



OVERSEAS DECISIONS BULLETIN

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

Administrative Law

Babcock v Kijakazi, Acting Commissioner of Social Security
Supreme Court of the United States: [Docket No. 20-480](#)

Judgment delivered: 13 January 2022

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

Catchwords:

Administrative law – Social security – Where *Social Security Act of 1935* reduced benefits to retirees who received separate pension payments from employment not subject to social security taxes – Where reduction not triggered, relevantly, by payments "based wholly on service as member of uniformed service" – Where petitioner dual-status military technician, federal civilian employee who provided technical or administrative assistance to National Guard – Where Sixth Circuit concluded that petitioner's civil-service pension payments were based on service in civilian capacity and therefore uniformed-services exception did not apply – Whether uniformed-services exception applies to civil-service pension payments based on employment as dual-status military technician.

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

Biden v Missouri; Becerra, Secretary of Health and Human Services v Louisiana

Supreme Court of the United States: [Docket Nos. 21A240 and 21A241](#)

Judgment delivered: 13 January 2022

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

Catchwords:

Administrative law – Stay of injunction – Covid-19 – Vaccination mandate – Where Congress authorised Secretary of Health and Human Services to impose conditions on receipt of Medicare and Medicaid funds that "Secretary finds necessary in interest of health and safety of individuals who are furnished services" – Where Secretary announced that to receive Medicare and Medicaid funding, participating facilities needed to ensure staff were vaccinated against Covid-19 – Where two District Courts enjoined enforcement of rule – Whether Secretary's rule falls within authority Congress conferred – Whether Secretary exceeded statutory authority – Whether to stay injunctions.

Held (5:4): Applications for stays granted.

Federal Bureau of Investigation v Fazga

Supreme Court of the United States: [Docket No. 20-828](#)

Judgment delivered: 4 March 2022

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

Catchwords:

Administrative law – Where respondents, members of Muslim communities in California, filed putative class action against Federal Bureau of Investigation and certain Government officials, claiming that Government subjected them and other Muslims to illegal surveillance under *Foreign Intelligence Surveillance Act of 1978* ("FISA") – Where FISA provided special procedures for use when Government wished to conduct foreign intelligence surveillance including, pursuant to §1806(f), procedure under which trial-level court could consider legality of electronic surveillance – Where Government moved to dismiss most of respondents' claims under "state secrets" privilege – Where District Court determined dismissal appropriate because litigation of dismissed claims "would require or unjustifiably risk disclosure of secret and classified information" – Where Ninth Circuit reversed in relevant part, holding that "Congress intended FISA to displace state secrets privilege and its dismissal remedy with respect to electronic surveillance" – Whether §1806(f) displaces state secrets privilege.

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

Municipal Employees Pension Fund & Anor v Mongwaketse
Constitutional Court of South Africa: [\[2022\] ZACC 9](#)

Judgment delivered: 14 March 2022

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

Catchwords:

Administrative law – Social security – Jurisdiction – Meaning of "complainant" and "complaint" – Where respondent lodged grievance with Pension Fund Adjudicator ("Adjudicator") in terms of Chapter VA of *Pension Funds Act 24 of 1956* ("Act") against Municipal Employees Pension Fund ("MEPF") and Akani Retirement Fund Administrators (Pty) Limited, MEPF's administrator – Where grievance concerned respondent's purported membership of MEPF – Where Adjudicator found in favour of respondent, ordering MEPF to repay all contributions made in respect of her purported membership – Where Adjudicator's function to investigate and dispose of "complaints" of "complainants" – Where s 1 of Act defined "complainants" to include member or former member of fund – Whether respondent's grievance "complaint" and respondent "complainant" as defined in s 1 of Act.

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

National Federation of Independent Business v Department of Labor, Occupational Safety and Health Administration; Ohio v Department of Labor, Occupational Safety and Health Administration
Supreme Court of the United States: [Docket Nos. 21A244 and 21A247](#)

Judgment delivered: 13 January 2022

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

Catchwords:

Administrative law – Applications for stays – Covid-19 – Vaccination mandate – Where Occupational Safety and Health Administration tasked with ensuring occupational safety and does so by enforcing occupational safety and health standards promulgated by Secretary of Labor – Where standards must be "reasonably necessary or appropriate to provide safe or healthful employment" and must be developed through notice-and-comment procedures, except for "emergency temporary

standards" – Where Secretary enacted vaccination mandate requiring all employers with at least 100 employees to ensure workforces were vaccinated – Where covered employers required to "develop, implement, and enforce a mandatory Covid-19 vaccination policy" – Whether Secretary authorised to impose mandate – Whether applicants likely to succeed on merits of claim such that stays should be granted.

Held (6:3): Applications for stays granted.

R (on the application of O (a minor, by her litigation friend AO)) v Secretary of State for the Home Department; R (on the application of The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department

Supreme Court of the United Kingdom: [\[2022\] UKSC 3](#)

Judgment delivered: 2 February 2022

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

Catchwords:

Administrative law – Citizenship – Nationality – Where claimant, O, born in United Kingdom, had Nigerian citizenship, but from 10th birthday satisfied requirements to apply for registration as British citizen under *British Nationality Act 1981* – Where application made to register O as British citizen but O's mother unable to raise full amount of fee, only enough to cover administrative costs – Where Secretary of State refused to process application because full fee not paid – Where fees fixed in subordinate legislation, including *under Immigration and Nationality (Fees) Regulations 2018*, at such level designed to produce substantial surplus – Where large number of children and families could not afford fee charged – Whether right to citizenship is rendered nugatory by high fees in subordinate legislation, including *under Immigration and Nationality (Fees) Regulations 2018* – Whether subordinate legislation ultra vires.

