OVERSEAS DECISIONS BULLETIN

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

Administrative Law

R (on the application of Palestine Solidarity Campaign Ltd & Anor) v Secretary of State for Housing, Communities and Local Government

United Kingdom Supreme Court: [2020] UKSC 16

Judgment delivered: 29 April 2020

Coram: Lady Hale, Lords Wilson and Carnwath, Lady Arden, Lord Sales

Catchwords:

Administrative law – Judicial review – Local government pension scheme – *Public Service Pensions Act 2013* ("PSPA") – Where PSPA empowers respondent Secretary to make regulations providing for issue of guidance to authorities on "administration and management" of local government pension scheme – Where Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 made pursuant to PSPA – Where Regulations require authority to formulate investment strategy – Where strategy must be in accord with guidance and must include authority's policy on "how social, environmental and corporate governance considerations are taken into account" in investment decisions (reg 7) – Where appellants commenced judicial review proceedings alleging two passages in guidance issued by respondent Secretary in 2016 pursuant to reg 7 were unlawful – Where first passage read that "the Government has made clear that using pension policies to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries are inappropriate, other than where formal legal

sanctions, embargoes and restrictions have been put in place by the Government" – Where second passage said that authorities "[s]hould not pursue policies that are contrary to UK foreign policy or UK defence policy" – Where High Court held passages unlawful – Where Court of Appeal allowed Secretary's appeal – Whether issue of two passages exceeded Secretary's powers.

Held (3:2): Appeal allowed.

Elgizouli v Secretary of State for the Home Department

United Kingdom Supreme Court: [2020] UKSC 10

Judgment delivered: 25 March 2020

Coram: Lady Hale, Lords Reed, Kerr, Carnwath and Hodge, Lady Black, Lord Lloyd-Jones

Catchwords:

Administrative law – Judicial review – Mutual legal assistance ("MLA") – Where appellant's son alleged to have been member of terrorist group in Syria involved in murder of US and British citizens – Where US made MLA request to UK in relation to investigation of group's activities – Where Home Secretary requested assurance that information sought would not be used directly or indirectly in prosecution that could lead to death penalty – Where US refused to provide full death penalty assurance – Where Home Secretary agreed to provide information absent any assurance – Where appellant challenged Home Secretary's decision in judicial review proceedings – Where Divisional Court dismissed appellant's claims – Whether common law has evolved to recognise principle that it is unlawful for Secretary of State to exercise power to provide MLA so as to supply information to foreign state that will facilitate imposition of death penalty in that state on individual subject of information – Whether lawful under Pt 3 of *Data Protection Act 2018*, interpreted in light of EU data protection law, for UK law enforcement authorities to transfer personal data to foreign authorities for use in criminal proceedings where death penalty can result.

Held (7:0): Appeal unanimously allowed on basis of *Data Protection Act 2018* issue; only Lord Kerr would have resolved common law issue in appellant's favour, with Lady Hale expressing no view, and other Justices holding that common law had not evolved in way contended for.

Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited & Ors

Constitutional Court of South Africa: [2020] ZACC 5

Judgment delivered: 24 March 2020

Coram: Khampepe ADCJ, Jafta, Madlanga, Majiedt, Mhlantla, Theron, and Tshiqi JJ, Victor AJ

Catchwords:

Administrative law – Exploration rights – Public participation – Mootness – Where second respondent applied for exploration right under s 79 of *Mineral and Petroleum Resources Development Act 2002* – Where right sought included farms owned by applicant – Where first respondent, South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited, accepted application – Where first respondent published notices seeking public comment on application – Where applicant commenced proceedings in High Court of South Africa contending that decision to accept second respondent's application was nullity because mandatory statutory notice requirements had not been complied with – Where High Court held first respondent's actions in accepting application unlawful – Where Supreme Court of Appeal allowed appeal on bases that applicant had failed to show that it had suffered prejudice and that application for review had been brought too early – Where applicant sought leave to appeal to Constitutional Court – Where second respondent withdrew application for exploration right after applicant filed application for leave to appeal – Whether withdrawal of application for exploration right rendered matter moot – Whether interests of justice favoured granting leave to appeal regardless – Whether applicant was dilatory in disclosing withdrawal of application to Constitutional Court.

Held (8:0): leave to appeal refused; costs order against applicant made on attorney/client scale.

MS (Pakistan) v Secretary of State for the Home Department

United Kingdom Supreme Court: [2020] UKSC 9

Judgment delivered: 18 March 2020

Coram: Lady Hale, Lord Kerr, Lady Black, Lords Lloyd-Jones and Briggs

Catchwords:

Administrative law – Asylum – Powers of tribunals – Where Pakistani appellant entered UK in 2011 aged 16 on visitor's visa – Where appellant brought to UK by step-grandmother on pretence that it was for education – Where step-grandmother arranged for appellant to be forced to work for no pay for her financial advantage – Where appellant then moved from job to job under control and compulsion of adults – Where appellant referred to National Referral Mechanism ("NRM") on basis that he may have been trafficked – Where NRM decided, without meeting or interviewing appellant, that there was no reason to believe he had been trafficked – Where appellant sought judicial review of that decision – Where appellant had also claimed asylum – Where application for asylum

rejected and Secretary of State subsequently decided to remove appellant from UK – Where appellant appealed decision on asylum and human rights grounds – Where First-tier Tribunal ("FTT") found he had been under compulsion and control but nonetheless dismissed appeal – Where Upper Tribunal ("UT") held FTT made errors of law, and remade decision in appellant's favour – Where UT noted that NRM's decision could only be challenged in judicial review proceedings, not in immigration appeals system, but also held that if NRM decision perverse or otherwise contrary to some public law ground, UT could make its own decision as to whether appellant victim of trafficking, as removal decision would otherwise be contrary to European Convention on Action against Trafficking in Human Beings ("ECAT") and European Convention on Human Rights ("ECHR") – Where respondent appealed from UT to Court of Appeal – Where Court of Appeal allowed appeal on basis that UT could only go behind NRM's decision as to trafficking if NRM's decision perverse or irrational or not open to it – Where Court of Appeal considered UT wrong to consider that ECAT obligations were also positive obligations under art 4 of ECHR – Where appellant granted leave to Supreme Court, but later withdrew – Whether Equality and Human Rights Commission, intervening, could take over appeal – Whether in determining immigration appeal, including whether removal decision would infringe rights under ECHR, UT bound by NRM's determination as to trafficking.

Held (5:0): Appeal allowed.

