



OVERSEAS DECISIONS BULLETIN

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

Volume 19 Number 2 (1 April – 31 May 2022)

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

Administrative Law

Boechler, PC v Commissioner of Internal Revenue
Supreme Court of the United States: [Docket No. 20-1472](#)

Judgment delivered: 21 April 2022

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

Catchwords:

Administrative law – Jurisdiction – Jurisdictional deadline – Where Internal Revenue Service ("IRS") notified Boechler, PC, of tax filing discrepancy – Where Boechler did not respond and IRS assessed "intentional disregard" penalty and notified Boechler of intent to levy Boechler's property to satisfy penalty pursuant to 26 USC §§6330(a), 6721(a)(2), (e)(2)(A) – Where Boechler requested and received "collection due process hearing" before IRS's Independent Office of Appeals pursuant to §6330(b), but Office sustained proposed levy – Where, under §6330(d)(1), Boechler had 30 days to petition Tax Court for review – Where Boechler filed petition one day late – Where Tax Court dismissed petition for lack of jurisdiction and Eighth Circuit affirmed – Whether §6330(d)(1)'s 30-day filing deadline jurisdictional – Whether §6330(d)(1)'s 30-day filing deadline subject to equitable tolling.

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

Arbitration

CJA v CIZ

Court of Appeal of Singapore: [\[2022\] SGCA 41](#)

Judgment delivered: 17 May 2022

Coram: Menon CJ, Prakash JCA and Chao SJ

Catchwords:

Arbitration – Award – Recourse against award – Setting aside – Scope of arbitration agreement – Breach of natural justice – Where High Court judge set aside part of arbitral award on basis Tribunal exceeded jurisdiction – Where judge held Tribunal, in finding in favour of appellant on one of claims, interpreted articles in agreement in manner contrary to case advanced by appellant in arbitration – Where judge held, since appellant run entire case on premise of subsisting agreement and therefore no issue of expiry of original agreement arose, excess of jurisdiction for Tribunal to find no subsisting agreement, but that original agreement could be interpreted in manner which allowed appellant's claim – Whether Tribunal's findings and interpretations of articles within scope of submission to Tribunal.

Held (3:0): Appeal allowed.

CSY v CSZ

Court of Appeal of Singapore: [\[2022\] SGCA 43](#)

Judgment delivered: 19 May 2022

Coram: Menon CJ and Leong JCA

Catchwords:

Arbitration – Domestic arbitration – Stay of proceedings – Exercise of courts' discretion – Where differences in legislative schemes governing domestic and international arbitration regarding stay of court proceedings brought in breach of arbitration agreement – Where, for international arbitrations, court mandated to stay proceedings in favour of international arbitration unless arbitration agreement "null and void, inoperative or incapable of being performed" under s 6(2) of *International Arbitration Act 1994* (2020 Rev Ed) – Where, for domestic arbitration, court retains discretion to refuse to stay court proceedings in favour of domestic arbitration under s 6(2) of *Arbitration Act* (Cap 10, 2002 Rev Ed) ("AA") when court satisfied there sufficient reason why matter should not be referred to arbitration in accordance with arbitration agreement or if applicant seeking stay not ready and willing to do all necessary for proper

conduct of arbitration – Where appellant appealed against decision of High Court granting application of respondent to stay proceedings in favour of domestic arbitration – Proper approach to court's exercise of discretion to refuse stay of proceedings in favour of domestic arbitration under s 6 of AA.

Held (2:0): Appeal allowed.

Morgan v Sundance, Inc

Supreme Court of the United States: [Docket No. 21-328](#)

Judgment delivered: 23 May 2022

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

Catchwords:

Arbitration – Employment dispute – Agreement to arbitrate – Where petitioner hourly employee at Taco Bell franchise owned by respondent – Where petitioner signed agreement to arbitrate any employment dispute – Where, despite agreement, petitioner filed nationwide collective action asserting respondent violated federal law regarding overtime payment – Where respondent defended action but, eight months after commencement of lawsuit, respondent moved to stay litigation and compel arbitration under *Federal Arbitration Act*, 9 USC §3 – Where petitioner argued respondent waived right to arbitrate for litigating for so long – Where courts below applied Eighth Circuit precedent, under which party waives right to arbitration if knew of right; "acted inconsistently with right"; and "prejudiced other party by inconsistent actions": *Erdman Co v Phoenix Land & Acquisition, LLC*, 650 F 3d 1115, 1117 – Where prejudice requirement not feature of federal waiver law generally – Where Eighth Circuit adopted requirement because of federal policy favouring arbitration, but other courts rejected such requirement – Whether federal courts should adopt arbitration-specific waiver rule demanding showing of prejudice.