Held (5:0): Appeal dismissed.

Arbitration

Badgerow v Walters

Supreme Court of the United States: [Docket No. 20-1143](#)

Judgment delivered: 31 March 2022

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

Catchwords:

Arbitration – Arbitral awards – Federal jurisdiction – Where s 4 of *Federal Arbitration Act* ("FAA") provided party may petition court to compel arbitration proceeding, where arbitration agreement contemplates – Where FAA does not create subject matter of jurisdiction and federal court required to have independent jurisdictional basis – Where, in *Vaden v Discover Bank*, 556 US 49, Court determined whether jurisdictional basis to decide FAA s 4 petition to compel arbitration by examining parties' underlying dispute – Where, in *Vaden*, Court held s 4 instructed a federal court to "look through" petition to "underlying substantive controversy" – Where Badgerow commenced arbitration proceeding against employer alleging unlawful termination – Where arbitrators dismissed claims and Badgerow filed suit in Louisiana state court to vacate arbitral award – Where Walters removed case to Federal District Court and applied to confirm award – Where Badgerow moved to remand case to state court, arguing federal court lacked jurisdiction – Where District Court applied *Vaden*, finding jurisdiction in federal law claims contained in underlying employment action – Where Fifth Circuit affirmed – Whether "look through" approach to jurisdiction applies to applications to confirm or vacate arbitral awards.

Held (8:1): Judgment of Court of Appeals for the Fifth Circuit reversed and case remanded.

BZW & Anor v BZV

Singapore Court of Appeal: [\[2022\] SGCA 1](#)

Judgment delivered: 12 January 2022

Coram: Menon CJ, Prakash and Chong JJCA

Catchwords:

Arbitration – Award – Recourse against Award – Remission – Where respondent entered into contract with appellants for construction of vessel – Where dispute arose over delay in construction and quality of vessel's generators – Where respondent pursued two claims against appellants: first, claim for liquidated damages due to delay ("Delay Claim"); and second, claim for installation of inadequate generators ("Rating Claim") – Where Tribunal held, relevantly, appellants were delayed in delivering vessel, but dismissed Delay Claim – Where Tribunal dismissed respondent's claims and appellants' counterclaims – Where subsequent applications to Tribunal for corrections to, and interpretation of, Award – Where, on application to High Court, necessary for judge to attempt to arrange Tribunal's findings into "coherent chain of reasoning" – Where judge held no nexus between Tribunal's chain of reasoning and parties' arguments – Where judge set aside part of Award which dismissed respondent's claims in arbitration and refused to exercise discretion to remit Award to Tribunal – Whether respondent filed application to set aside Award within three month time limit – Whether three-month period contemplates subsequent applications – Proper approach to Art 34(3) of UNCITRAL Model Law on

International Commercial Arbitration prescribing application for setting aside may not be made after three months have elapsed – Whether Tribunal breached rules of natural justice in dealing with claims – Whether to remit Award to Tribunal.

Held (3:0): Appeal dismissed.

National Oilwell Varco Norway AS (formerly known as Hydralift AS) v Keppel FELS Ltd d (formerly known as Far East Levingston Shipbuilding Ltd)

Singapore Court of Appeal: [\[2022\] SGCA 24](#)

Judgment delivered: 16 March 2022

Coram: Menon CJ, Prakash and Loh JJCA

Catchwords:

Arbitration – Enforcement – Setting aside leave to enforce – Where enforcement of arbitral awards provided for in s 19 of *International Arbitration Act* (Cap 143A, 2002 Rev Ed), which empowered court to enforce award in same manner as judgment or order "to same effect" and to enter judgment against debtor only "in terms of award" – Where appellant sought to enforce final award, which issued not in its name, but in name of company that no longer existed, A/S Hydralift ("Hydralift") – Where, following two mergers as part of corporate restructuring exercise, appellant assumed all assets, rights, obligations and liabilities of Hydralift – Where respondent commenced arbitration against Hydralift and appellant appeared and defended claim whilst purporting to be Hydralift, never disclosing fact of mergers – Where appellant succeeded in counterclaim and made ex parte application seeking to enforce award against respondent – Where appellant's application in High Court set aside – Whether use of name Hydralift nothing more than misnomer – Whether appellant entitled to enforce award.

Held (3:0): Appeal allowed.

Civil Procedure

Anderson v Alberta

Supreme Court of Canada: [\[2022\] SCC 6](#)

Judgment delivered: 18 March 2022

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

Catchwords:

Civil procedure – Costs – Advance costs – Requirement of impecuniosity – Where First Nation government applied for advance costs to fund litigation concerning treaty rights – Whether impecuniosity requirement can be met where applicant has access to financial resources that could fund litigation but claims that it must devote resources to other priorities.

Held (9:0): Appeal allowed.