Arbitration

BXH v BXI
Singapore Court of Appeal: [2020] SGCA 28

Judgment delivered: 2 April 2020

Coram: Menon CJ, Chong JA, Ang J

Catchwords:

Arbitration – Assignment of rights to arbitrate – Where respondent, wholly-owned subsidiary of Singapore company, manufactures consumer goods – Where appellant distributes respondent's goods in Russia – Where relationship between appellant and respondent governed by eight related contracts – Where Distributor Agreement contained arbitration agreement – Where Distributor Agreement originally between appellant and respondent's parent company, but where Assignment and Novation Agreement purported to transfer rights and obligations from parent company to respondent – Where appellant owed debts in three categories, Debt 1A, Debt 1B, and Debt 2B – Where Debts 1B and 2B purportedly assigned by respondent to third party through Participation Agreement, but purportedly reassigned to respondent through two buy-back agreements in April and December 2015 – Where in October 2015

respondent issued appellant notice of arbitration seeking payment of debts – Where appellant resisted claim and asserted that tribunal appointed by Singapore International Arbitration Centre ("SIAC") lacked jurisdiction to hear dispute – Where SIAC dismissed jurisdictional challenge in May 2017 and tribunal issued award in favour of respondent in July 2017 – Where High Court found that tribunal had jurisdiction, holding that though right of suit (and right to arbitrate) in relation to certain debts was reassigned to respondent in December 2015, after notice to arbitrate issued in October, relevant rights were retrospectively vested in respondent – Whether agreement to arbitrate ought to be given effect – Whether novation of right to arbitrate from parent company to respondent effective – Whether right to arbitrate in respect of certain debts was assigned to third party and effectively re-assigned to respondent – Whether Debt 2B had been novated from respondent to Russian corporation under Debt Transfer Agreement.

Held (3:0): Appeal allowed in part; arbitral award set aside in part.

Civil Procedure

Li Soo Tan also known as Lee Soo Tan Doreen v Chan Tsui Shan representing the estate of Lee Kwai Tai also known as Li Kwai Tai, deceased
Hong Kong Court of Final Appeal: [2020] HKCFA 4

Judgment delivered: 11 March 2020

Coram: Ribeiro, Fok, and Cheung PJJ, Tang and Spigelman NPJJ

Catchwords:

Civil procedure – Service of notice of action on non-parties – Where deceased died intestate in 1985 – Where, in 2012, person ("plaintiff") claiming to be deceased's nephew, and claiming that deceased left no wife, issue, or surviving parents, commenced probate action against Lee Kwai Tai – Where Lee Kwai Tai counterclaimed that she was only daughter of deceased and only beneficiary of his estate – Where Lee Kwai Tai died and her estate (respondent) represented by adopted daughter – Where, in 2015, appellant filed caveat, claiming to be only daughter of deceased and sole beneficiary of estate – Where in March 2016, respondent's solicitors served on appellant's solicitors notice of plaintiff's action commenced in 2012 – Where appellant did not acknowledge service in 2012 action but commenced separate probate action against plaintiff and respondent – Where appellant absent from trial of 2012 action in June 2016 – Where High Court gave judgment for respondent which bound appellant by reason of Order 15, rule 13A of Rules of High Court – Where in April 2017, appellant applied for extension of time to acknowledge service and to apply to set aside judgment in 2012 action – Where High Court noted inexcusable delay on part of appellant in applying to set aside judgment

but nonetheless exercised discretion to grant appellant's application on grounds that during trial, judge had indicated (in ignorance of effect of Order 15, rule 13A) that judgment in 2012 proceedings not intended to bind appellant, and that there would be little prejudice to respondent in granting appellant's application – Where Court of Appeal held that High Court's exercise of discretion miscarried and exercised it afresh, dismissing appellant's application – Whether Court of Appeal erred in setting aside trial judge's exercise of discretion.

Held (5:0): Appeal dismissed.

Competition law

Lodge Real Estate Limited & Ors v Commerce Commission
Supreme Court of New Zealand: [2020] NZSC 25

Judgment delivered: 2 April 2020

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

Catchwords:

Competition law – Price fixing – Where in 2014 representatives of certain real estate agencies met twice to discuss proposal by Trade Me (which ran residential property listings website) to changes to its pricing policy for standard residential listings – Where proposal would increase cost of listing properties – Where most agencies uploaded listings to site and absorbed cost of doing so themselves – Where Commerce Commission alleged that as result of meetings, agencies entered into price fixing arrangement in breach of s 30 of *Commerce Act 1986* which relevantly prohibited competitors from entering into contracts, arrangements, or understandings with purpose, effect, or likely effect of fixing, controlling, or maintaining price of goods or services – Where some agencies admitted liability and paid penalties while others denied liability – Where High Court held that agencies had entered into agreement or understanding but that it lacked purpose or effect of fixing, controlling, or maintaining price of goods or services – Where Court of Appeal allowed appeal, holding that agencies had entered into relevant kind of agreement or understanding and did so with relevant purpose or effect – Whether appellants entered into or arrived at relevant kind of understanding or arrangement – If yes, whether it had the relevant kind of purpose or effect.

Held (5:0): Appeal dismissed.

Constitutional Law

Ramos v Louisiana

United States Supreme Court: Docket 18-5924

Judgment delivered: 20 April 2020

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

Catchwords:

> Constitutional law – Sixth Amendment – Trial by jury – Unanimous verdicts – Where Louisiana and Oregon laws permit conviction on basis of 10-2 jury verdicts – Where 48 states and federal courts do not – Where petitioner convicted of serious crime by Louisiana court on basis of 10-2 verdict – Where petitioner sentenced to life imprisonment without parole – Whether conviction by non-unanimous jury unconstitutional denial of right to trial by jury in Sixth Amendment.

Held (6:3): Judgment of Court of Appeal of Louisiana, Fourth Circuit, reversed.

Allen v Cooper

United States Supreme Court: Docket 18-877

Judgment delivered: 23 March 2020

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

Catchwords:

> Constitutional law – State sovereign immunity – Copyright – Where marine salvage company discovered shipwreck off coast of North Carolina – Where North Carolina was legal owner of shipwreck and engaged company to salvage wreck – Where company hired appellant videographer to document salvage efforts – Where appellant took photos and videos of wreck over more than ten years – Where appellant registered copyright in those works – Where North Carolina published some of appellant's works online – Where appellant commenced proceedings for copyright infringement – Where North Carolina moved for dismissal on basis of state sovereign immunity – Where appellant contended that federal statute, *Copyright Remedy Clarification Act 1990*, removed States' sovereign immunity in copyright cases – Where District Court accepted appellant's argument – Where Court of Appeals for Fourth Circuit reversed – Whether Congress could deprive States of sovereign immunity under its Article I powers or under Section 5 of Fourteenth Amendment.

Held (9:0): Decision of Court of Appeals for Fourth Circuit affirmed.

