



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 (TN (Vietnam)) v Secretary of State for the Home Department & Anor
Supreme Court of the United Kingdom: [\[2021\] UKSC 41](#)

Judgment delivered: 22 September 2021

Coram: Lord Lloyd-Jones, Lord Briggs, Lady Arden, Lord Sales and Lord Stephens

Catchwords:

Administrative law – Judicial review – Ultra vires – Procedural unfairness – Where appellant Vietnamese national and claimed asylum in UK – Where appellant's claim dismissed by First-tier Tribunal following procedure in *Fast Track Procedure Rules 2005*, replaced by *Fast Track Procedure Rules 2014* – Where Court of Appeal in *R (Detention Action v First-tier Tribunal* [2015] EWCA Civ 840 quashed 2014 Rules as ultra vires because structurally unfair and unjust – Where appellant appealed dismissal on basis decision was determined using rules held to be ultra vires – Where Court of Appeal dismissed appellant's appeal - Whether dismissal of appellant's claim automatically nullity because claim determined under unfair procedure – Whether appellant required to demonstrate procedural fairness in her particular case.

Held (5:0): Appeal dismissed.

Arbitration

Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)
Supreme Court of the United Kingdom: [\[2021\] UKSC 48](#)

Judgment delivered: 27 October 2021

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

Catchwords:

Arbitration – Jurisdiction – Recognition and enforcement – Choice of law – Where appellant Lebanese company entered into Franchise Development Agreement with Al Homaizi Foodstuff Company – Where Franchise Agreement provided governed by English law – Where respondent parent company of Al Homaizi – Where dispute arose and appellant referred respondent to arbitration to International Chamber of Commerce in Paris – Where Al Homaizi not party to arbitration – Where respondent argued not party to Franchise Agreement – Where arbitrators found respondent party under French law and English law and made award in favour of appellant – Where respondent applied to set aside award in French Court of Appeal – Where appellant applied to enforce award in London Commercial Court – Where Commercial Court held Agreement governed by English law and postponed making final determination on enforcement pending Paris Court of Appeal decision – Where appellant's appeal to English Court of Appeal dismissed – Where English Court of Appeal held Commercial Court should have made final determination granting summary judgment refusing recognition and enforcement – Whether Agreement governed by English law – Whether respondent party to Agreement – Whether English Court of Appeal correct to give summary judgment refusing recognition and enforcement.

Held (5:0): Appeal dismissed.

Bloomerry Resorts and Hotels Inc & Anor v Global Gaming Philippines LLC & Anor
Singapore Court of Appeal: [\[2021\] SGCA 94](#)

Judgment delivered: 4 October 2021

Coram: Menon CJ, Prakash JCA and Woo JAD

Catchwords:

Arbitration – Powers of arbitral tribunal – Power to enforce arbitral award – Coercive powers – Where parties involved in arbitration for breach of contract, resulting in award in which appellants to pay respondents full value of certain shares to respondents in exchange for respondents' transfer of those shares to appellants – Where Arbitral Tribunal also ordered "Constructive Remedy" such that if appellant failed to pay,

respondents entitled to sell shares on market and appellant required to facilitate sale – Where appellant applied to High Court to set aside award on basis Arbitral Tribunal had no power to order enforcement of award – Where High Court dismissed application – Whether Arbitral Tribunal has power to order enforcement of award – Whether courts have exclusive jurisdiction over enforcement – Whether Constructive Remedy characterised as remedial or enforcement.

Held (3:0): Appeal dismissed.

Competition Law

Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd & Anor

Constitutional Court of South Africa: [\[2021\] ZACC 35](#)

Judgment delivered: 15 October 2021

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

Catchwords:

Competition law – Merger – Lessening of competition – Findings of fact – Power of Competition Appeal Court – Where respondents sought merger of their companies owning and managing significant number of hospitals – Where respondent sought approval from Competition Commission per s 13(1) of *Competition Act 89 of 1998* – Where Commissioner recommended to Competition Tribunal that proposed merger be prohibited because reasonable possibility substantially lessen competition in private health sector – Where Competition Tribunal agreed and made findings of fact proposed merger would result in uninsured patients being unable to switch to cheaper hospitals – Where Competition Appeal Court allowed respondents' appeal and held no evidence to show possibility of substantial harm if merger allowed – Whether Competition Appeal Court entitled to overturn findings of fact by Competition Tribunal – Whether merger would result in lessening of competition – Whether merger may be justified on public interest grounds.

