



OVERSEAS DECISIONS BULLETIN

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

Volume 13 Number 1 (1 January – 29 February 2016)

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 and the Supreme Court of New Zealand. Admiralty, arbitration and constitutional decisions of the Court of Appeal of Singapore.

Administrative Law

Youssef v Secretary of State for Foreign and Commonwealth Affairs
Supreme Court of the United Kingdom: [\[2016\] UKSC 3](#).

Judgment delivered: 27 January 2016.

Coram: Lord Neuberger, Lord Mance, Lord Wilson, Lord Sumption, Lord Carnwath.

Catchwords:

Administrative Law — Determination by Minister — United Nations Security Council sanctions — Foreign Secretary lifting hold on claimant's inclusion in United Nations Security Council's list of persons associated with terrorist organisation — Claimant consequently included on list and on European Union's sanctions list — Government subsequently concluding criteria for inclusion no longer met and seeking claimant's removal from Security Council's list — Government declining to support claimant's request for removal from European Union's sanctions list — Claim for judicial review of Foreign Secretary's decision — Whether full merits review appropriate — Test to be applied by Foreign Secretary for inclusion on list — Whether Foreign Secretary required to maintain hold on listing where designating state relying on foreign conviction obtained through evidence acquired under torture.

Held (5:0): Appeal dismissed.

Canadian Pacific Railway Co v Canada
Supreme Court of Canada: [2016 SCC 1](#).

Judgment Date: 15 January 2016.

Coram: McLachlin CJ and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

Catchwords:

Administrative law — Boards and tribunals — Regulatory boards — Canadian Transportation Agency — Transportation law — Railways — Regulatory process — Presumption agency acted properly in amending rail regulations — Where no facts adduced rebutting presumption — Regulations amending the Railway Interswitching Regulations, SOR/2014-193.

Held (9:0): Appeal dismissed.

Federal Energy Regulatory Commission v Electric Power Supply Association

Enernoc Inc v Electric Power Supply Association

Supreme Court of the United States: [Docket 14-840](#), [Docket 14-841](#).

Judgment Date: 25 January 2016.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor and Kagan JJ.

Catchwords:

Administrative law — Where the *Federal Power Act* authorises the Federal Energy Regulatory Commission to regulate “the sale of electric energy at wholesale in interstate commerce,” including both wholesale electricity rates and any rule or practice “affecting” such rates — Where the *Federal Power Act* leaves the regulation of “any other sale” of electricity to the states — Where the FPA provides FERC with the authority to regulate wholesale market operators’ compensation of demand response bids because the practices at issue directly affect wholesale rates.

Held (6:2): Reversed and remanded.

Admiralty

The “Chem Orchid” and another matter

The Singapore Court of Appeal: [\[2016\] SGCA 04](#).

Judgment Date: 20 January 2016.

Coram: Sundaresh Menon CJ, Chao Hick Tin JA, Andrew Phang Boon Leong JA, Judith Prakash J and Quentin Loh J.

Catchwords:

Admiralty and shipping — Civil procedure — Jurisdiction — Admiralty jurisdiction — Right to appeal — Practice and procedure of action in rem — Writ *in rem* — Where applicants did not seek leave — No right to appeal against an order refusing to strike out a writ action.

Held (5:0): Appeal dismissed.

Children

In re B (A Child)

Supreme Court of the United Kingdom: [\[2016\] UKSC 4](#).

Judgment delivered: 3 February 2016.

Coram: Lady Hale, Lord Clarke, Lord Wilson, Lord Sumption, Lord Toulson.

Catchwords:

Children — Custody rights — Jurisdiction — Habitual residence — Child born in England to mother in same sex relationship with applicant — Mother permanently removing child to Pakistan after separating from applicant — Applicant seeking shared residence order, contact order and orders to assist her in locating the child — Court declining jurisdiction on ground that child no longer habitually resident in England when application issued — Whether child’s habitual residence in England and Wales lost on arrival in Pakistan — Whether child remaining habitually resident in England and Wales — Whether jurisdiction to make orders sought

Held (3:2): Appeal allowed.

Constitutional Law

Hurst v Florida

Supreme Court of the United States: [Docket No 14-7505](#).