Contracts

CITGO Asphalt Refining Co v Frescati Shipping Co Ltd
United States Supreme Court: Docket 18-565

Judgment delivered: 30 March 2020

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

Catchwords:

> Contracts – Interpretation of warranties – Where petitioners sub-chartered oil tanker from Star Tankers, which had chartered it from respondent shipping company – Where abandoned ship anchor struck tanker's hull causing 264,000 gallons of heavy crude oil to spill into Delaware River – Where *Oil Pollution Act 1990* required respondent company, as vessel's owner, to cover clean-up costs (33 USC §2702(a)) – Where statute limited respondent company's liability to $45 million, with Federal Government's Oil Spill Liability Trust Fund reimbursing company additional $88 million in costs – Where respondent company and United States (also respondent) sued petitioners to recover clean-up costs – Where respondents alleged that petitioners had breached safe-berth clause in subcharter agreement between petitioners and Star Tankers – Where respondents alleged that clause required petitioners to choose "safe" berth that would allow tanker to travel "always safely afloat" and that this obligation was effectively warranty as to safety of selected berth – Where Court of Appeals for Third Circuit considered respondent company third-party beneficiary of that clause and held that safe-berth clause constituted express warranty of safety in relation to which petitioners' diligence in choosing berth was irrelevant – Whether safe-berth clause imposed unqualified duty of safety on petitioners or, as they contended, duty of due diligence.

Held (7:2): Decision of Court of Appeals for Third Circuit affirmed.

Criminal Law

Saravanan Chandaram v Public Prosecutor and another matter
Singapore Court of Appeal: [2020] SGCA 43

Judgment delivered: 29 April 2020

Coram: Menon CJ, Phang and Chong JJA

Catchwords:

Criminal law – Drug offences – Where appellant convicted of one charge of importing cannabis and one charge of importing cannabis mixture contrary to *Misuse of Drugs Act* – Where appellant given aggregate sentence of life imprisonment and 24 strokes of cane – Where appellant appealed against conviction and sentence – Whether appellant had requisite knowledge of nature of drugs – Whether term "cannabis mixture" describes mixture of vegetable matter entirely of cannabis origin or mixture of vegetable matter of cannabis and non-cannabis origin – Whether cannabis mixture should be classified as Class A controlled drug – Whether appropriate to sentence according to gross weight of cannabis mixture – Whether sentencing framework should take into account quantities of cannabinol and tetrahydrocannabinol in cannabis mixture – Whether calibrating sentences according to gross weight of cannabis mixture violates art 12 of Constitution ("Equal protection") on basis that doing so could lead to cannabis mixtures of same gross weight but different proportions of cannabis attracting same sentence – Whether Health Sciences Authority's testing and certification processes, which change form of vegetable matter, affect charges that can be preferred in relation to importation of vegetable matter.

Held (3:0): Conviction on importation of cannabis mixture charge quashed; conviction and sentence on importation of cannabis charge upheld.

R v Friesen

Supreme Court of Canada: 2020 SCC 9

Judgment delivered: 2 April 2020

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

Catchwords:

Criminal law – Crown appeals – Sentencing – Where respondent pleaded guilty to sexual interference with child and attempted extortion of child's mother – Where sentencing judge imposed six year sentence for sexual interference and concurrent six year sentence for attempted extortion – Where sentencing judge used four-to-five year sentencing starting point previously identified by Manitoba Court of Appeal as appropriate for major sexual assault committed on young person in a trust relationship even though respondent was not in position of trust with respect to victim – Where Manitoba Court of Appeal found that sentencing judge erred in principle in doing so, having found that no trust relationship existed – Where Court of Appeal reduced sentence to four and one half years' imprisonment for sexual interference and eighteen months' imprisonment to be served concurrently for attempted extortion – Where Crown appealed against Court of Appeal's sentence for sexual interference offence – Whether sentencing ranges for sexual offences against children still consistent with Parliamentary and judicial recognition of severity of

such crimes – Whether Court of Appeal erred by interfering with sentence imposed by sentencing judge.

Held (9:0): Appeal allowed; sentence imposed by sentencing judge restored.

R v Chung

Supreme Court of Canada: 2020 SCC 8

Judgment delivered: 27 March 2020

Coram: Karakatsanis, Brown, Rowe, Martin, and Kasirer JJ

Catchwords:

Criminal law – Crown appeals against acquittal – Where, at trial, appellant acquitted of dangerous driving causing death – Where trial judge acquitted on basis of reasonable doubt as to whether appellant had requisite mental state – Where Court of Appeal for British Columbia held trial judge committed error of law in so finding, set aside acquittal, and entered conviction – Whether trial judge committed error of law which could allow Crown to appeal against acquittal under s 676(1) of *Criminal Code*.

Held (4:1): Appeal dismissed.

National Director of Public Prosecutions v Botha N.O. & Anor

Constitutional Court of South Africa: [2020] ZACC 6

Judgment delivered: 26 March 2020

Coram: Mogoeng CJ, Froneman, Jafta, Khampepe, Madlanga, Mhlantla, and Theron JJ, Victor AJ

Catchwords:

Criminal law – Proceeds of crime – Proportionality – Where senior public servant (later, Member of Parliament) awarded tenders to certain company for lease of government premises – Where state lost approximately R26 billion through corrupt leasing arrangements – Where, in exchange for tenders, company undertook renovations costing R1,169,068.49 on public servant's family home – Where these arrangements came to light and public servant paid company R411,054.66 – Where public servant charged with corruption offences – Where public servant died before High Court rendered judgment but was subject of adverse findings – Where National Director of Public Prosecutions sought civil forfeiture order under ch 6 of *Prevention of Organised Crime Act 1998* – Where High Court considered renovations to be proceeds of unlawful activities and ordered forfeiture of entire property – Where executrix of deceased's estate appealed to Supreme Court of

Appeal – Where Supreme Court held that High Court's forfeiture order was disproportionate, and taking into account the R411,054.66 repaid by deceased, ordered estate to pay difference (R758,014.83) to state – Whether protection against arbitrary deprivation of property in s 25 of *Constitution* extends to proceeds of crime – Whether proportionality analysis applicable when court makes civil forfeiture order and if so, how that analysis should be conducted.

Held (8:0 on orders; 5:3 on reasons): Leave to appeal granted; appeal allowed.

Kahler v Kansas

United States Supreme Court: Docket 18-6135

Judgment delivered: 23 March 2020

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

Catchwords:

Criminal law – Insanity defence – Where Kansas law recognises cognitive incapacity test for insanity (whether defendant understands what they are doing when committing crime) but does not recognise moral incapacity test (whether defendant able to distinguish right from wrong with respect to criminal conduct) – Where petitioner charged with capital murder after shooting and killing four family members – Where prior to trial, petitioner argued that unavailability of moral incapacity test in Kansas law violates due process clause of *Constitution* – Where trial court rejected that argument and jury subsequently convicted and imposed death penalty – Where Supreme Court of Kansas rejected due process argument – Whether due process clause requires State criminal law to afford defendants moral incapacity test for insanity.