Held (8:2): Leave to appeal granted; appeal allowed.

Constitutional Law

Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg & Ors v Minister for Police & Ors

Constitutional Court of South Africa: [\[2021\] ZACC 37](#)

Judgment delivered: 22 October 2021

Coram: Mogoeng CJ, Jafta, Madlanga JJ, Mathopo AJ, Mhlantla, Theron JJ, Tshiqi J and Victor AJ

Catchwords:

Constitutional law – Human rights – Right to privacy – Searches – Warrantless searches – Where s 13(7)(a) and (b) of *South African Police Service Act 68 of 1995* provided for written authorisation of searches of premises by police – Where s 13(7)(c) provided for warrantless searches in certain circumstances – Where applicants lived in residences subject to searches by police under s 13(7)(a), (b) and (c) – Where applicants sought declaration of invalidity for whole of s 13(7) for incompatibility with right to privacy in s 14 of *Constitution* – Where High Court held s 13(7)(a) and (b) valid and invalidated (c) – Whether searches with written authorisation in s 13(7)(a) and (b) violates right to privacy – Whether warrantless searches in s 13(7)(c) violates right to privacy.

Held (7:1): Declaration of invalidity confirmed; leave to appeal granted; appeal dismissed.

Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill; Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government (Incorporation) (Scotland) Bill

Supreme Court of the United Kingdom: [\[2021\] UKSC 42](#)

Judgment delivered: 6 October 2021

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

Catchwords:

Constitutional law – Scottish Parliament – Devolution – Legislative power – Where Scottish Parliament passed two Bills, *United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* and *European Charter of Local Self-Government (Incorporation) (Scotland) Bill*, which incorporated certain treaties to which UK signatory into Scots law – Where certain provision of Bills provided Scottish courts interpret and scrutinise legislation of UK Parliament consistently with those treaties – Where other provisions allow Scottish Courts to strike down or invalidate Acts of UK Parliament for inconsistency with those treaties – Whether effect of those provisions modify or qualify legislative power of UK Parliament – Whether provisions within legislative competence of Scottish Parliament.

Held (5:0): Questions answered.

City of Toronto v Attorney-General of Ontario
Supreme Court of Canada: [\[2021\] SCC 34](#)

Judgment delivered: 1 October 2021

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

Catchwords:

Constitutional law — Charter of Rights — Freedom of expression — Municipal elections — Where Province enacted legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign — Whether legislation limits electoral participants' right to freedom of expression and, if so, whether limitation justified — *Canadian Charter of Rights and Freedoms*, ss. 1, 2(b) — *Better Local Government Act*, 2018, S.O. 2018, c. 11.

Constitutional law — Unwritten constitutional principles — Democracy — Where Province enacted legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign — Whether legislation unconstitutional for violating unwritten constitutional principle of democracy.

Held (5:4): Appeal dismissed.

Chairperson of the Council of UNISA v AfriForum NPC
Constitutional Court of South Africa: [\[2021\] ZACC 32](#)

Judgment delivered: 22 September 2021

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

Catchwords:

Constitutional law – Human rights – Right to education in language of one's choice – Where s 29(2) of *Constitution* provided for right to receive education in language of one's choice where reasonably practicable – Where University of South Africa adopted revised language policy, removing guarantee that courses be offered in both Afrikaans and English because few people opted to enrol in Afrikaans courses – Where respondent applied to set aside revised policy – Where Supreme Court of Appeal held policy invalid for lack of appropriate justification – Whether University of South Africa adduced sufficient evidence to justify removal of Afrikaans in policy – Whether revised policy unconstitutional and invalid.

Held (8:2): Leave to appeal granted; appeal dismissed.