Judgment delivered: 12 January 2016.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Constitutional law — Sixth Amendment — Capital Punishment — Florida's capital-sentencing scheme — Where a jury renders an "advisory sentence" but a judge must independently weigh the aggravating and mitigating factors before entering a sentence of life or death — Where Florida's capital-sentencing scheme violates the Sixth Amendment — Applied *Ring v. Arizona*.

Held (8:1): Reversed and remanded.

Kanas v Carr

Supreme Court of the United States: [Docket 14-449](#).

Judgment delivered: 20 January 2016.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Constitutional law — Eighth Amendment — Criminal procedure — Cruel and unusual punishments — The Eighth Amendment does not require capital-sentencing courts to instruct a jury that mitigating circumstances need not be proved beyond a reasonable doubt — The Constitution did not require severance of joint sentencing proceedings.

Held (8:1): Reversed and remanded.

Montgomery v Louisiana

Supreme Court of the United States: [Docket 14-280](#).

Judgment delivered: 25 January 2016.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Constitutional law — Eighth Amendment — Criminal procedure — Cruel and unusual punishments — Life imprisonment without parole for juvenile offenders is unconstitutional per *Miller v Alabama* — Retroactive application of constitutional law — *Miller* is a new substantive rule that, under the Constitution, is retroactive in cases on state collateral review.

Held (6:3): Reversed and remanded.

Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Ors

Constitutional Court of South Africa: [\[2015\] ZACC 2.](#)

Judgment delivered: 29 January 2016.

Coram: Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ, Van der Westhuizen J and Zondo J.

Catchwords:

Constitutional law — Provincial interference with municipalities' exclusive and constitutionally-enshrined domain — Section 156(1) of the Constitution — Local government competences — Provincial government competences — Municipal planning decisions lie within the exclusive competence of municipalities — *KwaZulu-Natal Planning and Development Act 6 of 2008* — Where section 45 allows appeals from municipalities decision to the Appeal Tribunal — Section 45 is constitutionally invalid.

Held (9:0): Appeal dismissed.

Minister for Environmental Affairs and Anor v Aquarius Platinum (SA) (Pty) Ltd and Ors

Constitutional Court of South Africa: [\[2016\] ZACC 4.](#)

Judgment delivered: 23 February 2016.

Coram: Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ, Van der Westhuizen J and Zondo J.

Catchwords:

Constitutional law — Constitutional validity of publication — *National Environmental Management Laws Amendment Act 25 of 2014* — Constitutional validity of publication of Act in absence of regulations — Where Act came into force 3 months after publication — Where regulations were not prepared before Act came into force — Rationality of President's decision to publish Act in absence of regulations — Publication

of Act may precede regulations — Decision not irrational — Act validly promulgated.

Held (9:0): Appeal allowed.

Criminal Law

R v Secretary of State for Justice

Supreme Court of the United Kingdom: [\[2016\] UKSC 2.](#)

Judgment delivered: 27 January 2016.

Coram: Lady Hale, Lord Clarke, Lord Wilson, Lord Carnwath, Lord Hughes.

Catchwords:

Criminal law — Mental disorder — Admission for treatment — Compulsory detention — Claimant committing double murder on release from compulsory detention in psychiatric hospital — Claimant convicted and sentenced to life imprisonment — While serving sentence claimant transferred to high security psychiatric hospital and later to medium security hospital — After completion of tariff period of sentence claimant's responsible clinician applying for claimant to have unescorted leave in the community so as to assess his suitability for discharge — Application refused by Secretary of State — Claimant seeking judicial review and anonymity order for non disclosure of his identity — High Court dismissing claim and refusing anonymity order — Court of Appeal dismissing appeal against refusal of anonymity order — Whether general presumption of anonymity in civil proceedings relating to patients compulsorily detained in psychiatric hospitals — Whether anonymity order to be made in claimant's case

Held (5:0): Appeal allowed.

R v Taylor

Supreme Court of the United Kingdom: [\[2016\] UKSC 5.](#)

Judgment delivered: 3 February 2016.

Coram: Lord Neuberger, Lady Hale, Lord Mance, Lord Sumption, Lord Carnwath, Lord Hughes, Lord Toulson.