Held (6:3): Decision of Supreme Court of Kansas affirmed.

HKSAR v Cheng Wing Kin

Hong Kong Court of Final Appeal: [2020] HKCFA 3

Judgment delivered: 11 March 2020

Coram: Ma CJ, Ribeiro, Fok, and Cheung PJJ, Spigelman NPJ

Catchwords:

Criminal law – Electoral integrity – Where appellant convicted of offences against *Elections (Corrupt and Illegal Conduct) Ordinance* – Where s 7(1) of Ordinance provides that person engages in corrupt conduct at election if they "corruptly" perform certain acts – Where trial judge considered that

word "corruptly" required a defendant to not only have intention to perform specified acts, but also to have intention to prevent fair, open and honest election – Where Court of Appeal considered that word "corruptly" only required that defendant intentionally perform specified act for personal gain – Whether trial judge's interpretation, Court of Appeal's interpretation, or some other interpretation of "corruptly" should be preferred.

Held (5:0): Appeal dismissed.

R v Copeland
United Kingdom Supreme Court: [2020] UKSC 8

Judgment delivered: 11 March 2020

Coram: Lords Reed, Carnwath, Lloyd-Jones, Sales, and Hamblen

Catchwords:

Criminal law – Possession of explosive substances – Lawful object – Where appellant charged with offences against *Explosive Substances Act 1883* in relation to possession of small quantity of Hexamethylene Triperoxide Diamine ("HTMD") – Where appellant had made HTMD from chemicals purchased online – Where appellant diagnosed with Autism Spectrum Disorder as child – Where appellant claimed chemicals acquired and HTMD made because he wished to understand how explosives worked and to experiment with them – Where primary judge considered he was bound by authority to hold that experimentation and self-education could not amount to "lawful object" for possessing HTMD within meaning of s 4(1) of *Explosive Substances Act* and so ruled in advance of trial that appellant's proposed defence bad in law – Where Court of Appeal upheld primary judge's ruling – Whether personal experimentation or private education, absent some ulterior unlawful purpose, can be lawful objects within meaning of s 4(1).

Held (3:2): Appeal allowed.

Damages

Whittington Hospital NHS Trust v XX
United Kingdom Supreme Court: [2020] UKSC 14

Judgment delivered: 1 April 2020

Coram: Lady Hale, Lords Reed, Kerr, Wilson, and Carnwath

Catchwords:

Damages – Loss of ability to bear child – Surrogacy – Public Policy – Whether damages for costs of commercial or non-commercial surrogacy recoverable in tort – Where respondent became infertile because of appellant's negligence – Where respondent and partner wished to have four children – Where probable that, with surrogacy arrangements, they could have two children with respondent's eggs and partner's sperm – Where they then wished to have two further children using donor eggs and partner's sperm – Where respondent's preference to utilise commercial surrogacy arrangements in California – Where primary judge considered himself bound to reject claim for commercial surrogacy in California as contrary to public policy and to hold that surrogacy using donor eggs not restorative of respondent's fertility – Where primary judge considered damages could be awarded for two surrogacies in UK using respondent's own eggs – Where respondent appealed against denial of commercial surrogacy claim and use of donor eggs – Where hospital cross-appealed against award of damages for two surrogacies using respondent's own eggs – Where Court of Appeal allowed appeal on both points and dismissed cross-appeal – Whether damages can be recovered in respect of surrogacy arrangements using respondent's own eggs – If so, whether damages can be recovered in respect of arrangements using donor eggs – Whether damages can be recovered in UK, where commercial surrogacy is prohibited, in respect of costs of commercial surrogacy arrangements in California, where it is not unlawful.

Held (3:2): Appeal dismissed.

Discrimination

Comcast Corporation v National Association of African American-Owned Media

United States Supreme Court: Docket 18-1171

Judgment delivered: 23 March 2020

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

Catchwords:

Discrimination – Causation – Where African American-owned television network, Entertainment Studios Network ("ESN"), sought to have Comcast Corporation (cable television conglomerate) carry its channels – Where Comcast refused on bases of bandwidth limitations, lack of consumer demand, and preference for other programming – Where ESN and National Association of African American-Owned Media commenced proceedings, alleging that Comcast Corporation's conduct violated statutory guarantee to "[a]ll persons … the same right … to make and enforce contracts … as is enjoyed by white citizens" (42 USC §1981) – Where District Court dismissed proceedings at pleading stage on basis

that complainants failed to show that but for racial animus, Comcast Corporation would have entered into proposed contract with ESN – Where Court of Appeals for Ninth Circuit reversed District Court's decision, holding that, to plead viable claim, ESN only needed to plead facts that plausibly showed that race played some role in Comcast Corporation's decision – Whether "but for" causation element of claims under §1981.

Held (9:0): Judgment of Court of Appeals for Ninth Circuit vacated; matter remanded.

Employment Law

Babb v Wilkie
United States Supreme Court: Docket 18-882

Judgment delivered: 6 April 2020

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

Catchwords:

Employment law – Age discrimination – Where petitioner employed as clinical pharmacist by US Department of Veterans Affairs Medical Centre – Where petitioner brought proceedings against Secretary of Veterans Affairs alleging, among other things, age discrimination in adverse personnel actions – Where Secretary sought summary dismissal on basis of non-discriminatory reasons for challenged actions – Where District Court found that while petitioner had established prima facie case, Secretary's reasons were legitimate and no jury could reasonably consider them to be pretextual, and so summarily dismissed petitioner's claims – Where petitioner appealed, arguing District Court erred in requiring that age be "but for" cause of discrimination in context of claim brought under federal-sector provision of *Age Discrimination in Employment Act 1967* – Where 29 USC §633a(a) requires that most "personnel actions" affecting individuals over 40 must be made "free from any discrimination based on age" – Where petitioner argued that such personnel actions unlawful if age factors in decision, even if not "but for" cause of decision, with consequence that even if Secretary's reasons not pretextual, age discrimination could still be present – Where Court of Appeals for Eleventh Circuit considered petitioner's argument untenable in light of intermediate appellate precedent – Whether §633a(a) requires that personnel actions be unaffected by consideration of age or just that age not be "but for" cause of actions.

Held (8:1): Judgment of Court of Appeals for Eleventh Circuit reversed; matter remanded.