Cameron v EMW Women’s Surgical Center, PSC
Supreme Court of the United States: [Docket No. 20–601](#)

Judgment delivered: 3 March 2022

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

Catchwords:

Civil procedure – Motion to intervene – Where EMW Women’s Surgical Center and two doctors filed federal suit seeking to enjoin enforcement of Kentucky House Bill 454 ("HB 454"), legislation regulating abortion procedure – Where named defendants in EMW’s lawsuit included two Commonwealth officials, attorney general and cabinet secretary for Health and Family Services – Where EMW agreed to dismiss claims against attorney general without prejudice, subject to stipulation that attorney general’s office reserved "all rights, claims, and defenses . . . in any appeals" and agreed to be bound by "any final judgment . . . subject to any modification, reversal or vacation of judgment on appeal" – Where District Court held HB 454 unconstitutionally burdened woman’s right to abortion and issued permanent injunction – Where notice of appeal filed and, while appeal pending, Kentucky elected new attorney general, petitioner Cameron, and elected former attorney general, Beshear, Governor – Where Governor Beshear appointed new secretary for Health and Family Services who continued defense of HB 454 on appeal – Where, prior to oral argument before Sixth Circuit, attorney general Cameron entered appearance as counsel for new secretary – Where divided Sixth Circuit panel affirmed District Court’s judgment – Where secretary informed attorney general’s office that secretary would not challenge Sixth Circuit panel’s decision – Where attorney general moved to withdraw as counsel for secretary and to intervene as party on Commonwealth’s behalf – Where Sixth Circuit denied attorney general’s motion to intervene – Whether Sixth Circuit should have permitted attorney general to intervene.

Held (8:1): Judgment of Court of Appeals for the Sixth Circuit reversed and case remanded.

Constitutional Law

Houston Community College System v Wilson
Supreme Court of the United States: [Docket No. 20-804](#)

Judgment delivered: 24 March 2022

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

Catchwords:

Constitutional law – First Amendment – Where Wilson elected to Board of Trustees of Houston Community College System (HCC), public entity operating various community colleges – Where Wilson charged Board repeatedly, in media and in state court actions, with violating ethical rules and bylaws – Where Board adopted public resolution censuring Wilson, stating conduct was "not consistent with best interests of College" and "not only inappropriate, but reprehensible", and imposed penalties – Where Wilson amended pleadings in pending state court lawsuit to add claims against HCC and trustees asserting Board's censure violated First Amendment – Where, on appeal, Fifth Circuit held Wilson had standing to pursue claim and complaint was actionable First Amendment Claim as "reprimand against an elected official for speech addressing matter of public concern" – Whether Wilson has actionable First Amendment claim based on purely verbal censure.

Held (9:0): Judgment of Court of Appeals for the Fifth Circuit reversed.

R v Ali

Supreme Court of Canada: [\[2022\] SCC 1](#)

Judgment delivered: 14 January 2022

Coram: Moldaver, Côté, Brown, Rowe and Jamal JJ

Catchwords:

Constitutional law – Charter of Rights – Search and seizure – Search incident to arrest – Where strip search of accused resulted in seizure of cocaine – Where trial judge found that strip search justified and admitted evidence found during search – Where accused convicted of possession of cocaine for purpose of trafficking – Where Court of Appeal held sufficient evidence to justify trial judge's finding of and probable grounds for strip search and affirmed conviction – Whether police's strip search of Mr Ali complied with s 8 of *Canadian Charter of Rights and Freedoms* in accordance with principles governing strip searches set out in *R v Golden* [2001] 3 SCR 679.

Held (5:0): Appeal dismissed; conviction affirmed.

Speaker of the National Assembly v Public Protector & Ors; Democratic Alliance v Public Protector & Ors

Constitutional Court of South Africa: [\[2022\] ZACC 1](#)

Judgment delivered: 4 February 2022

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

Catchwords:

Constitutional law – Chapter 9 of *Constitution* – Constitutionality of Rules adopted by National Assembly – Where s 194(1) of *Constitution* provided for removal from office of heads and commissioners of Chapter 9 institutions on grounds of misconduct, incapacity or incompetence – Where National Assembly adopted Rules setting out process for removal of office bearer, including appointment of independent panel to conduct preliminary assessment of whether prima facie evidence to remove office bearer – Where rule 129AD(3) provided office bearer entitled to legal representation, provided that legal practitioner did not participate in enquiry – Where rule 129V provided for independent panel to consist of three fit and proper citizens, which may include judge – Where High Court held appointment of judge to independent panel undesirable and limitation of legal representation in rule 129AD(3) irrational – Whether leave to appeal directly from High Court ought be granted – Whether rule 129AD(3) limitation on office bearer's right to legal representation during s 194 enquiry rationally connected to object of personal accountability sought to be achieved – Whether appointment of judge to independent panel offended separation of powers – Whether Rules ultra vires – Whether Rules afford office bearer opportunity to be heard.

Held (9:0): Leave to appeal granted; appeal allowed in part; leave to cross-appeal granted; cross-appeal dismissed.

Tan Seng Kee v Attorney-General & Ors

Singapore Court of Appeal: [\[2022\] SGCA 16](#)

Judgment delivered: 28 February 2022

Coram: Menon CJ, Leong, Prakash, Kwang and Chong JJCA

Catchwords:

Constitutional law – Rights – Where s 377A of Penal Code (Cap 224, 2008 Rev Ed) imposed term of imprisonment on any man who committed, abetted commission of, procured or attempted to procure "commission by any male person of, any act of gross indecency with another male person" – Where s 377A retained on statute books on express basis it would not be proactively enforced – Where Article 9 of *Constitution* protected life and

personal liberty of person – Where Article 14 of *Constitution* provided for right to freedom of speech and expression – Where Article 12 of *Constitution* provided for equality for law and equal protection – Where appellants homosexual men who challenged constitutionality of s 377A of Penal Code – Whether sexual orientation immutable – Proper interpretation of s 377A – Whether s 377A violates Articles 9, 12 and 14 of *Constitution* – Proper approach to doctrine of substantive legitimate expectations.