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

Constitutional Law

Attorney-General v Datchinamurthy a/l Kataiah

Court of Appeal of Singapore: [\[2022\] SGCA 46](#)

Judgment delivered: 30 May 2022

Coram: Leong, Prakash JJCA and Ang JAD

Catchwords:

Constitutional law – Judicial review – Equal protection of law – Fundamental liberties – Right to life – Stay of execution – Where respondent convicted and sentenced for capital offence and date of execution fixed – Where execution date fell prior to hearing of civil matter in which respondent one of 13 plaintiffs – Where High Court judge found there prima facie case of unequal treatment and allowed respondent's application for leave to commence judicial review proceedings – Whether, by scheduling of execution, respondent subjected to unequal treatment – Whether to stay execution pending resolution of respondent's judicial review application.

Held (3:0): Appeal dismissed.

City of Austin, Texas v Reagan National Advertising of Austin, LLC
Supreme Court of the United States: [Docket No. 20-1029](#)

Judgment delivered: 21 April 2022

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

Catchwords:

Constitutional law – First Amendment – Free Speech – Off-premises signs – Where Austin, Texas, City Code, §25-10-102(1) (2016) regulated signs advertising things not located on same premises as sign – Where Code prohibited construction of new off-premises signs – Where existing off-premises signs, "nonconforming signs", could not be altered to increase nonconformity but on-premises signs not similarly restricted – Where respondents owned billboards in Austin – Where respondent sought to digitise billboards but City denied applications – Where respondent filed suit alleging City's prohibition digitizing off-premises signs, but not on-premises signs, violated First Amendment free speech clause – Where District Court found for City, holding City Code provisions facially content neutral under *Reed v Town of Gilbert*, 576 US 155 (2015) – Where Court of Appeals reversed decision, finding on-/off-premises distinction to be facially content based because government official had to read sign's message to determine whether sign off-premises – Whether City's on-/off premises distinction facially content neutral under First Amendment.

Held (6:3; 5:4 (Alito J dissenting in part)): Judgment of Court of Appeals for the Fifth Circuit reversed and case remanded.

R v Bissonnette

Supreme Court of Canada: [\[2022\] SCC 23](#)

Judgment delivered: 27 May 2022

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

Catchwords:

Constitutional law – *Charter of Rights* – Cruel and unusual treatment or punishment – Punishment that is cruel and unusual by nature – Remedy – Where s 745.51 of *Criminal Code* authorised imposition of consecutive 25-year parole ineligibility periods in cases involving multiple first degree murders – Whether s 745.51 infringes s 12 of *Charter*, which guarantees right not to be subjected to cruel and unusual treatment or punishment – Appropriate remedy if s 12 infringed – *Constitution Act, 1982, s 52(1)* – *Canadian Charter of Rights and Freedoms, s 12* – *Criminal Code, RSC 1985, c C-46, s 745.51*.

Held (9:0): Appeal dismissed.

R v Brown

Supreme Court of Canada: [\[2022\] SCC 18](#)

Judgment delivered: 13 May 2022

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

Catchwords:

Constitutional law – *Charter of Rights* – Fundamental justice – Presumption of innocence – Reasonable limits – Where s 33.1 of *Criminal Code* prevented accused from raising common law defence of self-induced intoxication akin to automatism – Whether s 33.1 violates principles of fundamental justice or presumption of innocence – Whether, if so, infringement justified – *Canadian Charter of Rights and Freedoms, ss 1, 7, 11(d)* – *Criminal Code, RSC 1985, c C-46, s 33.1*.

Held (9:0): Appeal dismissed.

R v Dussault

Supreme Court of Canada: [\[2022\] SCC 16](#)

Judgment delivered: 29 April 2022

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

Catchwords:

Constitutional law – *Charter of Rights* – Right to counsel – Where accused spoke with lawyer on telephone from police station – Where call ended in

belief that police had agreed to allow them to continue conversation at station – Where police refused to let accused meet with lawyer when he arrived at station – Where police subsequently conducted interrogation resulting in accused making incriminating statement – Whether police required to provide accused with further opportunity to consult counsel before interrogation – *Canadian Charter of Rights and Freedoms*, s 10(b).

Held (9:0): Appeal dismissed.