Barclays Bank plc v Various Claimants
United Kingdom Supreme Court: [2020] UKSC 13

Judgment delivered: 1 April 2020

Coram: Lady Hale, Lords Reed, Kerr, Hodge, and Lloyd-Jones

Catchwords:

Employment law – Vicarious liability – Where appellant bank required job-applicants to pass pre-employment medical examinations – Where over roughly 16 year period appellant arranged appointments with certain doctor – Where doctor was self-employed medical practitioner with portfolio practice – Where appellant paid fee for each medical report produced and did not pay doctor a retainer – Where examinations were conducted in consulting room in doctor's home – Where 126 respondents commenced group action alleging that doctor sexually assaulted them during examinations – Where doctor died in 2009, and proceedings brought against appellant – Where primary judge held appellant vicariously liable for assaults doctor is proved to have committed – Where Court of Appeal dismissed appeal – Whether appellant bank vicariously liable for torts of doctor.

Held (5:0): Appeal allowed.

WM Morrison Supermarkets plc v Various Claimants
United Kingdom Supreme Court: [2020] UKSC 12

Judgment delivered: 1 April 2020

Coram: Lady Hale, Lords Reed, Kerr, Hodge, and Lloyd-Jones

Catchwords:

Employment law – Vicarious liability – Where appellant operates chain of supermarkets – Where certain employee on internal audit team tasked with transmitting payroll data for employer's entire workforce to external auditors – Where employee did so but also made and kept personal copy of data – Where employee published that data online and sent it anonymously to three UK newspapers – Where employee convicted and imprisoned – Where some affected members of appellant's workforce sued appellant on basis of its vicarious liability for employee's acts – Where claims for breach of statutory duty under *Data Protection Act 1998*, misuse of private information, and breach of confidence – Where primary judge held that employee acted in course of his employment – Where primary judge held that appellant vicariously liable on each basis claimed, and rejected argument that vicarious liability inapplicable to claim based on *Data Protection Act 1998* on account of its content and foundation in EU Directive – Where Court of Appeal dismissed appeal – Whether appellant vicariously liable for employee's conduct on basis of common

law "close connection" test – Whether *Data Protection Act 1998* excludes imposition of vicarious liability for statutory, common law, or equitable wrongs.

Held (5:0): Appeal allowed.

National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) & Ors

Constitutional Court of South Africa: [2020] ZACC 7

Judgment delivered: 26 March 2020

Coram: Khampepe ADCJ, Froneman, Jafta, Madlanga, and Majiedt JJ, Mathopo AJ, Mhlantla J, Theron and Tshiqi JJ, Victor AJ

Catchwords:

Employment law – Trade unions – Where applicant union requested that respondent employer deduct union fees for its members who are employed by respondent – Where respondent refused on basis that its operations (paper packaging) were outside scope of union's constitution – Where respondent alleged applicant not entitled to organise in its workplace and that union had acted ultra vires its constitution in admitting respondent's employees as members – Where dispute referred to Commission for Conciliation, Mediation and Arbitration – Where Commission's arbitration award granted applicant union certain organisational rights, including deduction of union fees – Where respondent sought review in Labour Court, seeking to have award set aside on basis that respondent's operations did not fall within scope of applicant's constitution, and as such, applicant lacked standing to bring dispute to Commission – Where respondent further argued that employees' constitutional rights to fair labour practices and freedom of association are given effect by s 4 of *Labour Relations Act 1995*, including right to join trade union "subject to its constitution" – Where Labour Court dismissed application for review, holding that relationship between union and its members under constitution is matter for those parties, not for a third party (here, respondent) to agitate – Where respondent appealed and Labour Appeal Court allowed appeal setting aside Commission's award on basis that union had acted ultra vires its constitution in creating class of members outside provisions of constitution, and holding that respondent employer had standing to challenge that decision – Whether Labour Appeal Court's interpretation of s 4 of *Labour Relations Act* and decision as to union's ability to admit members who are not eligible for membership according to its constitution fail to give proper regard to Constitutional rights to fair labour practices and freedom of association.

Held (10:0): Leave to appeal refused.

Maswanganyi v Minister of Defence and Military Veterans & Ors
Constitutional Court of South Africa: [2020] ZACC 4

Judgment delivered: 20 March 2020

Coram: Khampepe ADCJ, Froneman, Jafta, and Madlanga JJ, Mathopo AJ, Theron and Tshiqi JJ, Victor AJ

Catchwords:

> Employment law – Termination – Where applicant member of South African National Defence Force – Where applicant convicted of rape – Where applicant's service terminated by operation of law under s 59(1)(d) of *Defence Act 2002* upon being sentenced – Where conviction and sentence set aside on appeal – Where Defence Force refused to reinstate applicant following conviction and sentence being set aside – Where applicant commenced proceedings in High Court of South Africa alleging that Defence Force should have suspended his service pursuant to s 42(1) of *Military Discipline Supplementary Measures Act 1999* until avenues of appeal and review exhausted rather than terminating service under *Defence Act* – Where High Court ordered reinstatement of applicant and payment of salary and benefits from date of arrest – Where Supreme Court of Appeal overturned High Court's decision – Where applicant sought leave to appeal to Constitutional Court, invoking constitutional rights to dignity, fair labour practices, and to appeal or review by higher court (ss 10, 23(1), and 35(3)(o) of *Constitution* respectively) – Whether words "conviction" and "sentence" in s 59(1)(d) refer to valid and final convictions and sentences in circumstances where appeal avenues available.

Held (8:0): Leave to appeal granted; appeal allowed; declaration made that employee's service never terminated and service ongoing.

Member of the Executive Council for the Department of Health, Western Cape v Coetzee & Ors
Constitutional Court of South Africa: [2020] ZACC 3

Judgment delivered: 20 March 2020

Coram: Khampepe ADCJ, Froneman, Jafta, Madlanga, and Majiedt JJ, Mathopo AJ, Mhlantla J, Theron, and Tshiqi JJ, Victor AJ

Catchwords:

> Employment law – Collective agreements – Scarce skills allowance – Where in 1967 and 1975 two universities made teaching hospital agreements with provincial authority – Where respondents employed by universities and worked at hospitals as Principal and Chief Specialists – Where in 2004 Public Health and Welfare Sector Bargaining Council ("Council") and State agreed to scarce skills agreement under which

scarce skills allowance would be paid to designated health professionals working in certain public hospitals or institutions managed by State – Where dispute arose over payment of allowance to respondents, with State contending that they were employed by universities, not by applicant Department, and therefore ineligible – Where Commission for Conciliation, Mediation and Arbitration held respondents were employees in public service, within jurisdiction of Council, and entitled to allowance – Where applicant unsuccessfully sought review in Labour Court of Commission's award – Where Labour Appeal Court affirmed that decision, holding that respondents were part of public service – Where applicant sought leave to appeal to Constitutional Court – Whether respondents members of registered trade union which was party to agreement concluded by Council – Whether respondents public servants – Whether decision of Commission affected by material error of law.

Held (10:0): Leave to appeal refused.