Held (5:0): Appeal dismissed.

Criminal Law

R v Samaniego

Supreme Court of Canada: [\[2022\] SCC 9](#)

Judgment delivered: 25 March 2022

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

Catchwords:

Criminal law – Trial – Evidence – Admissibility – Cross-examination – Intervention by trial judge – Scope of trial management power – Where curtailment of four lines of questioning by trial judge during cross-examination of Crown witness by accused’s counsel – Whether trial judge’s rulings were proper exercise of trial management power – Whether trial judge erred in curtailing cross-examination – If so, whether curative proviso applies – *Criminal Code*, RSC 1985, c C-46, s 686(1)(b)(iii).

Held (6:3): Appeal dismissed.

R v Vallières

Supreme Court of Canada: [\[2022\] SCC 10](#)

Judgment delivered: 31 March 2022

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

Catchwords:

Criminal law – Sentencing – Discretion of court – Amount of fine – Where fine imposed in lieu of order for forfeiture of property that was proceeds of crime – Whether court has discretion to limit amount of fine in lieu to profit made by offender from their criminal activities – Whether value of property that was proceeds of crime may be apportioned between co-accused – *Criminal Code*, RSC 1985, c C-46, s 462.37(3).

Held (9:0): Appeal allowed.

Ramirez v Collier

Supreme Court of the United States: [Docket No. 21-5592](#)

Judgment delivered: 24 March 2022

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

Catchwords:

Criminal law – Death sentence – Execution protocol – Where Ramirez sentenced to execution – Where Ramirez filed prison grievance asking that his pastor be permitted to lay hands on him and pray over him during execution – Where Texas denied request, but pointed to no provision of execution protocol requiring result and State had history of allowing prison chaplains to engage in such activities – Where Ramirez filed suit alleging that refusal of prison officials to allow pastor to lay hands on him in execution chamber violated his rights under *Religious Land Use and Institutionalized Persons Act of 2000* and First Amendment – Where Ramirez sought stay of execution until District Court considered claims – Where District Court and Fifth Circuit denied request – Whether preliminary injunction should be granted – Whether Ramirez’s execution without requested participation of his pastor should be halted pending full consideration of claims.

Held (8:1): Judgment of Court of Appeals for the Fifth Circuit reversed and case remanded.

United States v Tsarnaev

Supreme Court of the United States: [Docket No. 20-443](#)

Judgment delivered: 4 March 2022

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

Catchwords:

Criminal law – Terrorism – Jury selection – Evidence at sentencing – Where brothers Dzhokhar and Tamerlan Tsarnaev planted and detonated two bombs near Boston Marathon finish line – Where Dzhokhar arrested and indicted for 30 crimes, including 17 capital offences – Where, to prepare for jury selection, parties proposed 100 question screening, which included several questions regarding whether media coverage may have biased prospective jurors – Where District Court declined to include proposed question asking prospective jurors to list facts on case learned from media

– Where jury found Dzhokhar guilty on all counts and Government sought death penalty – Where, at sentencing, Dzhokhar sought mitigation based on theory that Tamerlan masterminded bombing – Where, in support of theory, Dzhokhar sought to introduce statements of Ibragim Todashev, who had alleged during FBI interview that, years earlier, Tamerlan had participated in triple homicide in Waltham, Massachusetts – Where District Court excluded evidence and jury concluded 6 of Dzhokhar's crimes warranted death penalty – Where First Circuit vacated Dzhokhar's capital sentences – Whether District Court abused discretion by declining to ask about content and extent of jurors' media consumption – Whether District Court abused discretion in excluding from sentencing proceeding evidence of Waltham murders.

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

Wooden v United States

Supreme Court of the United States: [Docket No. 20–5279](#)

Judgment delivered: 7 March 2022

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

Catchwords:

Criminal law – Sentencing – Single criminal episode – Meaning of different "occasions" – Where jury convicted Wooden of being felon in possession of firearm in violation of 18 USC §922(g) – Where Government asked District Court to sentence Wooden under *Armed Career Criminal Act* ("ACCA") – Where ACCA mandated 15 year minimum penalty for §922(g) offenders with at least three prior convictions for specified felonies "committed on occasions different from one another" pursuant to §924(e)(1) – Where Wooden's relevant criminal record included 10 burglary convictions arising out of single criminal episode in 1997, during which Wooden burglarized ten units in single storage facility – Where Wooden pleaded guilty to ten counts of burglary, being one for each storage unit – Where, at Wooden's sentencing for §922(g) conviction, District Court applied ACCA's penalty enhancement in accordance with Government's view that Wooden had commenced new "occasion" of criminal activity each time he entered another unit – Where, based on ACCA enhancement, District Court sentenced Wooden to 16 years imprisonment – Where Sixth Circuit affirmed District Court decision – Whether ACCA's occasions clause satisfied whenever crimes take place sequentially rather than simultaneously – Proper meaning of "occasions" in §924(e)(1).

Held (9:0): Judgment of Court of Appeals for the Sixth Circuit reversed.