Catchwords:

Criminal law — Road traffic — Aggravated vehicle taking — Accident causing fatal injury — Defendant driving vehicle without owner's consent — Rider of scooter killed in collision with vehicle — No evidence defendant at fault — Defendant charged with aggravated vehicle taking — Whether necessary for prosecution to prove fault in relation to driving of vehicle —

Whether driving with excess alcohol constituting such fault — *Theft Act 1968* (c 60), s 12A (as inserted by Aggravated Vehicle-Taking Act 1992 (c 11) s 1(1)(3) and amended by *Criminal Justice Act 2003* (c 44), s 285(1))

Held (7:0): Allowed appeal.

R v Jogee

Ruddock v The Queen

Supreme Court of the United Kingdom: [\[2016\] UKSC 8](#); [\[2016\] UKPC 7](#).

Judgment delivered: 18 February 2016.

Coram: Lord Neuberger, Lady Hale, Lord Hughes, Lord Toulson, Lord Thomas.

Catchwords:

Criminal law — Joint enterprise — Instructions to jury — Where trial judge gave instructions that appellants were guilty if they knew criminal third party 'might' intend to kill or harm the victim derived from *Chan Wing-Siu*[1985] 1 AC 168 and *R v Powell and English* [1991] 1 AC 1 — Overturned *Chan Wing-Siu* and *Powell* — Foresight is simply evidence of intent to assist or encourage, which is the proper mental element for establishing secondary liability.

Held (5:0): Appeal allowed.

Equity

Montanile v Board of Trustees of the National Elevator Industry Health Benefit Plan

Supreme Court of the United States: [Docket No 14-723](#).

Judgment delivered: 20 January 2016.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Equity — Equitable remedy — *Employee Retirement Income Security Act 1974* — Where an ERISA-plan participant receives funds from a third party for injuries — When an ERISA-plan participant wholly dissipates a third-party settlement on non traceable items — The plan fiduciary may not bring suit to attach the participant's separate assets under Section 502(a)(3) — Plan is not seeking equitable relief under the circumstances of seeking to recover general funds.

Held (8:0): Reversed and remanded.

Immigration Law

Mirga v Secretary of State for Work and Pensions

Samin v Westminster City Council

Supreme Court of the United Kingdom: [\[2016\] UKSC 1](#).

Judgment delivered: 26 January 2016.

Coram: Lord Neuberger, Lady Hale, Lord Kerr, Lord Clarke, Lord Reed.

Catchwords:

European Union — Freedom of movement — Right to reside — Equal treatment — Polish citizen not acquiring right to reside under workers registration scheme and refused income support — Whether national legislation excluding European Union citizens from social assistance benefits despite such benefits being available to nationals of host state in breach of fundamental rights of European Union citizens — Whether European Union legislation precluding national legislation — Income Support (General) Regulations 1987 (SI 1987/1967) — Parliament and Council Directive 2004/38/EC — FEU Treaty, art 21(1)FEU

Local government — Homeless persons — Migrants from European Union member states — Austrian citizen entering United Kingdom to reside — Health problems adversely affecting ability to work — Local authority refusing application for housing as homeless person after eviction from private tenancy — Whether entitled to housing as European Union migrant — Housing Act 1996 (c 52), Pt VII — Parliament and Council Directive 2004/38/EC — FEU Treaty, art 18FEU

Held (5:0): Appeals dismissed

Minister of Home Affairs v Rahim and Ors

Constitutional Court of South Africa: [\[2016\] ZACC 3](#).

Judgment delivered: 18 February 2016.

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ, Van der Westhuizen J and Zondo J.

Catchwords:

Immigration — Detention — *Immigration Act* 13 of 2002 — Section 34(1) — Illegal foreigners — Where respondents detained in places not determined for detention by the Director-General — Damages for wrongful detention.

Held (10:0) Appeal dismissed.

Industrial Relations

Steenkamp and Ors v Edcon Limited

Constitutional Court of South Africa: [\[2016\] ZACC 1](#).

Judgment delivered: 22 January 2016.

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J.

Catchwords:

Industrial relations — *Labour Relations Act* 66 of 1995 — Large-scale retrenchments — Dismissal for operational requirements — Non-compliance with section 189A(8) — Where notices of termination issued before facilitator appointed — Where notice of dismissal not invalid but may be unfair— Remedies — Statutory remedy not common law remedy for breach of *Labour Relations Act*

Held (9:2): Appeal dismissed.