Centre for Child Law v Director General: Department of Home Affairs & Ors

Constitutional Court of South Africa: [\[2021\] ZACC 31](#)

Judgment delivered: 22 September 2021

Coram: Mogoeng CJ, Jafta, Khampepe, Madlanga, Majiedt JJ, Mathopo AJ, Mhlantla, Theron, Tshiqi JJ and Victor AJ

Catchwords:

Constitutional law – Human rights – Rights of child – Anti-discrimination – Discrimination on grounds of marital status – Where s 10 of *Births and Deaths Registration Act 51 of 1992* provided, for child born out of wedlock, unmarried father cannot register birth of child under his surname in absence of child's mother – Where father South African citizen but mother non-citizen and gave birth in South Africa – Where, at time of birth, mother's visa expired but due to pregnancy could not return to home country – Where father sought to register child in South Africa under his surname but Department refused to register child pursuant to s 10 – Where parents applied to High Court for review of decision to refuse registration – Where Full Court held s 10 inconsistent with *Constitution* and invalid on basis deprives child of rights to fully realise rights under *Constitution* and impermissibly discriminates on basis of marital status contrary to s 9 of *Constitution* – Whether s 10 deprives child of fully realising constitutionally guaranteed rights – Whether s 10 impermissibly discriminates on basis of marital status – Whether s 10 unconstitutional and invalid.

Held (8:2): Declaration of constitutional invalidity confirmed.

Electoral Commission v Minister of Cooperative Governance and Traditional Affairs & Ors

Constitutional Court of South Africa: [\[2021\] ZACC 29](#)

Pronouncement of orders: 3 September 2021

Reasons delivered: 18 September 2021

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

Catchwords:

Constitutional law – Local government – Elections – Free and fair elections Voter registration weekends – Impact of pandemic – Where Minister by proclamation set local government election date for 27 October 2021 – Where electoral roll closed after proclamation – Where Electoral Commission did not hold voter registration weekends prior to proclamation – Where Democracy Alliance asked Constitutional Court to declare Minister's election date proclamation invalid because proclamation did not allow for voter registration weekend to be held prior to closing of

electoral roll – Where s 159(2) of *Constitution* required local government elections must be held within 90 days of expiry of terms of existing councils – Where s 190(1)(b) provided elections must be free and fair and ss 12(2) and 27(1)(a) provided election must respect and protect right of voters to life, bodily integrity and healthcare – Where, due to risks associated with COVID-19 pandemic, Electoral Commission asked Constitutional Court for order that it could hold local government election scheduled for 27 October 2021 in February 2022 in order to comply with constitutional rights – Whether Constitutional Court has power to order election be held after expiry of 90 day period – If so, whether risks associated with COVID-19 pandemic justifies such order – Whether Minister’s proclamation invalid and unconstitutional for not allowing time for voter registration weekends.

Held (6:3): Direct access granted; Electoral Commission’s application dismissed; Democratic Alliance’s application granted; Declaration of unconstitutionality made.

Contracts

6362222 Canada inc. v Prelco inc.

Supreme Court of Canada: [\[2021\] SCC 39](#)

Judgment delivered: 15 October 2021

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

Catchwords:

Contract – Non-performance – Non-liability clause – Doctrine of breach of fundamental obligation – Public order – Objective cause of obligation – Where contract by mutual agreement including non-liability clause entered into between manufacturing company and consulting firm specialized in evaluation and implementation of integrated management computer systems – Where action in damages brought by company against consulting firm for breach of its contractual obligations because of fault committed in implementing computer system – Whether doctrine of breach of fundamental obligation can render inoperative non-liability clause that was freely negotiated by legal persons – *Civil Code of Québec*, arts. 1371, 1437, 1474.

Held (9:0): Appeal allowed.

Costs

Ho v Adekun

Supreme Court of the United Kingdom: [\[2021\] UKSC 45](#)

Judgment delivered: 6 October 2021

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

Catchwords:

Costs – Enforcement – Set-off of costs orders – Cost cap – Where Pt 44 of *Civil Procedure Rules* provided for monetary cap on costs where defendant may enforce costs orders only up to amount awarded by court in damages to claimant – Where appellant injured in road accident by respondent – Where parties entered into settlement agreement where respondent paid £30,000 in damages and £16,700 in costs – Where dispute as to proper calculation of costs taken to court – Where Court of Appeal held respondent liable only for £16,700 in costs and awarded respondent £48,600 for costs of hearing, but did not make orders as to damages as damages had been agreed in settlement – Where respondent could not enforce £48,600 cost order because Pt 44 operated to set monetary cap at £0, because no damages awarded – Whether respondent entitled to set off £16,700 costs owed to appellant against £48,600 costs appellant owes to respondent.