Discrimination law

Damons v City of Cape Town

Constitutional Court of South Africa: [\[2022\] ZACC 13](#)

Judgment delivered: 30 March 2022

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

Catchwords:

Discrimination law – Unfair discrimination – Disability – Reasonable accommodation – Inherent requirements of job – Where applicant firefighter injured on duty and unable to undertake strenuous physical activity, including completion of firefighter physical assessment – Where physical fitness accepted as inherent requirement of job of operational firefighter – Where applicant claimed respondent discriminating by refusing to waive physical fitness requirement – Whether respondent discriminated unfairly against applicant on grounds of disability – Whether respondent has duty to reasonably accommodate applicant – Whether respondent can rely on defence of inherent requirement of job – Proper approach to "job" in assessing inherent requirement of job.

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

Equity

Bott & Co Solicitors Ltd v Ryanair DAC

Supreme Court of the United Kingdom: [\[2022\] UKSC 8](#)

Judgment delivered: 16 March 2022

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

Catchwords:

Equity – Equitable lien – Where air passengers entitled to compensation and assistance where flight cancelled or delayed – Where appellant specialised in consumer claims on "no win, no fee" basis, including compensation claims against respondent – Where respondent adopted new practice of dealing directly with clients, rather than through third-party claim handlers, including paying compensation directly to clients – Where appellant lost opportunity to deduct its fees from compensation paid by respondent before passing balance to client – Where appellant claimed equitable lien over sums payable by respondent to appellant's clients in compensation for flight delays – Where High Court and Court of Appeal dismissed appellant's claims – Whether equitable lien covers costs charged to clients by appellant for claiming compensation for flights from respondent – Proper boundary of equitable liens.

Held (3:2): Appeal allowed.

Evidence

Hemphill v New York

Supreme Court of the United States: [Docket No. 20-637](#)

Judgment delivered: 20 January 2022

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

Catchwords:

Evidence – Trial – Sixth Amendment – Right to confront witnesses – Where stray 9-millimeter bullet killed child – Where Morris charged with murder but entered into plea deal where he admitted to possession of .357-magnum revolver, being different firearm to one used to kill victim – Where, years later, State prosecuted petitioner Hemphill – Where Hemphill elicited undisputed testimony from prosecution witness that police recovered 9-milimeter ammunition from Morris' night stand – Where Morris not available to testify as outside United States – Where, over objection of Hemphill's counsel, trial court allowed State to introduce parts of transcript of Morris' plea allocution to rebut Hemphill's theory that Morris committed murder – Where trial court reasoned, citing *People v Reid*, 19 N. Y. 3d 382, Hemphill's arguments and evidence opened door to introduction of out-of-court statements reasonably necessary to correct misleading impression Hemphill created – Where Hemphill found guilty – Where Confrontation Clause of Sixth Amendment provided criminal defendant right "to be confronted with witnesses against him" – Where New York Court of Appeal affirmed trial court decision – Whether trial court's admission of Morris' plea allocution under rule in *People v Reid* violated Hemphill's Sixth Amendment right – Whether Hemphill failed to present claim adequately to state courts.

Held (8:1): Judgment of Court of Appeals of New York reversed and case remanded.

United States v Zubaydah

Supreme Court of the United States: [Docket No. 20-827](#)

Judgment delivered: 3 March 2022

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

Catchwords:

Evidence – Discovery – State secrets privilege – Where Zubaydah claimed to be detained at CIA detention site in Poland and subjected to "enhanced interrogation" techniques – Where Zubaydah filed criminal complaint in Poland, seeking to hold accountable Polish nationals involved in mistreatment – Where 28 USC §1782 provided that District Court may order person to provide testimony or documents "for use in proceeding in foreign... tribunal" – Where Zubaydah filed discovery application pursuant to §1782 seeking permission to serve two former CIA contractors with subpoenas requesting information regarding alleged CIA detention facility in Poland and Zubaydah's treatment – Where Government intervened asserting state secrets privilege in opposition to discovery request – Whether information sought to be disclosed protected by state secrets privilege.

Held (7:2; 6:3 (Kagan J dissenting in part)): Case remanded with instructions to dismiss discovery application.

Human Rights

Craig v Her Majesty's Advocate (for the Government of the United States of America) & Anor

Supreme Court of the United Kingdom: [\[2022\] UKSC 6](#)

Judgment delivered: 23 February 2022

Coram: Lord Reed, Lord Lloyd-Jones, Lord Kitchin, Lord Burrows and Lord Stephens

Catchwords:

Human rights – Extradition – Obligations of government – Powers of ministers – Commencement of legislation – Where Scottish Ministers' powers limited under *Scotland Act 1998* ("Act") by requirement not to act incompatibly with rights guaranteed by *European Convention on Human Rights* ("Convention") – Where Article 8 of Convention provided everyone has right to respect for private and family life, home and correspondence – Where Home Secretary failed to make commencement order bringing into force provisions of Act which were designed for protection of individuals whose extradition sought – Where failure successfully challenged and Court issued final order declaring Government acted unlawfully and contrary to duties – Where, despite court order, Government failed to make commencement order and extradition proceedings continued against appellant – Where High Court, in appeal against extradition decision, dismissed arguments that extradition proceedings failed to comply with Article 8 – Whether Scottish Ministers in conducting extradition proceedings against appellant, and decision to order extradition, were ultra vires by

reason of incompatibility with appellant's rights under Article 8 of Convention – Proper effect of Court's declaratory orders.

Held (5:0): Appeal allowed.