Negligence

Kennedy v Cordia (Services) LLP

Supreme Court of the United Kingdom: [\[2016\] UKSC 6](#).

Judgment delivered: 10 February 2016.

Coram: Lady Hale, Lord Wilson, Lord Reed, Lord Toulson and Lord Hodge.

Catchwords:

Negligence — Management of Health and Safety at Work Regulations 1999 — Where appellant slipped on frozen path outside a client's home — Where respondent had completed risk assessment that identified the risk of slipping on a frozen path for home visits — Lord Ordinary was entitled to conclude that the respondents had been negligent.

Evidence — Admissibility — Expert witness — Where expert witness included inadmissible statements — Experienced judge could treat the statements as opinions and make up his own mind to the legal questions.

Held (5:0): Appeal allowed.

Knauer v Ministry of Justice

Supreme Court of the United Kingdom: [\[2016\] UKSC 9](#).

Judgment delivered: 24 February 2016.

Coram: Lord Neuberger, Lady Hale, Lord Mance, Lord Clarke, Lord Reed, Lord Toulson, Lord Hodge.

Catchwords:

Negligence — Assessment of damages — Calculated damages for loss of dependency from the date of trial — Overturned *Cookson v Knowles* [1976] AC 556 and *Graham v Dodds* [1983] 1 WLR 808.

Held (7:0): Appeal allowed.

Planning

Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Ors

Constitutional Court of South Africa: [\[2015\] ZACC 2](#).

Judgment delivered: 29 January 2016.

Coram: Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ, Van der Westhuizen J and Zondo J.

Catchwords:

KwaZulu-Natal Planning and Development Act 6 of 2008 — constitutionality of section 45 — provision is constitutionally invalid
Section 156(1) of the Constitution — local government competences — provincial government competences — municipal planning decisions lie within the exclusive competence of municipalities

Held (9:0): Appeal dismissed.

Procedure

Bruce v Samuels

Supreme Court of the United States: [Docket No 14-844](#).

Judgment delivered: 12 January 2016.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Procedure — Filing fee — Prisoners — *Prison Litigation Reform Act*, 28 U.S.C. § 1915(b)(2) — Where a prisoner files more than one case or appeal in the federal courts in forma pauperis — Act calls for simultaneous, rather than sequential, recoupment of multiple monthly instalment payments.

Held (9:0): Case affirmed.

Campbell-Ewald Co v Gomez

Supreme Court of the United States: [Docket 14-857](#).

Judgment delivered: 20 January 2016.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Procedure — Class action — Where offer of judgment was given to appellant before the deadline to file a motion for class certification — An unaccepted settlement offer or offer of judgment does not moot a plaintiff's case — District court retains jurisdiction to adjudicate the plaintiff's complaint — A federal contractor is not entitled to immunity from suit for its violation of the *Telephone Consumer Protection Act* when it violated federal law and the government's explicit instructions.

Held (6:3): Affirmed and remanded.

Musacchio v United States

Supreme Court of the United States: [Docket 14-1095](#).

Judgment delivered: 20 January 2016.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Procedure — Appeal — Statute of limitations defence — Where appellant had not raised statute of limitations defence at trial — Statute of limitations defence is not available on appeal.

Procedure — Appeal — Sufficiency challenge — When a jury instruction adds an element to the charged crime — Where government fails to object — A challenge to the sufficiency of the evidence should be assessed against the elements of the charged crime, rather than the elements set forth in the erroneous jury instruction.

Held (9:0): Case affirmed.

Menominee Indian Tribe of Wisconsin v United States et al
Supreme Court of the United States: [Docket 14-510](#).

Judgment delivered: 25 January 2016.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Procedure — Statute of limitations — Equitable tolling is not available to preserve contract claims that were not timely presented to a federal contracting officer.

Held (9:0): Case affirmed.

Taxation

Shop Direct Group v Commissioners for Her Majesty's Revenue and Customs

Supreme Court of the United Kingdom: [\[2016\] UKSC 7](#).

Judgment delivered: 17 February 2016.

Coram: Lord Neuberger, Lord Reed, Lord Carnwath, Lord Hughes, Lord Hodge.

Catchwords:

Taxation — Where appellants received repayment of VAT — VAT repayments are liable to corporation tax under the *Income and Corporations Taxes Act 1988*.

Held (5:0): Appeal dismissed.
