): Judgment of Court of Appeals for the Ninth Circuit reversed and remanded.

HKSAR v Chan Chun Kit

Hong Kong Court of Final Appeal: [2022] HKCFA 15

Judgment delivered: 15 July 2022

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and Gleeson NPJ

Catchwords:

Statutory interpretation – Criminal law – *Ejusdem generis* rule – *Summary Offences Ordinance* (CAP 228), s 17 – English and Chinese texts – Where s 17 provides, relevantly, person in possession of "other instrument fit for unlawful purposes" with intent to use same for any unlawful purpose, be liable to fine or imprisonment – Whether, on true construction of English and Chinese texts of s 17, terms subject to *ejusdem generis* rule.

Held (5:0): Appeal allowed.

Kemp v United States

Supreme Court of the United States: Docket No. 21–5726

Judgment delivered: 13 June 2022

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

Catchwords:

Statutory interpretation – Meaning of "mistake" – Judicial mistake – Federal Rule of Civil Procedure, Rule 60(b) – Where petitioner and seven co-

defendants convicted of various drug and gun crimes – Where Eleventh Circuit consolidated appeals and, in November 2013, affirmed convictions and sentences – Where, in April 2015, petitioner moved District Court to vacate sentence under 28 USC §2255 – Where District Court dismissed Kemp's motion as untimely because not filed within one year of "date on which … judgment of conviction becomes final" (§2255(f)(1)) and petitioner did not appeal – Where, in June 2018, Kemp sought to reopen §2255 proceedings under Rule 60(b), which authorised court to reopen final judgment under certain enumerated circumstances – Where, relevantly, party may seek relief within one year under Rule 60(b)(1) based on "mistake, inadvertence, surprise, or excusable neglect" – Where party may also seek relief "within reasonable time" under Rule 60(b)(6) for "any other reason that justifies relief", but relief under Rule 60(b)(6) available only when other grounds for relief specified in Rules 60(b)(1)–(5) inapplicable – Where petitioner's motion to reopen §2255 proceedings invoked Rule 60(b)(6), but motion sought reopening based on "mistake" covered by Rule 60(b)(1), namely petitioner argued one year limitation period on §2255 motion did not begin to run until co-defendants' rehearing petitions were denied in May 2014, making April 2015 motion timely – Where Eleventh Circuit agreed with petitioner that §2255 motion timely but concluded that because petitioner alleged judicial mistake, Rule 60(b) motion fell under Rule 60(b)(1), subject to Rule 60(c)'s one year limitation period, and therefore untimely – Whether term "mistake" in Rule 60(b)(1) includes judge's error of law.

Held (8:1): Judgment of Court of Appeals for the Eleventh Circuit affirmed.

Marietta Memorial Hospital Employee Health Benefit Plan v DaVita Inc

Supreme Court of the United States: Docket No. 20-1641

Judgment delivered: 21 June 2022

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

Catchwords:

Statutory interpretation – Health – Employer-sponsored group health plan – Where petitioner an employer-sponsored group health plan that offers all participants same limited coverage for outpatient dialysis – Where respondent, major provider of dialysis services, sued petitioner, arguing petitioner's limited coverage for outpatient dialysis violated Medicare Secondary Payer statute – Where statute makes Medicare "secondary" payer to individual's existing insurance plan for certain medical services, including dialysis, when plan already covers same services (42 USC §§1395y(b)(1)(C), (2), (4)) – Where, to prevent plans from circumventing primary-payer obligation for end-stage renal disease treatment, statute imposes, relevantly, two constraints relevant: (1) plan must "not differentiate in benefits it provides between individuals having end stage

renal disease and other individuals covered by such plan on basis of existence of end stage renal disease, need for renal dialysis, or in any other manner" (§1395y(b)(1)(C)(ii)); and (2) plan must "not take into account that individual entitled to or eligible for" Medicare due to end-stage renal disease (§1395y(b)(1)(C)(i)) – Where District Court dismissed respondent's claims petitioner violated both statutory constraints – Where Sixth Circuit reversed, ruling statute authorised disparate-impact liability and that limited payments for dialysis treatment had disparate impact on individuals with end-stage renal disease – Whether §1395y(b)(1)(C) authorised disparate-impact liability – Whether petitioner's coverage terms for outpatient dialysis violate §1395y(b)(1)(C).