PWR v Director of Public Prosecutions; Akdogan & Anor v Director of Public Prosecutions

Supreme Court of the United Kingdom: [\[2021\] UKSC 2](#)

Judgment delivered: 26 January 2022

Coram: Lord Lloyd-Jones, Lady Arden, Lord Hamblen, Lord Burrows and Lady Rose

Catchwords:

Human rights – Criminal law – Terrorism – Where s 13 of *Terrorism Act 2000* provided criminal offence for person in public place to carry or display article in such way or circumstances as to arouse reasonable suspicion of being member or supporter of proscribed organisation – Where Article 10 of *European Convention on Human Rights* ("Convention") provided right to freedom of expression – Where appellants were convicted of s 13 offence for carrying flag of Kurdistan Workers Party, a proscribed organisation – Whether s 13(1) of *Terrorism Act 2000* creates strict liability offence and, if so, whether s 13(1) is compatible with Article 10 of Convention.

Held (5:0): Appeal dismissed.

Industrial Law

Commercial Stevedoring Agricultural and Allied Workers' Union & Ors v Oak Valley Estates (Pty) Ltd & Anor

Constitutional Court of South Africa: [\[2022\] ZACC 7](#)

Judgment delivered: 1 March 2022

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

Catchwords:

Industrial Law – Right to strike – Interdictory relief – Where protected strike called by first applicant commenced at premises of first respondent involving some 364 workers – Where strike triggered incidents of intimidation, damage to property, unlawful interference with first respondent's business operations and numerous breaches of Picketing Rules – Where first respondent sought rule nisi interdicting first applicant, each of 364 workers (referred to as "Individual Respondents") and people who

associated with Individual Respondents (referred to as "Unidentifiable Respondents") from unlawfully interfering with first respondent's operations – Where Labour Appeal Court accepted Labour Court's rejection of "requirement of establishing link between interdicted individuals and impugned conduct" – Whether employer faced with unlawful conduct committed during protected strike can interdict employees participating in strike without linking each employee to unlawful conduct – Whether there must be rational factual connection between actual or threatened unlawful conduct and persons against whom interdict is sought.

Held (8:0): Leave to appeal granted; appeal upheld in part.

Intellectual Property

Unicolors Inc. v H&M Hennes & Mauritz L. P.

Supreme Court of the United States: [Docket No. 20-915](#)

Judgment delivered: 24 February 2022

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

Catchwords:

Intellectual property – Copyright – Infringement – Where valid copyright registration provides copyright holder with right to bring "civil action for infringement" of copyrighted work under *Copyright Act* 17 USC §411(a) – Where Unicolors, owner of various fabric design copyrights, filed copyright infringement action against H&M Hennes & Mauritz ("H&M") – Where H&M sought judgment, arguing Unicolors could not maintain infringement suit because Unicolors knowingly included inaccurate information on registration application, rendering registration invalid – Where alleged inaccuracy stemmed from Unicolors having filed single application seeking registration for 31 separate works despite Copyright Office regulation that provided single application may cover multiple works only if included in same unit of publication – Where H&M argued Unicolors did not meet requirement because Unicolors initially made some of 31 designs available for sale exclusively to certain customers, while offering rest to general public – Where District Court determined because Unicolors did not know, when it filed application, of failure to satisfy single unit of publication requirement, Unicolors' copyright registration remained valid by operation of safe harbor provision under §411(b)(1)(A) – Where §411(b)(1)(A) provided certificate of registration valid, regardless of whether certificate contained inaccurate information, unless information included with knowledge it inaccurate – Where, on appeal, Ninth Circuit determined did not matter whether Unicolors aware of failure to satisfy single unit of publication requirement, because safe harbor excuses only good faith mistakes of fact, not law – Where Ninth Circuit reasoned Unicolors had known relevant facts, so knowledge of law (or lack thereof) irrelevant – Whether §411(b)

distinguishes between mistake of law and mistake of fact – Proper scope of phrase "with knowledge it inaccurate".

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

Practice and Procedure

Municipal Manager O.R. Tambo District Municipality & Anor v Ndabeni
Constitutional Court of South Africa: [\[2022\] ZACC 3](#)

Judgment delivered: 14 February 2022

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

Catchwords:

Practice and procedure – Nullity of court order – Contempt – Where Ndabeni employed on fixed term contract by Municipality – Where Municipality passed Resolution 10/11 converting contract employees to permanent employees – Where Resolution 10/11 did not apply to Ndabeni – Where Ndabeni sought order declaring employment permanent – Where High Court made order in favour of Ndabeni ("Mjali J order") – Where, almost four years after commencement of litigation, Municipal Manager realised that implementing Mjali J order, when no post on staff establishment, would result in Municipal Manager being personally liable for irregular and wasteful expenditure pursuant to s 66(5) of *Local Government: Municipal Systems Act* – Where Municipal Parties contended Mjali J order nullity – Where majority of Supreme Court of Appeal held Mjali J order not nullity and Municipal Parties were in contempt – Whether Mjali J order nullity and unenforceable – Whether Municipal Parties in contempt – Whether Municipal Parties should be compelled to comply with Mjali J order – Whether special costs order justified.

Held (9:0): Application dismissed.