Environmental Law

County of Maui v Hawaii Wildlife Fund
United States Supreme Court: Docket 18-260

Judgment delivered: 23 April 2020

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

Catchwords:

Environmental law – Water pollution – Where *Clean Water Act* prohibits "any addition" of any pollutant from "any point source" to "navigable waters" without permission from Environmental Protection Agency ("EPA") – Where petitioner's wastewater reclamation facility collects and treats sewage, and pumps approximately 4 million gallons of treated water into ground – Where effluent then travels through groundwater to Pacific Ocean – Where respondents brought citizens' suit under Act alleging that petitioner was discharging pollutant into navigable waters without permit – Where District Court gave summary judgment for respondents, holding that discharge into groundwater was functionally into navigable water – Where Court of Appeals for Ninth Circuit affirmed – Whether functional equivalent of direct discharge (here, discharge into groundwater) caught by relevant statutory definitions, such that petitioners in breach of Act.

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

Human Rights

R v K.G.K.
Supreme Court of Canada: 2020 SCC 7

Judgment delivered: 20 March 2020

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

Catchwords:

Human rights – *Canadian Charter of Rights and Freedoms* s 11(b) (right to be tried within reasonable time) – Where appellant charged in April 2013 with sexual offences – Where evidence and argument at trial concluded in January 2016 – Where trial judge gave judgment in October 2016, convicting appellant – Where day before judgment appellant sought stay of proceedings on basis that delay between date of charges being laid and date of verdict unreasonable and infringed his right under s 11(b) of Charter – Where application for stay dismissed – Whether time between charge and last day of trial or delay between last day of trial and judgment constituted unreasonable delay in contravention of appellant's Charter rights.

Held (9:0): Appeal dismissed.

Insurance

Maine Community Health Options v United States
United States Supreme Court: Docket 18-1023

Judgment delivered: 27 April 2020

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

Catchwords:

Insurance – *Patient Protection and Affordable Care Act* – Where Act established online exchange where health insurers could sell healthcare plans – Where §1342 of Act established "Risk Corridors" program to limit profits and losses of healthcare plans in first three years' of operation of exchange – Where §1342 set out formula for calculating loss or gain of plan at end of each year – Where certain profitable plans to pay Secretary of the Department of Health and Human Services and where Secretary to pay certain unprofitable plans – Where Act neither provided for appropriations nor limited amounts Secretary might be liable to pay out – Where amounts owed in relation to unprofitable plans significantly exceeded amounts paid in relation to profitable ones – Where appropriations bills for Centers for Medicare and Medicaid Services

included riders preventing those Centers from using funds to make Risk Corridor payments – Where petitioners (four health-insurers who had provided unprofitable plans) sought damages from Federal Government in Court of Federal Claims, invoking *Tucker Act* to claim that §1342 imposed obligation on Government to pay full amount of losses as calculated according to statutory formula – Where one petitioner succeeded at trial, and all lost on appeal when Court of Appeals for Federal Circuit held that while §1342 had imposed obligation on Government to pay full amounts, subsequent riders in appropriations bills impliedly repealed or suspended obligation – Whether §1342 imposed obligation on Government to pay full amount of loss incurred by health-insurers – Whether Congress impliedly suspended or repealed any such obligation.

Held (8:1): Judgments of Court of Appeals for Federal Circuit reversed; matters remanded.

Aspen Underwriting Ltd & Ors v Credit Europe Bank NV

United Kingdom Supreme Court: [2020] UKSC 11

Judgment delivered: 1 April 2020

Coram: Lady Hale, Lords Reed, Kerr, Hodge, Lloyd-Jones, Kitchin, and Sales

Catchwords:

Insurance – Conflict of laws – Jurisdiction of High Court of England and Wales – Brussels Regulation Recast (Regulation (EU) 1215/2012) ("EU Regulation") – Where insurers (Aspen Underwriting Ltd and others) insured vessel under policy that valued vessel at $22m – Where policy included exclusive jurisdiction clause in favour of courts of England and Wales – Where bank (Credit Europe Bank NV) domiciled in Netherlands funded re-financing of vessel in exchange for mortgage of vessel and assignment of insurance policy – Where assignment identified bank as sole loss payee under policy – Where vessel sank – Where bank authorised insurers to pay out any resulting claims to nominated company – Where, after settlement discussions between owners and managers of vessel and insurers, insurers paid $22m to nominated company – Where three years later, Admiralty Court held that owners had deliberately sunk vessel – Where insurers then commenced proceedings in High Court against owners and bank seeking to have settlement agreement set aside and to recover sums paid under agreement, either in restitution or as damages for alleged misrepresentations – Where art 4 of EU Regulation provides that defendants must be sued in member state where they are domiciled, subject to exception in art 7(2) that in "matters relating to tort, delict or quasi-delict", defendant may be sued in place where relevant "harmful event" occurred – Where art 7(2) subject to s 3 of EU Regulation which provides that in "matters relating to insurance", insurers may only bring proceedings in courts of member state where defendant domiciled – Where primary judge ruled bank not bound by exclusive jurisdiction clause but that it could not rely on s 3 of EU Regulation – Where primary judge

held that High Court had jurisdiction to hear damages claim under art 7(2) of EU Regulation but not restitution claim – Where Court of Appeal affirmed primary judge's decisions – Where both insurers and bank appealed – Whether High Court had jurisdiction over any of insurers' claims against bank.

Held (7:0): Insurers' appeal dismissed; bank's appeal allowed; declaration made that High Court does not have jurisdiction over any of insurers' claims against bank.

Intellectual Property

Georgia v Public Resource.Org, Inc
United States Supreme Court: Docket 18-1150

Judgment delivered: 27 April 2020

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

Catchwords:

Intellectual property – Copyright – Government edicts doctrine – Where Copyright Act extends monopoly protection to "original works of authorship" (17 USC §102(a)) – Where government edicts doctrine provides that officials empowered to speak with force of law cannot be authors of works created in course of official duties – Where State of Georgia produced Official Code of Georgia Annotated ("OCGA"), containing Georgia statutes currently in force and non-binding annotations beneath provisions – Where OCGA produced by state agency, Code Revision Commission, comprised mostly of legislators, funded through appropriations set aside for legislature, and staffed by Office of Legislative Counsel – Where Commission contracted out production of annotations to division of LexisNexis Group – Where agreement with contractors specified that any copyright in OCGA vests in State of Georgia – Where respondent organisation published and distributed copies of OCGA – Where Commission sued respondent for infringing copyright in OCGA – Where respondent argued that all of OCGA, including annotations, was in public domain – Where District Court accepted Commission's argument that annotations eligible for copyright protection on basis that they had not been enacted in law – Where Court of Appeals for Eleventh Circuit reversed on basis of government edicts doctrine – Whether OGCA annotations eligible for copyright protection.