Held (7:2): Judgment of Court of Appeals for the Sixth Circuit reversed and remanded.

West Virginia v Environmental Protection Agency

Supreme Court of the United States: Docket No. 20–1530

Judgment delivered: 30 June 2022

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

Catchwords:

Statutory Interpretation – Scope of authority conferred on agency – Intention of congress – Major questions – Where Environmental Protection Agency ("EPA") promulgated Clean Power Plan rule, which addressed carbon dioxide emissions from existing coal-fired and natural-gas-fired power plants – Where, for authority, EPA cited Section 111 of *Clean Air Act*, which, authorised regulation of certain pollutants from existing sources (Section 111(d), 42 USC §7411(d)) – Where, prior to Clean Power Plan, EPA had used Section 111(d) only few times since enactment – Where, under provision, although States set actual enforceable rules governing existing power sources, EPA determined emissions limit – Where EPA derives limit by determining "best system of emission reduction… adequately demonstrated," or BSER, for existing source (§7411(a)(1)) – Where, in Clean Power Plan, EPA determined BSER for existing coal and natural gas plants included three types of measures, called "building blocks" (80 Fed Reg 64667) – Where, having determined BSER, EPA then determined "degree of emission limitation achievable through application" of system (§7411(a)(1)) – Where, from projected changes, EPA determined applicable emissions performance rates – Where Supreme Court stayed Clean Power Plan in 2016, preventing rule from taking effect and later repealed – Where, in 2019, EPA found Clean Power Plan had exceeded EPA's statutory authority, which EPA interpreted to limit BSER to systems operating at building, structure, facility, or installation" (84 Fed Reg 32524) and, rather, Clean Power Plan, based standard on "shift in energy generation mix at grid level" – Where Agency determined interpretive question raised by Clean Power Plan fell under "major questions doctrine",

requiring clear statement for Court to conclude Congress intended to "delegate authority of breadth to regulate fundamental sector of economy" – Where, finding none, EPA replaced Clean Power Plan by promulgating different Section 111(d) regulation, known as Affordable Clean Energy ("ACE") rule – Where several States and private parties filed petitions for review in DC Circuit, challenging EPA's repeal of Clean Power Plan and enactment of replacement ACE rule – Whether case justiciable notwithstanding Government's contention no petitioner has Article III standing – Whether EPA, pursuant to Section 111(d) of *Clean Air Act*, has authority from Congress to devise emissions caps based approach EPA took in Clean Power Plan.

Environmental law – Environmental Protection Agency – *Clean Air Act* – Clean Power Plan – Emission limits – Emission caps.

Held (6:3): Judgment of Court of Appeals for the District of Colombia Circuit reversed and remanded.

Taxation

Canada (Attorney General) v Collins Family Trust
Supreme Court of Canada: [2022] SCC 26

Judgment delivered: 17 June 2022

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

Catchwords:

Taxation – Income tax – Equity – Remedies – Rescission – Where taxpayers mistaken about income tax consequences of transactions freely agreed upon – Where taxpayers petitioned for rescission of transactions – Whether equitable remedy of rescission available.

Held (8:1): Appeal allowed, judgments of Court of Appeal and of chambers judge set aside and petitions dismissed.

Telecommunications

Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd; Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd and AP Wireless II (UK) Ltd; On Tower UK Ltd (formerly known as Arqiva Services Ltd) v AP Wireless II (UK) Ltd
Supreme Court of the United Kingdom: [2022] UKSC 18

Judgment delivered: 22 June 2022

Coram: Lord Hodge, Lord Sales, Lord Leggatt, Lord Burrows, Lady Rose

Catchwords:

Telecommunications – Electronic communications – *Electronic Communications Code* ("Code") – Where Code came into force in 2017 and formed Schedule 3A to *Communications Act 2003* ("2003 Act") – Where *Digital Economy Act 2017* ("2017 Act") inserted Code into 2003 Act and made provision for transition of existing arrangements made under old code ("transitional provisions") – Where old code empowered courts to intervene to require unwilling landowner to provide settling terms and conditions on which operator would install and maintain relevant electronic communications apparatus ("ECA") – Where, in March 2004, Vodafone Ltd entered into lease with Compton Beauchamp Estates Ltd, entitling Vodafone to install telecommunications mast – Where lease for term of 10 years and expired on 25 March 2014 – Where tenancy at will arose but terminated by Compton Beauchamp in October 2017 – Where old code prevented Compton Beauchamp from removing ECA by deeming presence of ECA on land to be lawful (para 21(9) of old code) and requiring Compton Beauchamp to apply for court order under para 21(6) of old code to remove it – Where Cornerstone, joint venture formed with Vodafone and Telefonica, applied to Upper Tribunal under Code seeking longer term rights and temporary rights – Where para 9 of Code provided right in respect of land may only be conferred on operator under agreement between occupier of land and operator – Where Upper Tribunal held Tribunal had no jurisdiction to impose agreement on Compton Beauchamp conferring code rights on Cornerstone because Vodafone, not Compton Beauchamp, in occupation of site – Whether and how operator who has already installed ECA on site can acquire new or better code rights from site owner.

Held (5:0): On Tower's appeal allowed; Cornerstone's appeal dismissed.

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e.tv (Pty) Limited v Minister of Communications and Digital Technologies; Media Monitoring Africa and Another v e.tv (Pty) Limited

Constitutional Court of South Africa: [2022] ZACC 22

Judgment delivered: 28 June 2022

Coram: Kollapen, Majiedt, Mathopo, Mhlantla JJ, Mlambo AJ, Theron, Tshiqi JJ and Unterhalter AJ

Catchwords:

Telecommunications – Television broadcasting – Migration from analogue to digital signal – Where South Africa in "dual illumination period", during which both analogue and digital transmissions used – Where analogue switch-off scheduled for 30 June 2022 – Where applications brought challenging order of High Court permitting Minister of Communications and

Digital Technologies ("Minister") to complete digital migration process – Whether rights under ss 16 and 27 of *Constitution*, being right to freedom of expression and right to receive social assistance, are infringed – Whether, if Minister's power executive, Minister acted rationally – Whether, if power administrative in nature, Minister adequately consulted, as required by *Promotion of Administrative Justice Act*, before deciding to determine analogue switch-off date.

Held (8:0): Appeal upheld.

Tribal Law

Oklahoma v Castro-Huerta

Supreme Court of the United States: Docket No. 21–429

Judgment delivered: 29 June 2022

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

Catchwords:

Tribal law – Indian country – Jurisdiction to prosecute – Federal government – State government – Where respondent charged by State of Oklahoma for child neglect – Where respondent convicted in state court and sentenced to 35 years of imprisonment – Where, while respondent's state-court appeal pending, Supreme Court decided *McGirt v Oklahoma*, 591 US ___ (2020) – Where Court held Creek Nation's reservation in eastern Oklahoma never been properly disestablished and therefore remained "Indian country" – Where, in light of *McGirt*, eastern part of Oklahoma, including Tulsa, recognized as Indian country – Where respondent argued Federal Government had exclusive jurisdiction to prosecute respondent (non-Indian) for crime committed against stepdaughter (Cherokee Indian) in Tulsa (Indian country), and State therefore lacked jurisdiction to prosecute – Where Oklahoma Court of Criminal Appeals agreed and vacated conviction – Whether State's jurisdiction extends to prosecuting crimes committed by non-Indians against Indians in Indian country – Proper approach to Federal Government and State Government's jurisdiction to prosecute crimes in Indian country.

Held (5:4): Judgment of the Court of Criminal Appeals for Oklahoma reversed and remanded.