Held (5:0): Appeal allowed.

Courts

R (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department

Supreme Court of the United Kingdom: [\[2021\] UKSC 46](#)

Judgment delivered: 20 October 2021

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

Catchwords:

Courts – First-tier Tribunal – Void orders – Effect of unlawful order before appeal – Where appellant granted immigration bail by First-tier Tribunal – Where order granting bail non-compliant with *Immigration Act 1971* – Where Home Secretary decided to impose restrictions on appellant inconsistent with Tribunal bail order – Where appellant applied for judicial review of Home Secretary's decision for inconsistency with Tribunal order – Where Upper Tribunal held Home Secretary's decision unlawful – Where Court of Appeal held Tribunal's bail order legally defective and void and therefore Home Secretary's decision lawful – Whether Tribunal decision unlawful or void – Whether Home Secretary required to comply with unlawful order before order directly appealed.

Held (5:0): Appeal allowed.

Anwar v The Advocate General for Scotland (representing the Secretary of State for Business, Energy and Industrial Strategy) (Scotland)

Supreme Court of the United Kingdom: [\[2021\] UKSC 44](#)

Judgment delivered: 13 October 2021

Coram: Lord Hodge, Lord Lloyd-Jones, Lord Briggs, Lord Leggatt and Lord Burrows

Catchwords:

Courts — Judgment enforcement — Power of court to order enforcement of tribunal remedy — European Union law — Right to effective remedy — Where appellant brought proceedings in employment tribunal against former employer for workplace harassment and was successful in claiming compensation — Where appellant unable to enforce remedy in court because former employer dissipated assets to frustrate remedy — Where tribunal had no power to enforce remedy at time of award before assets had been dissipated — Where appellant applied for judicial review on basis failure to provide for enforcement by tribunal contravenes European Union Directives 2000/43/EC and 2000/78/EC requiring provision of effective remedies for workplace discrimination claims — Where Outer House Court of Session dismissed application and Inner House dismissed appeal on basis appellant could have applied to Court of Session or Sheriff Court to grant enforcement — Whether Court of Session or Sheriff Court has power to order enforcement of remedy given by tribunal — If so, whether lack of power to order direct enforcement by tribunal breach of right to effective remedy.

Held (5:0): Appeal dismissed.

Canadian Broadcasting Corp v Manitoba

Supreme Court of Canada: [\[2021\] SCC 33](#)

Judgment delivered: 24 September 2021

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

Catchwords:

Courts — Jurisdiction — Publication bans — Variation — Criminal proceedings — Where Court of Appeal ordered indefinite publication ban on affidavit filed in criminal proceedings before it — Where motion brought by media representative after judgment on merits of proceedings rendered asked Court of Appeal to set aside publication ban — Where Court of Appeal declined to hear motion on basis that jurisdiction

exhausted — Whether court retains jurisdiction to reconsider publication ban orders and other such ancillary orders after merits of criminal proceedings decided.

Held (8:1): Appeal allowed.

Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State & Ors

Constitutional Court of South Africa: [\[2021\] ZACC 28](#)

Judgment delivered: 17 September 2021

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

Catchwords:

Courts – Rescission – *Res judicata* – *Functus officio* – Application for rescission of earlier decision – Where, in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 2, Constitutional Court ordered applicant to give evidence before Judicial Commission – Where, in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 18, Constitutional Court found applicant guilty of crime of contempt of court for non-compliance with earlier order and ordered applicant’s imprisonment – Where, in contempt judgment, applicant did not oppose contempt case and elected not to appear before court – Where applicant now applies to Constitutional Court seeking rescission and reconsideration of contempt judgment and order pursuant to rule 42(1)(a) of Uniform Rules of Court and in common law – Where applicant argued contempt judgment made in his absence justifies reconsideration – Whether applicant’s elected absence resulted in error – Whether contempt judgment and imprisonment order erroneously granted – Whether contempt judgment enlivens *res judicata* and *functus officio* – Whether exceptional circumstances to depart from *res judicata* and *functus officio*.

Held (8:1): Direct access granted; application dismissed.

Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Ltd

Constitutional Court of South Africa: [\[2021\] ZACC 24](#)

Judgment delivered: 3 September 2021

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

Catchwords:

Courts – Jurisdiction – Referral to statutory arbitration – Stay of proceedings – Where applicant franchisee of respondent – Where respondent applied in High Court for ejection of applicant after expiry of franchise agreement – Where, after application but before end of agreement, applicant lodged request for dispute to be referred to arbitration by Controller pursuant of s 12B of *Petroleum Products Act 120 of 1977* – Where applicant applied for stay of proceedings on basis referral to arbitration ousts High Court’s jurisdiction – Where High Court dismissed stay application – Whether arbitration under s 12B ousts jurisdiction of High Court – Whether High Court has discretion to refuse stay application.

Held (9:0): Leave to appeal granted; appeal dismissed with costs.

Criminal Law

Khill v The Queen

Supreme Court of Canada: [\[2021\] SCC 37](#)

Judgment delivered: 14 October 2021

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

Catchwords:

Criminal law — Defences — Self-defence — Charge to jury — Scope of “person’s role in the incident” in s. 34(2)(c) of Criminal Code — Where accused charged with second degree murder after shooting deceased in what he claimed was self-defence — Where accused acquitted by jury — Whether trial judge failed to instruct jury to consider accused’s role in the incident in accordance with s. 34(2)(c) — If so, whether error material to acquittal — *Criminal Code*, R.S.C. 1985, c. C-46, s. 34(2)(c).

Held (8:1): Appeal dismissed.

HKSAR v Fu Man Kit

Hong Kong Court of Final Appeal: [\[2021\] HKFCA 34](#)

Judgment delivered: 30 September 2021

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and Lord Reed NPJJ

Catchwords:

Criminal law – Double jeopardy – Application to disciplinary proceedings – Where appellant inmate in prison when involved in fight with other inmates – Where appellant subjected to disciplinary proceedings by Acting Superintendent of Prison under Prison Rules for fighting in prison and punished – Where, after appellant released, re-arrested and charged with

assault occasioning actual bodily harm over same incident – Where appellant applied for stay for abuse of process on grounds disciplinary proceedings based on substantially same facts – Where appellant argued on basis of double jeopardy doctrine at common law and as incorporated in s 8, art 11(6) of *Hong Kong Bill of Rights Ordinance (Cap 383)* – Where, at common law, double jeopardy required previous proceedings by “court of competent jurisdiction” – Where magistrate dismissed application and Court of First Instance dismissed appeal – Whether Acting Superintendent “court of competent jurisdiction” – Whether disciplinary proceedings criminal proceedings for purposes of double jeopardy doctrine at common law – Where disciplinary proceedings criminal proceedings for purposes of double jeopardy doctrine in *Bill of Rights*.

Held (5:0): Appeal dismissed.

Secretary for Justice v Leung Kwok Hung
Hong Kong Court of Final Appeal: [\[2021\] HKFCA 32](#)

Judgment delivered: 27 September 2021

Coram: Cheung CJ, Ribeiro, Fok PJJ, Chan and Lord Reed NPJJ

Catchwords:

Criminal law – Contempt – Legislative privilege – Immunity of members of Legislative Council – Court jurisdiction over conduct of legislative proceedings – Where appellant member of Legislative Council charged with contempt contrary to s 17(c) of *Legislative Council (Powers and Privileges) Ordinance (Cap. 382)* – Where prosecution alleged appellant during joint meeting of Legislative Council Panel on Housing and Panel on Development, snatched confidential documents from Under Secretary for Development’s folder and refused Chairperson’s requests to return documents – Where appellant contended immunity due to freedom of speech and debate in Legislative Council pursuant to ss 3 and 4 of Ordinance or art 77 of Basic Law, or alternatively, court non-intervention in conduct of Legislative Council proceedings – Where magistrate gave preliminary ruling on issues in favour of appellant – Where Court of Appeal allowed appeal from magistrate – Whether s 17(c) applies to members of Legislative Council – Whether members of Legislative Council immune due to freedom of speech and debate – Whether courts have jurisdiction to intervene in Legislative Council proceedings.

Held (5:0): Appeal dismissed.