Held (5:4): Judgment of Court of Appeals for Eleventh Circuit affirmed.

Romag Fasteners, Inc v Fossil Group, Inc
United States Supreme Court: Docket 18-1233

Judgment delivered: 23 April 2020

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

Catchwords:

Intellectual property – Trademark infringement – Award of profits – Where parties agreed to use petitioner's fasteners in making respondent's leather goods – Where it came to light that some factories producing respondent's goods were using counterfeit fasteners – Where petitioner sued respondent for trademark infringement, seeking award of profits – Where District Court declined to order award of profits, following circuit authority to effect that that such relief was unavailable in circumstances where jury found that respondent acted callously, but not wilfully – Where Court of Appeals for Federal Circuit affirmed – Whether, in proceedings under *Lanham Act*, plaintiff in trademark infringement suit must prove that infringement was wilful before court can order award of profits.

Held (9:0): Judgment of Court of Appeals for Federal Circuit vacated; matter remanded.

Thryv, Inc v Click-To-Call Technologies, LP

United States Supreme Court: Docket 18-916

Judgment delivered: 20 April 2020

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

Catchwords:

Intellectual property – Patents – Inter partes review – Where statute empowers US Patent and Trademark Office to reconsider validity of earlier granted patent claims (35 USC §§314-5) – Where §315(b) provides that if request for review made more than one year after suit against requesting party for patent infringement, inter partes review may not be instituted – Where §314(d) provides that US Patent and Trademark Office's determination whether to institute review under that section "final and nonappealable" – Where entities associated with petitioner sought inter partes review of patent owned by respondent – Where respondent claimed application out of time, relying on §315(b) – Where Patent Trial and Appeal Board rejected respondent's submission and cancelled 13 of patent's claims as obvious or lacking novelty – Where respondent appealed – Where Court of Appeals for Federal Circuit treated Board's decision as amenable to judicial review, concluded that petitioner's application for review was out of time, and so vacated Board's decision and remanded with instructions to dismiss application for inter partes

review – Whether §314(d) precluded judicial review of decision as to application of time limit in §315(b).

Held (7:2): Decision of Court of Appeals for Federal Circuit vacated and matter remanded with instructions to dismiss for lack of appellate jurisdiction.

Migration Law

AM (Zimbabwe) v Secretary of State for the Home Department

United Kingdom Supreme Court: [2020] UKSC 17

Judgment delivered: 29 April 2020

Coram: Lady Hale, Lord Wilson, Ladies Black and Arden, Lord Kitchin

Catchwords:

Migration law – Deportation on basis of serious crimes – Prohibition on "inhuman and degrading treatment or punishment" in art 3 of European Convention on Human Rights ("ECHR") – Where appellant Zimbabwean citizen who is HIV positive and had access to antiretroviral therapy in UK – Where appellant convicted of serious crimes while lawfully resident in UK and deportation order made against him – Where appellant sought revocation of deportation order on basis that if returned to Zimbabwe he would be unable to access treatment he receives in UK – Where respondent Secretary refused to revoke deportation order – Where appellant appealed to First-tier Tribunal and to Upper Tribunal, relying on art 8 of ECHR (right to respect for private and family life), and conceding that decision of House of Lords in *N v Secretary of State for the Home Department* [2005] 2 AC 296; [2005] UKHL 31 precluded reliance on art 3 – Where, before appeal to Court of Appeal heard, Grand Chamber of European Court of Human Rights gave judgment in *Paposhvili v Belgium* [2017] Imm AR 867 – Where appellant considered Grand Chamber's decision expanded application of art 3 in manner favourable to him – Where conceded that Court of Appeal bound by decision in *N*, and appeal accordingly dismissed – Whether Supreme Court should, in light of Grand Chamber's decision, depart from *N* and remit appellant's application for rehearing by reference to art 3.

Held (5:0): Appeal allowed; application remitted to Upper Tribunal.

Barton v Barr

United States Supreme Court: Docket 18-725

Judgment delivered: 23 April 2020

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

Catchwords:

Migration law – Removal – Where lawful permanent resident commits serious crimes, state can seek removal orders from immigration judge (8 USC §1229a) – Where lawful permanent resident found to be removable, judge may only cancel removal if resident satisfies certain statutory criteria (8 USC §§1229b(a), (d)(1)(B)) – Where over 12 year period petitioner convicted of various crimes against state laws – Where immigration judge found petitioner removable on basis of firearms and drug offences – Where petitioner sought cancellation of removal decision – Where criteria for cancellation include requirement that resident must have "resided in the United States continuously for 7 years after having been admitted in any status" (§1229b(a)(2)) – Where §1229b(d)(1)(B) provides that continuous period of residence deemed to end when resident commits specified offences – Where immigration judge concluded petitioner ineligible for cancellation on basis that he had committed specified offence (aggravated assault) within his first seven years of residence, and so his continuous period of residence had been deemed to end before he met seven year threshold – Where Board of Immigration Appeals and Court of Appeals for Eleventh Circuit affirmed – Whether, for purposes of determining eligibility for cancellation of removal decision, specified offence in relation to deemed length of residence period must also be one of offences on which order for removal is based.

Held (5:4): Judgment of Court of Appeals for Eleventh Circuit affirmed.

Guerrero-Lasprilla v Barr

United States Supreme Court: Docket 18-776

Judgment delivered: 23 March 2020

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

Catchwords:

Migration law – Judicial review – Privative clauses – Where Immigration and Nationality Act provided for limited judicial review of final Government order directing removal of aliens (8 USC §1252(a)) – Where, in cases where removal rests on alien having committed certain crimes, reviewing courts limited to considering only "constitutional claims or questions of law" (§§1252(a)(2)(C), (D)) – Where statute provided that motions to reopen removal proceedings to be filed within 90 days of date of entry of final removal order – Where petitioners were aliens living in United States, committed drug crimes, and subsequently subject to removal orders – Where neither filed motion to reopen removal proceedings within 90 days – Where 18 and 13 years respectively after removal orders filed, petitioners sought to have Board of Immigration Appeals reopen their removal proceedings, arguing that 90-day limit should be equitably tolled,

both petitioners having become eligible for discretionary relief in light of judicial and Board decisions made after orders for their removal – Where Board denied requests to reopen, considering, among other reasons, that petitioners had not demonstrated requisite due diligence – Where Court of Appeals for the Fifth Circuit denied requests for review, holding that petitioners' claims concerning due diligence were questions of fact, and therefore beyond its review jurisdiction by force of §1252(a)(2)(D) – Whether question of whether Board incorrectly applied equitable tolling due diligence standard is question of law such that reviewing court has jurisdiction to consider it.

Held (7:2): Decisions of Fifth Circuit on jurisdiction reversed; judgments reversed; matters remanded.