R v JF

Supreme Court of Canada: [\[2022\] SCC 17](#)

Judgment delivered: 6 May 2022

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

Catchwords:

Constitutional law – *Charter of Rights* – Right to be tried within reasonable time – Order for new trial – Whether, after new trial is ordered, accused can file motion under s 11(b) of *Canadian Charter of Rights and Freedoms* for stay of proceedings based on delay in accused's first trial – Whether presumptive ceilings established in *R v Jordan* [2016] SCC 27 apply to retrial delay.

Held (8:1): Appeal allowed, stay of proceedings set aside and case remanded to the Court of Québec for continuation of the trial.

R v Stairs

Supreme Court of Canada: [\[2022\] SCC 11](#)

Judgment delivered: 8 April 2022

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

Catchwords:

Constitutional law – *Charter of Rights* – Search and seizure – Search incident to arrest – Where police arrested accused in basement of home following report of domestic violence – Where police conducted clearing search of basement living room after arrest and found methamphetamine – Where accused convicted of possession of controlled substance for purpose of trafficking – Whether common law standard for search incident to arrest should be modified when search conducted in home – Whether clearing search of basement living room lawful search incident to arrest – *Canadian Charter of Rights and Freedoms*, s 8.

Held (6:3): Appeal dismissed.

R v Sullivan

Supreme Court of Canada: [\[2022\] SCC 19](#)

Judgment delivered: 13 May 2022

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

Catchwords:

Constitutional law – *Charter of Rights* – Fundamental justice – Presumption of innocence – Reasonable limits – Where s 33.1 of *Criminal Code* prevented accused from raising common law defence of self-induced intoxication akin to automatism – Whether s 33.1 violates principles of fundamental justice or presumption of innocence and, if so, whether infringement justified – *Canadian Charter of Rights and Freedoms*, ss 1, 7, 11(d) – *Criminal Code*, RSC 1985, c C-46, s 33.1.

Constitutional law – Remedy – Declaration of invalidity – Whether declaration of unconstitutionality issued by superior court pursuant to s 52(1) of *Constitution Act*, 1982, can be considered binding on courts of coordinate jurisdiction.

Criminal law – Appeals – Appeals to Supreme Court of Canada – Jurisdiction – Where accused convicted of indictable offence at trial – Where Court of Appeal set aside conviction and ordered new trial – Where Crown brought appeal to Supreme Court of Canada – Where accused applied for leave to cross-appeal order of new trial and requested stay – Whether Court has jurisdiction to hear accused's appeal – *Criminal Code*, RSC 1985, c C-46, s 691.

Held (9:0): Appeal dismissed.

R v Tim

Supreme Court of Canada: [\[2022\] SCC 12](#)

Judgment delivered: 14 April 2022

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

Catchwords:

Constitutional law – *Charter of Rights* – Arbitrary detention – Search and seizure – Remedy – Exclusion of evidence – Where Police arrested accused for possession of controlled substance based on mistake of law about pill in accused's possession being controlled substance – Where police subsequently conducted searches of accused and his car and found drugs,

ammunition and handgun – Whether arrest and subsequent searches infringed accused's rights against arbitrary detention and unreasonable search and seizure – If so, whether admission of evidence would bring administration of justice into disrepute warranting its exclusion – *Canadian Charter of Rights and Freedoms*, ss 8, 9, 24(2).

Held (6:1): Appeal dismissed.

Shurtleff v Boston

Supreme Court of the United States: [Docket No. 20-1800](#)

Judgment delivered: 2 May 2022

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

Catchwords:

Constitutional law – First Amendment – Free speech – Where outside Boston City Hall stood three flagpoles – Where Boston flew American flag on first pole, flag of Commonwealth of Massachusetts on second pole and, usually, City's flag on third pole – Where Boston allowed groups to hold ceremonies on plaza and hoist flag of their choosing on third pole in place of City's flag – Where, between 2005 and 2017, Boston approved raising of approximately 50 unique flags for 284 such ceremonies – Where most of flags other countries', but some associated with groups or causes, such as Pride Flag and banner honouring emergency medical service workers – Where Shurtleff, director of organization called Camp Constitution, sought to hold event on plaza to celebrate contributions of Christian community – Where, part of ceremony, Shurtleff wished to raise "Christian flag" – Where commissioner of Boston's Property Management Department worried flying religious flag at City Hall could violate Establishment Clause and told Shurtleff could hold event but could not raise flag – Where Shurtleff and Camp Constitution sued, claiming Boston's refusal to allow their flag violated First Amendment – Where District Court held flying private groups' flags from City Hall's third flagpole amounted to government speech, so Boston's refusal did not run afoul of First Amendment – Where First Circuit affirmed – Whether flags Boston allows others to fly express government speech – Whether denial of petitioners' flag-raising request consistent with First Amendment.