Environmental Law

Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & Ors

Supreme Court of New Zealand: [\[2021\] NZSC 127](#)

Judgment delivered: 30 September 2021

Coram: Winkelmann CJ, William Young, Glazebrook, Ellen France and Williams JJ

Catchwords:

Environmental law – Seabed mining – Proper test for assessing marine discharge and dumping consents – Relevance of Maori customary rights and interests – Where appellant sought marine consents and marine discharge consents under *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012* to undertake seabed mining – Where respondents opposed consents because of effects on environment and on Maori tribes holding tikanga-based customary rights and interests in affected areas – Where Environmental Protection Authority granted consents with conditions – Where respondents successfully challenged consents in High Court and Court of Appeal dismissed appellant’s appeal – Whether Authority applied correct test in balancing environmental interests with economic interests – Whether Act requires Authority to consider tikanga-based customary rights and interests.

Held (5:0): Appeal dismissed.

Human Rights

Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)

Supreme Court of Canada: [\[2021\] SCC 43](#)

Judgment delivered: 29 October 2021

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

Catchwords:

Human rights — Right to safeguard of dignity — Right to equal recognition and exercise of human rights and freedoms — Freedom of expression — Where discrimination claim brought on behalf of public figure with disability against professional comedian who mocked some of his physical characteristics — Whether within scope of jurisdiction of Commission des droits de la personne et des droits de la jeunesse and Human Rights Tribunal with respect to discrimination — Correct legal test to discrimination claim based on expression where there is conflict between

right to safeguard of dignity and freedom of expression – *Charter of Human Rights and Freedoms*, CQLR, c. C-12, ss. 3, 4, 9.1, 10.

Held (5:4): Appeal allowed.

Fitzgerald v The Queen

Supreme Court of New Zealand: [\[2021\] NZSC 131](#)

Judgment delivered: 7 October 2021

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

Catchwords:

Human rights – Right not to be subject to cruel, degrading or disproportionately severe punishment – Sentencing – Three-strike offences – Where s 86D of *Sentencing Act 2002* provided for three-strike sentencing regime, requiring mandatory sentences for repeat offenders – Where appellant suffered from mental illness and committed third-strike offence – Where parties agreed applying three-strike mandatory sentencing disproportionate – Where s 9 of *Bill of Rights* provided right not to be subjected to cruel, degrading or disproportionately severe punishment – Where High Court and Court of Appeal applied mandatory sentence – Whether three-strike sentencing regime requires judges to impose sentences that would breach s 9 of *Bill of Rights* – Where three-strike sentencing regime is compatible with s 9 of *Bill of Rights*.

Held (5:0): Appeal allowed.

Industrial Law

Kostal UK Ltd v Dunkley & Ors

Supreme Court of the United Kingdom: [\[2021\] UKSC 47](#)

Judgment delivered: 27 October 2021

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

Catchwords:

Industrial law – Collective bargaining – Prohibited result – Direct offer to employees – Where s 145B of *Trade Union and Labour Relations (Consolidation) Act 1992* provided employer may not make offer directly to employee if acceptance of offer would result in prohibited result – Where prohibited result defined as where employee's terms of employment not determined by collective bargaining – Where appellants members of trade union and after negotiation with union, respondent made pay offer to employees through union – Where employees balloted

and rejected offer – Where employer made same offer directly to employees twice – Where effect of direct offer meant some, but not all, terms of employment not determined by collective bargaining – Where appellants complained to Employment Tribunal that offers made contravened s 145B, which upheld complaints – Where Court of Appeal set aside decision – Whether direct offer to employees had effect of some, but not all, terms of employment not determined by collective bargaining contravened s 145B.

Held (5:0): Appeal allowed.

Northern Regional Health Authority

Supreme Court of Canada: [\[2021\] SCC 42](#)

Judgment delivered: 22 October 2021

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

Catchwords:

Industrial law – Labour relations — Jurisdiction of arbitrator — Where human rights dispute arose from collective agreement — Where unionized employee suspended after attending work under influence of alcohol and later terminated for breaching abstinence agreement — Where employee filed human rights complaint alleging that employer failed to adequately accommodate disability — Whether exclusive jurisdiction of labour arbitrator appointed under collective agreement and empowered by provincial labour legislation extends to adjudicating human rights disputes arising from collective agreement — *The Labour Relations Act*, C.C.S.M., c. L10, s. 78 — *The Human Rights Code*, C.C.S.M., c. H175, ss. 22, 26, 29(3).