Ysleta del Sur Pueblo v Texas

Supreme Court of the United States: Docket No. 20–493

Judgment delivered: 15 June 2022

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

Catchwords:

> Tribal law – Ysleta del Sur Pueblo Indian Tribe – Gaming – *Indian Gaming Regulatory Act* ("IGRA") – Texas gaming officials – Where, in 1968, Congress recognized Ysleta del Sur Pueblo as Indian tribe and assigned trust responsibilities for Tribe to Texas (82 Stat 93) – Where, in 1983, Texas renounced trust responsibilities as inconsistent with State's Constitution and expressed opposition to any new federal trust legislation prohibiting State to apply State gaming laws on tribal lands – Where Congress restored Tribe's federal trust status in 1987 when it adopted *Ysleta del Sur and Alabama and Coushatta Indian Tribes of Texas Restoration Act* (101 Stat 666) – Where *Restoration Act* also "prohibited" as matter of federal law all gaming activities prohibited by laws of Texas – Where Congress adopted comprehensive Indian gaming legislation, *Indian Gaming Regulatory Act* ("IGRA"), which established rules for separate classes of games and permitted Tribes to offer class II games in States that "permi[t] such gaming" (25 USC §2710(b)(1)(A)) – Where IGRA allowed Tribes to offer class III games only pursuant to negotiated tribal/state compacts (§2703(8)) – Where Tribe sought to negotiate compact with Texas to offer class III games, but Texas refused, arguing *Restoration Act* displaced IGRA and required Tribe to follow all of State's gaming laws on tribal lands – Where District Court held Texas violated IGRA by failing to negotiate in good faith, but Fifth Circuit reversed (36 F 3d 1325, 1326, 1334 ("*Ysleta I*")) – Where, in 2016, Tribe began to offer class II game – Where Texas sought to shut down all of Tribe's bingo operations – Where, bound by *Ysleta I*, District Court sided with Texas and enjoined Tribe's bingo operations – Where Fifth Circuit reaffirmed *Ysleta I* – Whether *Restoration Act*, as matter of federal law, bans on tribal lands only gaming activities also banned in Texas.

Held (5:4): Judgments of Court of Appeals for the Fifth Circuit vacated and remanded.

Women, Children and Reproductive Rights

Dobbs v Jackson Women's Health Organization

Supreme Court of the United States: Docket No. 19–1392

Judgment delivered: 24 June 2022

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

Catchwords:

> Women, children and reproductive rights – Abortion – *Roe v Wade*, 410 UD 113 – *Planned Parenthood of Southeastern Pa v Casey*, 505 US 833 – Where

Mississippi's Gestational Age Act provides, except in medical emergency or in case of severe fetal abnormality, person shall not intentionally or knowingly perform or induce abortion of unborn human being if probable gestational age of unborn human being been determined to be greater than 15 weeks (Miss Code Ann §41–41–191) – Where respondents challenged Act in Federal District Court alleging it violated Court's precedents establishing constitutional right to abortion, in particular *Roe* and *Casey* – Where District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of Act, reasoning Mississippi's 15-week restriction on abortion violated Court's cases forbidding States to ban abortion pre-viability – Where Fifth Circuit affirmed – Whether *Roe* and *Casey* wrongly decided – Whether Mississippi's Act constitutional.

Constitutional law – Constitutional rights – Fourteenth Amendment – "Liberty" – Interpretation – *Stare decisis* – Proper approach to rational-basis review – Whether constitutional right to abortion exists.

Held (6:3): Judgments of Court of Appeals for the Fifth Circuit reversed and remanded.

The Voice of the Unborn Baby and Another v Minister of Home Affairs

Constitutional Court of South Africa: [2022] ZACC 20

Judgment delivered: 15 June 2022

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

Catchwords:

Women, children and reproductive rights – Burial – Foetus – Still-birth – Where s 20(1) of *Births and Deaths Registration Act* ("BADRA") provides no burial shall take place unless notice of death or still-birth has been given to person contemplated in section 4 and prescribed burial order issued – Where s 1 of BADRA defines "burial" as disposal of corpse, "corpse" as including body of still-born child, and "still-born" as child with at least 26 weeks of intra-uterine existence – Where High Court declared s 20(1) invalid – Where s 18 of BADRA concerned issuance of certificate prescribing child still-born – Whether s 20(1), read with ss 1 and 18 of BADRA, inconsistent with *Constitution* insofar as they prohibit burial of foetal remains other than in cases of still-birth.

Constitutional law – Rights to privacy, dignity, religion and equality – Whether s 20(1), read with ss 1 and 18 of BADRA, infringes constitutional rights.

Held (8:0): Order of constitutional invalidity not confirmed.