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

Thompson v Clark

Supreme Court of the United States: [Docket No. 20-659](#)

Judgment delivered: 4 April 2022

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

Catchwords:

Constitutional law – Fourth Amendment – Malicious prosecution – Favourable termination requirement – Where Thompson arrested, charged and detained for obstructing governmental administration, but subsequently released – Where charges dismissed before trial without explanation by prosecutor or judge – Where, after dismissal, Thompson filed suit under 42 USC §1983 alleging several constitutional violations, including Fourth Amendment claim for malicious prosecution – Where, to maintain claim under §1983, plaintiff to demonstrate favourable termination of underlying criminal prosecution – Where Second Circuit precedent in *Lanning v Glens Falls*, 908 F. 3d 19 required Thompson to show criminal prosecution ended not merely without conviction, but also with affirmative indication of innocence – Where District Court, bound by *Lanning*, held Thompson's criminal case not ended in way to affirmatively indicate innocence because Thompson could not offer substantial evidence to explain why case dismissed – Where Second Circuit affirmed dismissal of Thompson's claim – Whether, to demonstrate favourable termination of criminal prosecution for purposes of Fourth Amendment claim under §1983 for malicious prosecution, plaintiff needs to show criminal prosecution ended with affirmative indication of innocence.

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

United States v Vaello Madero

Supreme Court of the United States: [Docket No. 20-303](#)

Judgment delivered: 21 April 2022

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

Catchwords:

Constitutional law – Territory Clause – Security income benefits – Where Art IV, §3, cl 2 of *Constitution*, which states Congress may make all needful Rules and Regulations respecting Territory belonging to United States, affords Congress broad authority to legislate with respect to US Territories – Where, in exercise of authority, Congress long maintained different federal tax and benefits programs for residents of Territories than for residents of 50 States – Where Supplemental Security Income (SSI), federal benefits program, applied under 42 USC §1382c(a)(1)(B)(i) only to residents of United States, being 50 States and District of Columbia – Where residents of Puerto Rico not eligible for Supplemental Security Income – Where Madero received Supplemental Security Income benefits while residing in New York and continued to received benefits after moving to

Puerto Rico – Where US Government subsequently sought to recover payments and sued for restitution – Where Madero argued Congress's exclusion of residents of Puerto Rico from Supplemental Security Income program violated equal-protection component of Fifth Amendment's Due Process Clause – Whether equal-protection component of Fifth Amendment's Due Process Clause requires Congress to make Supplemental Security Income benefits available to residents of Puerto Rico to same extent benefits available to residents of States.

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

Costs

Competition and Markets Authority v Flynn Pharma Ltd & Anor; Competition and Markets Authority v Pfizer Inc & Anor
Supreme Court of the United Kingdom: [\[2022\] UKSC 14](#)

Judgment delivered: 25 May 2022

Coram: Lord Hodge, Lord Sales, Lord Leggatt, Lord Stephens and Lady Rose

Catchwords:

Costs – Tribunal's power to make order – Principle from *Bradford Metropolitan District Council v Booth* [2000] 164 JP 485 – Where appellants successful in appeal brought before Competition Appeal Tribunal ("CAT") challenging decision adopted by respondent ("CMA") – Where CAT allowed appellants' appeal in part – Where, on appellants' application for costs of appeal, CAT ordered CMA pay proportion of costs – Where Court of Appeal set aside CAT's costs order and directed no order as to costs, holding CAT erred in ordering CMA to pay appellants' costs because disregarded principle derived from *Bradford* and subsequent cases – Where *Bradford* line of cases determined, where tribunal's power to make costs order does not include express general rule or default position, starting point no order for costs be made against public body unsuccessful in bringing or defending proceedings in exercise of statutory functions ("*Bradford* principle") – Whether CAT's discretion as to costs constrained by *Bradford* principle.

Held (5:0): Appeals allowed.