Held (6:1): Appeal allowed.

Booi v Amathole District Municipality & Ors

Constitutional Court of south Africa: [\[2021\] ZACC 36](#)

Judgment delivered: 19 October 2021

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

Catchwords:

Industrial law – Unfair dismissal – Remedies – Reinstatement – Breakdown of employment relationship – Where applicant employed by first respondent, charged with misconduct, and following disciplinary hearing, dismissed – Where arbitrator found him not guilty of misconduct and ordered reinstatement – Where first respondent appealed to Labour

Court, which held although applicant unfairly dismissed, applicant's conduct had destroyed employment relationship with employer, and ordered compensation rather than reinstatement – Whether arbitrator correct in awarding reinstatement – Correct test for breakdown in employment relationship.

Held (6:1): Appeal allowed.

Practice and Procedure

FS Cairo (Nile Plaza) LLC v Brownlie (as dependant and executrix of Professor Sir Ian Brownlie CBE QC)

Supreme Court of the United Kingdom: [\[2021\] UKSC 45](#)

Judgment delivered: 20 October 2021

Coram: Lord Reed, Lord Lloyd-Jones, Lord Briggs, Lord Leggatt and Lord Burrows

Catchwords:

Practice and procedure – Service – Service outside jurisdiction – Jurisdictional gateway – Relevance of foreign law – Presumption of similarity - Where appellant Egyptian hotel company – Where respondent and husband on holiday in Egypt and stayed at appellant's hotel – Where husband killed and respondent injured in crash when on tour organised by appellant's hotel – Where respondent brought tort and contract proceedings in England and applied for service to appellant out of jurisdiction – Where *Civil Procedure Rules* relevantly require respondent to demonstrate jurisdictional gateway by showing damage sustained in England, and demonstrate claim has reasonable prospect of success – Where respondent's claims governed by Egyptian law – Where respondent did not adduce evidence of Egyptian law and relied on presumption of similarity to argue Egyptian law and English law similar – Where Supreme Court held respondent's damages sustained in England sufficient, and respondent's failure to adduce evidence of Egyptian law does not defeat claim – Whether respondent satisfied jurisdictional gateway despite accident occurring in Egypt – Whether respondent required to adduce evidence of Egyptian law to prove reasonable prospects of success, or may rely on presumption of similarity for purposes of service.

Held (4:1): Appeal dismissed.

Torts

City of Nelson v Marchi

Supreme Court of Canada: [\[2021\] SCC 41](#)

Judgment delivered: 21 October 2021

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

Catchwords:

Torts — Negligence — Duty of care — Government liability — Core policy immunity — Snow clearing and removal — Where person injured while attempting to cross snowbank created by city when clearing snow — Where City's snow clearing and removal decisions made in accordance with written policies and unwritten practices — Whether relevant city decision was core policy decision immune from negligence liability.

Held (7:0): Appeal dismissed.

M (SC 82/2020) v Attorney-General (in respect of the Ministry of Health)
Supreme Court of New Zealand: [\[2021\] NZSC 118](#)

Judgment delivered: 17 September 2021

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

Catchwords:

Torts – Unlawful detention – Detention as special care recipient – Delay in authorisation – Where appellant charged in 2001 and found unfit to stand trial due to intellectual disabilities – Where appellant detained as special care recipient pursuant to s 24(4) of *Criminal Procedure (Mentally Impaired Persons) Act 2003* – Where s 30(1)(b) provided maximum period of detention as special care recipient half maximum term of imprisonment if person had been convicted – Where s 31(4) provided if half-sentence period expired, Attorney-General must direct individual be detained as “care recipient not subject to criminal justice system” – Where appellant's half-sentence period expired on 20 October 2008 but Attorney-General did not make s 31(4) direction until 14 January 2009 – Where appellant commenced proceedings for unlawful detention for period between 20 October 2008 and 14 January 2009 – Where High Court dismissed claim and Court of Appeal dismissed appeal – Whether appellant unlawfully detained for period after half-sentence period expired but before Attorney-General made s 31(4) direction.

Held (3:2): Appeal allowed.