Public Prosecutors Office of the Athens Court of Appeal v O'Connor
Supreme Court of the United Kingdom: [\[2022\] UKSC 4](#)

Judgment delivered: 2 February 2022

Coram: Lord Reed, Lord Hamblen, Lord Leggatt, Lord Burrows and Lord Stephens

Catchwords:

Practice and procedure – Application for leave to appeal – Statutory interpretation – Where s 26(5) of *Extradition Act 2003* provided where

person gives notice of application for leave to appeal after end of permitted period, High Court must not for that reason refuse to entertain application if person did everything reasonably possible to ensure notice given as soon as could be given – Where Court of Appeal of Athens issued European Arrest Warrant requesting extradition of respondent – Where respondent resisted application for extradition – Where Belfast Recorder's Court ordered extradition – Where, after ruling, respondent instructed solicitor to appeal and solicitor announced, orally in court, appeal would be lodged – Where application for leave to appeal lodged by respondent's solicitor, but omitted to serve it on appellant until three weeks later – Where accepted failure to serve notice fault of solicitor – Where Divisional Court in Northern Ireland interpreted s 26(5) such that not necessary to hold person responsible for failings of legal representatives – Whether distinction exists between actions of person who has done everything possible to give notice of application for leave to appeal to High Court against extradition order within time limit and actions of person's legal representative who has not – Proper test under s 26(5) of *Extradition Act*.

Held (5:0): Appeal dismissed.

Privacy

Bloomberg LP v ZXC

Supreme Court of the United Kingdom: [\[2022\] UKSC 5](#)

Judgment delivered: 16 February 2022

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

Catchwords:

Privacy – Misuse of private information – Proper approach to reasonable expectation of privacy – Where UK criminal law enforcement body ("UKLEB") investigated company, specifically division of company for which ZXC responsible, which operated overseas in several foreign countries – Where Bloomberg published article containing information almost exclusively obtained from confidential Letter of Request by UKLEB to foreign state – Where ZXC brought claim for misuse of private information arising out of article – Whether there exists general rule that person under criminal investigation has, prior to being charged, reasonable expectation of privacy in respect of information relating to investigation – Whether, outside breach of confidence claim, fact that information published about criminal investigation originated from confidential law enforcement document rendered information private and/or undermined Bloomberg's ability to rely on public interest in its disclosure.

Held (5:0): Appeal dismissed.

Property

Croydon London Borough Council v Kalonga
Supreme Court of the United Kingdom: [\[2022\] UKSC 7](#)

Judgment delivered: 9 March 2022

Coram: Lord Briggs, Lady Arden, Lord Kitchin, Lord Leggatt and Lord Stephens

Catchwords:

Property – Secure tenancies – Fixed term – Termination of secure tenancy by landlord – Where statutory regime for secure tenancies first introduced by *Housing Act 1980* ("1980 Act"), with provisions consolidated in *Housing Act 1985* ("1985 Act") – Where statutory regime provided tenancy not be brought to end by landlord otherwise than as provided for in 1985 Act – Where s 82(3) of 1985 Act provided for termination of fixed term secure tenancy, containing forfeiture provision, by court order – Where appellant granted respondent "flexible" secure tenancy for fixed term of five years – Where appellant served standard form notice of intention to seek possession of property relying on grounds 1 and 2 of Sch 2 of 1985 Act, being rent arrears and anti-social behaviour, and issued claim in County Court seeking possession of property – Where no claim of forfeiture made – Whether existence of provision for forfeiture in tenancy agreement and its exercise by obtaining termination order in lieu of forfeiture under section 82(3) of 1985 Act only way to bring to end secure fixed-term tenancy – Whether secure tenancy regime in 1980 Act and 1985 Act adds statutory security to contractual and proprietary security already conferred by tenancy, or whether replaces, and thereby to some extent reduces or removes, contractual and proprietary security – Whether respondent's tenancy agreement contained provision for forfeiture.

Held (5:0): Appeal allowed in part.

FirstPort Property Services Ltd v Settlers Court RTM Company & Ors
Supreme Court of the United Kingdom: [\[2022\] UKSC 1](#)

Judgment delivered: 12 January 2022

Coram: Lord Briggs, Lord Sales, Lord Leggatt, Lord Burrows and Lady Rose

Catchwords:

Property – Leaseholds – Right to manage ("RTM") – Where *Commonhold and Leasehold Reform Act 2002* ("2002 Act") enabled long leasehold tenants of residential flats to take over management of building of which flats form part through medium of RTM company – Where building formed part of larger estate containing communal estate facilities – Where

appellant responsible for management of estate facilities and entitled to payment of service charges from lessees – Where appellant contended estate facilities not form part of premises over which RTM extended – Where Upper Tribunal considered itself bound to decide question in favour of respondents by decision in *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2013] 1 WLR 988 – Whether 2002 Act confers upon RTM company any, and if so what, rights of management of estate facilities – Whether *Gala Unity* correctly decided.

Held (5:0): Appeal allowed.

Winland Finance Ltd v Gain Hero Finance Ltd
Hong Kong Court of Final Appeal: [\[2022\] HKCFA 3](#)

Judgment delivered: 11 February 2022

Coram: Cheung CJ, Ribeiro PJ, Bokhary, Chan and McLachlin NPJJ

Catchwords:

Property – Real property – Assignment – Where Tang Shung Ching Sabin registered owner of flat and car space ("Property") in residential development constructed under government housing scheme for civil servants – Where Property assigned subject to "non alienation" covenants, which prohibited Tang from assigning, mortgaging, charging or otherwise parting with possession of Property or interest therein, or entering into any agreement to do so, without written consent of Financial Secretary Incorporated ("FSI") – Where, to secure performance of non-alienation covenants, Tang gave legal charge over Property in favour of FSI – Where legal charge, like assignment containing non-alienation covenants, registered in Land Registry – Where Tang borrowed from loan companies, including from appellant and respondent – Where Tang assigned balance of future proceeds of sale of Property to appellant as security for repayment of loan – Where Tang subsequently borrowed from respondent under loan agreement whereby Tang agreed not to sell or create or enter into any charge, lien or other encumbrance over Property or otherwise dispose of Property until full repayment – Where loans could not be secured, but loan agreements registered in Land Registry – Where Tang defaulted on loan to respondent – Where respondent obtained judgment against Tang and charging order nisi against Property in enforcement of judgment debt – Where appellant informed of intended sale of Property and contended price below market and appellant held priority over respondent to proceeds of sale – Where Court of Appeal drew distinction between respondent's interest in land and appellant's interest in proceeds – Where Court of Appeal held as Tang had to defer to respondent in claim to proceeds, appellant (as assignee of Tang's rights) could not enjoy better rights – Proper approach to priority of sale proceeds of real property as between earlier assignee of proceeds pursuant to equitable assignment before Property sold and judgment creditor who obtained later charging order against property.

Held (5:0): Appeal dismissed.

Social Security

Hughes v Northwestern University

Supreme Court of the United States: [Docket No. 19-1401](#)

Judgment delivered: 24 January 2022

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

Catchwords:

Social security – Retirement plans – Where, under §1104(a)(1)(B) of *Employee Retirement Income Security Act of 1974* ("ERISA"), plan fiduciaries required to discharge duties with care, skill, prudence, and diligence that prudent man acting in like capacity and familiar with such matters would use – Where fiduciary duty of prudence governed conduct of respondents, who administered several retirement plans on behalf of current and former employees of Northwestern University, including petitioners – Where Seventh Circuit held petitioners' allegations of imprudent decisions failed as matter of law, in part based on Court's determination that petitioners' preferred type of low-cost investments available as plan options which eliminated concerns other plan options were imprudent – Proper approach to ERISA's duty of prudence – Whether violation of duty of prudence as articulated in *Tibble v Edison Int'l* (2015) 575 US 523.

Held (8:0): Judgment of Court of Appeals for the Seventh Circuit vacated and case remanded.

Taxation

Barnard Labuschagne Incorporated v South African Revenue Service & Anor

Constitutional Court of South Africa: [\[2022\] ZACC 8](#)

Judgment delivered: 11 March 2022

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

Catchwords:

Taxation – Tax judgment – Recission – Where South African Revenue Service ("SARS") filed with Registrar of High Court of South Africa certified

statement in terms of s 172(1) of *Tax Administration Act* ("TAA") recording that applicant, incorporated firm of attorneys, owed SARS R804,747 – Where, pursuant to s 174 of TAA, certified statement filed must be treated as civil judgment in favour of SARS as liquid debt for amount specified in statement – Where applicant brought application to rescind tax judgment on basis certified statement wrong because applicant made payments which SARS failed to appropriate to relevant assessed taxes – Whether tax judgment "susceptible of rescission" – Whether, if not susceptible of rescission, ss 172 and 174 are constitutionally invalid.

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

Commissioners for Her Majesty's Revenue and Customs v NCL Investments Ltd & Anor

Supreme Court of the United Kingdom: [\[2022\] UKSC 9](#)

Judgment delivered: 23 March 2022

Coram: Lord Reed, Lord Briggs, Lord Sales, Lord Hamblen and Lady Rose

Catchwords:

Taxation – Share option scheme – Where respondent companies ("Companies") granted employees share options in ultimate holding company – Where accounting debits ("Debits") made in accounts of Companies, for corporation tax purposes, as result of grant of share options – Where Companies required by International Financial Reporting Standard 2 to recognise profit and loss accounts that services of their employees, remunerated in part by options, had consumed in generating profits – Whether disregarding Debits "adjustment required or authorised by law" within meaning of s 46(1) of CTA 2009 – Whether deduction disallowed by s 54(1)(a) of CTA 2009, prohibiting deductions for "expenses not incurred wholly and exclusively for purposes of trade" – Whether deduction disallowed by s 53 CTA 2009, which provided no deduction allowed for "items of capital nature" – Whether deduction is disallowed (or deferred) by s 1290 CTA 2009, restricting deductions of employee benefit contributions.

Held (5:0): Appeal dismissed.

Voting Rights

Wisconsin Legislature v Wisconsin Elections Commission

Supreme Court of the United States: [Docket No. 21A471](#)

Judgment delivered: 23 March 2022

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

Catchwords:

Voting rights – Redistricting – Where, following 2020 census, Wisconsin’s State Assembly and Senate districts no longer equally apportioned – Where, after reaching impasse, Wisconsin Legislature and Governor turned to Wisconsin Supreme Court ("WSC") – Where WSC invited parties to propose maps complying with State Constitution, Federal Constitution, and *Voting Rights Act of 1965* ("VRA") – Where WSC issued decision selecting Assembly and Senate maps that Governor proposed which created seven majority-black districts – Where WSC held it could not be satisfied that seven-majority black Assembly districts were required by VRA, but concluded Governor's map complied with Equal Protection Clause of Fourteenth Amendment – Whether WSC selected race-based maps without sufficient justification in violation of Equal Protection Clause – Proper approach to relationship between Equal Protection Clause and VRA.

Held (7:2): Judgment of the Supreme Court of Wisconsin reversed as to the selection of the Governor’s State Assembly and Senate maps; case remanded.