Criminal Law

Brown v Davenport

Supreme Court of the United States: [Docket No. 20–826](#)

Judgment delivered: 21 April 2022

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

Catchwords:

Criminal law – Fourteenth Amendment – Due process – Shackling of criminal defendant at trial – Where Davenport convicted of first-degree murder following jury trial where, at times, shackled at table with privacy screen – Where, on appeal, Davenport argued conviction be set aside following *Deck v Missouri*, 544 US 622 (2005), in which US Supreme Court held Fourteenth Amendment's Due Process Clause generally forbids shackling criminal defendants at trial absent "special need" – Where Michigan Supreme Court agreed trial court's actions violated *Deck* and sought to apply *Chapman v California*, 386 US 18 (1967) where US Supreme Court held preserved claim of constitutional error identified on direct appeal does not require reversal of conviction if prosecution can establish error harmless beyond reasonable doubt – Where Michigan Supreme Court remanded case to trial court with instructions to determine whether jury saw Davenport's shackles and, if so, whether prosecution could demonstrate beyond reasonable doubt shackling did not contribute to verdict against defendant – Where five of twelve jurors remembered seeing restraints, but all testified shackles did not enter into deliberations or influence unanimous verdict – Where trial court found State had discharged burden to show harmlessness beyond reasonable doubt – Where subsequent appeal dismissed and Davenport sought relief in federal district court, filing habeas petition – Where, under *Antiterrorism and Effective Death Penalty Act of 1996*, 28 USC § 2254 ("AEDPA"), federal court may disturb final state-court conviction in narrow circumstances, relevantly, where habeas petitioner shows decision either (1) "contrary to" or "unreasonable application of" clearly established federal law, or (2) based on "unreasonable determination of facts" presented in state-court proceeding – Where divided Sixth Circuit declined to analyse case under AEDPA, instead holding review governed by *Brecht v Abrahamson*, 507 US 619 (1993), which held that state prisoner seeking to challenge conviction on basis *Chapman* error must show error had "substantial and injurious effect or influence" on trial's outcome – Where Sixth Circuit, persuaded Davenport could satisfy *Brecht*, granted federal habeas relief – Proper approach to tests in *Brecht* and AEDPA.

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

HKSAR v Chan Kam Ching

Hong Kong Court of Final Appeal: [\[2022\] HKCFA 7](#)

Judgment delivered: 14 April 2022

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

Catchwords:

Criminal law – Substitution of conviction of offence – Forgery – Fraud – Dishonesty – Where appellant convicted of using false instrument and using copy of false instrument contrary to ss 73 and 74 of Crimes Ordinance in dealing with client's property – Where ss 73 and 74 provided person who uses instrument or copy of instrument which is, and which person knows to be, false, with intention of inducing acceptance as genuine, commits offence – Where *mens rea* for ss 73 and 74 required knowledge of falsity – Whether instrument "false" – Whether, if instrument not "false", conviction for other offence should be substituted – Whether offence of conviction for fraud contrary to s 16A of Theft Ordinance should be substituted where s 16A requires proof of deceit.

Held (5:0): Appeal allowed.

R v JD

Supreme Court of Canada: [\[2022\] SCC 15](#)

Judgment delivered: 22 April 2022

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

Catchwords:

Criminal law – Trial – Continuation of proceedings before another judge – Evidence – Admissibility – Where transcripts of testimony from first trial filed with consent of parties as evidence on merits in trial – Proper approach to legal framework governing admissibility in evidence in trial commenced again – *Criminal Code*, RSC 1985, c C-46, s 669.2(3).

Held (9:0): Appeal allowed.

R v Maughan

Supreme Court of the United Kingdom: [\[2022\] UKSC 13](#)

Judgment delivered: 18 May 2022

Coram: Lord Hodge, Lord Hamblen, Lord Burrows, Sir Declan Morgan and Lord Lloyd-Jones

Catchwords:

Criminal law – Sentencing – Reduction in sentence – Intention to plead guilty – Where Maughan caught "red-handed" in relation to several offences – Where Maughan pleaded guilty at arraignment – Where Maughan gave no prior indication of intention to plead guilty – Where sentencing policy, derived from *Attorney General's Reference (No 1 of 2006)* [2006] NICA 4, concerning identification of first reasonable opportunity to indicate intention to plead guilty – Where sentencing policy, set out in *R v Pollock* [2005]

NICA 43, regarding reductions of discount where caught red-handed – Where Article 33 of Criminal Justice (Northern Ireland) Order 1996 prescribed, in determining sentence, court to take into account stage in "proceedings" offender indicated intention to plead guilty – Whether term "proceedings" includes investigation by way of questioning by police – Proper approach to reduction in sentence where offender caught red-handed.