Kansas v Garcia

United States Supreme Court: Docket 17-834

Judgment delivered: 3 March 2020

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

Catchwords:

Migration law – Pre-emption of state statutes by federal statutes – Where federal law, *Immigration Reform and Control Act* ("IRCA"), makes it unlawful to hire alien knowing that they are unauthorised to work in United States (8 USC §§1324a(a)(1), (h)(3)) – Where employees must provide completed form ("I-9") by first day of employment and provide certain personal details including Social Security number – Where I-9 forms and appended documents (and employment verification system as whole) can only be used for enforcement of *Immigration and Nationality Act* or other specified federal laws (§§1324a(b)(5), (d)(2)(F) – Where IRCA does not address use of employee's federal and state-tax withholding forms ("W-4" and "K-4" respectively) – Where Kansas law criminalises identity theft and engaging in fraud to obtain benefit – Where respondents were three unauthorised aliens convicted for fraudulently using another's Social Security number on W-4 and K-4 submitted on obtaining employment – Where respondents had used same number on their I-9 forms – Where Kansas Court of Appeals affirmed convictions – Where by majority Kansas Supreme Court reversed, holding that §1324a(b)(5) prevents state from using any information contained in I-9 as basis for identity theft prosecution under state law, and considering it irrelevant that same information was contained in W-4 and K-4 – Whether Kansas criminal statutes expressly or impliedly pre-empted by federal law.

Held (5:4, dissentients concurring in part): Judgments of Supreme Court of Kansas reversed; matters remanded.

Police

Kansas v Glover
United States Supreme Court: Docket 18-556

Judgment delivered: 6 April 2020

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

Catchwords:

> Police – Reasonable suspicion – Fourth Amendment – Where deputy sheriff ran license plate check on vehicle and found it belonged to respondent and that respondent's license revoked – Where deputy sheriff pulled over vehicle on assumption that respondent was driving – Where respondent was driving and was accordingly charged with driving as habitual violator – Where in proceedings before District Court respondent moved to have evidence obtained from stop suppressed on basis that deputy sheriff lacked reasonable suspicion – Where District Court granted motion – Where Court of Appeals reversed – Where Supreme Court of Kansas reversed Court of Appeals' decision, holding that the stop violated Fourth Amendment for want of reasonable suspicion – Whether reasonable for officer who has run license plate check on vehicle and discovered that registered owner's license revoked to stop vehicle for investigative purposes in circumstances where officer lacks information that would negate inference that registered owner is driving.

Held (8:1): Judgment of Supreme Court of Kansas reversed; matter remanded.

Taxation

Zipvit Ltd v Commissioners for Her Majesty's Revenue and Customs
United Kingdom Supreme Court: [2020] UKSC 15

Judgment delivered: 1 April 2020

Coram: Lord Hodge, Lady Black, Lords Briggs, Sales, and Hamblen

Catchwords:

> Taxation – Deductions – Input VAT – Principal VAT Directive (2006/112/EC) ("Directive") – Where appellant sold vitamins and minerals by mail order – Where Royal Mail's terms and conditions required appellant to pay commercial price for supply of postal services plus such amount of VAT as chargeable – Where at time of supply, Royal Mail and appellant understood that supply exempt from VAT, so appellant only charged and only paid sum equal to commercial price for services – Where

Court of Justice of European Union subsequently held that supply of individually negotiated mail services should have been treated as standard rated (not exempt) for VAT – Where appellant claims that it is entitled under art 168(a) of Directive to deduct as input VAT (tax paid by traders on goods and services in connection with their businesses) the VAT due in respect of supply of services by Royal Mail or entitled to deduct VAT element deemed by law to be included in price paid to Royal Mail for each supply – Where respondent taxation authorities contend that when the Directive is properly interpreted there was no VAT due or paid for the purposes of Directive and/or since appellant at no point had invoices which showed VAT to be due (in compliance with arts 226(9), (10) of Directive), appellant not entitled to recover input tax – Whether appellant entitled to recover input VAT under Directive.

Held (5:0): Legal position under Directive unclear; common ground that at this stage in UK's withdrawal from EU, in cases involving unclear issues of EU law, Supreme Court obliged to refer the issues to Court of Justice of European Union; accordingly, questions referred to that Court.

MacDonald v Canada

Supreme Court of Canada: 2020 SCC 6

Judgment delivered: 13 March 2020

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

Catchwords:

Taxation – Forward contracts – Hedging – Where in 1997, Toronto-Dominion Bank offered appellant taxpayer loan of up to $10.5m with loan agreement requiring that taxpayer enter into forward contract to sell shares in Bank of Nova Scotia to TD Securities Inc – Where forward contract structured such that appellant would benefit financially if stock price of Bank of Nova Scotia decreased – Where appellant pledged Bank of Nova Scotia shares and any cash settlement payments received under forward contract as security for loan from Toronto-Dominion Bank – Where price of Bank of Nova Scotia shares increased during life of forward contract and appellant made cash settlement payments totalling approximately $10m – Where appellant characterised cash settlement payments as income losses deductible against income from other sources – Where Minister of National Revenue reassessed appellant's tax liability and characterised the cash settlement payments as capital losses on basis that forward contract was hedge on Bank of Nova Scotia shares – Whether forward contract should be characterized as hedge or speculation – Whether gains or losses arising from forward contract are taxable on income or capital account.

Held (8:1): Appeal dismissed.

Torts

Atlantic Richfield Co v Christian
United States Supreme Court: Docket 17-1498

Judgment delivered: 20 April 2020

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

Catchwords:

Torts – Jurisdiction of courts – Where *Comprehensive Environmental Response, Compensation, and Liability Act* (42 USC §9601 et seq) directs Environmental Protection Agency ("EPA") to maintain prioritised list of contaminated sites and makes responsible parties liable for costs of clean up – Where Act provides that before clean up plans selected, remedial investigations and feasibility studies conducted – Where Act provides that federal district courts have exclusive jurisdiction over all controversies arising under Act, and that those courts can only review challenges to removal or remedial action in limited circumstances – Where smelter in Montana contaminated large area over nearly century – Where EPA worked with owner of smelter (no longer operational) to implement clean up plan – Where 98 landholders brought civil proceedings against owner of smelter in Montana state court, seeking restoration damages – Where landowners' claims go beyond measures considered necessary by EPA to protect human health and environment – Where primary judge held Act did not preclude landholders from bringing proceedings in state court – Where Montana Supreme Court upheld that decision – Whether Montana Supreme Court's judgment "final" and therefore amenable to review by Supreme Court of United States – Whether Act deprived Montana state courts of jurisdiction over landholders' claims – Whether landholders were potentially responsible parties, and therefore prohibited from taking remedial action without EPA approval.

Held (9:0): Judgment of Montana Supreme Court affirmed in part and vacated in part; matter remanded.