Held (5:0): Appeal dismissed.

Shinn v Martinez Ramirez

Supreme Court of the United States: [Docket No. 20–1009](#)

Judgment delivered: 23 May 2022

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

Catchwords:

Criminal law – Ineffective-assistance claim – Where respondents, Ramirez and Jones, each convicted of capital crimes in Arizona state court and sentenced to death – Where respondents filed for federal habeas relief under 28 USC §2254, arguing trial counsel ineffective for failing to conduct adequate investigations – Where Federal District Court held in each case prisoner's ineffective-assistance claim procedurally defaulted because not properly presented in state court – Where to overcome procedural default, prisoner must demonstrate "cause" to excuse procedural defect and "actual prejudice": *Coleman v Thompson*, 501 US 722, 750 – Where to demonstrate cause, respondents relied on *Martinez v Ryan*, 566 US 1, holding ineffective assistance of post-conviction counsel may be cited as cause for procedural default of ineffective-assistance-of-trial-counsel claim – Where, in Ramirez's case, District Court permitted record to be supplemented with evidence not presented in state court to support case to excuse procedural default – Where, assessing new evidence, court excused procedural default but rejected Ramirez's ineffective-assistance claim on merits – Where Ninth Circuit reversed and remanded for more evidentiary development to litigate merits of Ramirez's ineffective-assistance-of-trial-counsel claim – Where, in Jones' case, District Court held lengthy evidentiary hearing on "cause" and "prejudice," forgave procedural default, and held state trial counsel had provided ineffective assistance – Where State of Arizona petitioned Court in both cases, arguing §2254(e)(2) did not permit federal court to order evidentiary development simply because post-conviction counsel alleged to have negligently failed to develop state-court record – Whether equitable rule announced in *Martinez* permits federal court to dispense with §2254(e)(2)'s narrow limits because prisoner's state post-conviction counsel negligently failed to develop state-court record.

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

Tuta v The State

Constitutional Court of South Africa: [\[2022\] ZACC 19](#)

Judgment delivered: 13 May 2022

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

Catchwords:

Criminal law – Fair trial – Putative private defence – Where applicant charged, convicted and sentenced for murder of constable and attempted murder of another constable – Where applicant argued infringement of right to fair trial pursuant to s 35(3) of *Constitution* for, as result of trial judge's intervention, no cross-examination on intention by prosecutor – Where applicant argued not informed of State's case applicant knew, foresaw, or should have foreseen assailants policemen – Where applicant argued point of general public importance whether trial court applied test for putative private defence correctly – Whether argument of infringement of fair trial rights sufficiently serious to undermine basic notions of trial fairness, engaging Court's jurisdiction – Proper formulation of test for putative private defence.

Held (7:2): Leave to appeal granted; appeal upheld.

Discrimination

Cummings v Premier Rehab Keller, PLLC

Supreme Court of the United States: [Docket No. 20-219](#)

Judgment delivered: 28 April 2022

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

Catchwords:

Discrimination – Damages – Disability – American Sign Language (ASL) interpreter – Where petitioner deaf and legally blind – Where petitioner sought physical therapy services from respondent and requested ASL interpreter at sessions – Where respondent declined to provide ASL interpreter, telling petitioner therapist could communicate through other means – Where petitioner sought care from other provider – Where petitioner commenced suit against respondent alleging failure to provide ASL interpreter constituted disability discrimination in violation of *Rehabilitation Act of 1973*, 29 USC §794(a) and *Affordable Care Act*, 42 USC §18116 – Where respondent subject to statutes as entity receiving federal financial assistance through Medicare and Medicaid – Where District

Court dismissed complaint, observing "damages for emotional harm" not compensable injuries – Where Court of Appeals affirmed decision – Whether damages for emotional harm recoverable in private actions brought to enforce *Rehabilitation Act of 1973* or *Affordable Care Act*.

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

Election Law

Federal Election Commission v Ted Cruz

Supreme Court of the United States: [Docket No. 21-12](#)

Judgment delivered: 16 May 2022

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

Catchwords:

Election law – Campaign financing – Repayment of campaign loan – Where during 2018 Senate reelection campaign, consistent with federal law (11 CFR §110.10; 52 USC §30101(9)(A)(i)) appellee loaned \$260,000 to campaign committee, Ted Cruz for Senate ("Committee") – Where, to repay campaign debts, campaigns may continue to receive contributions after election day: 11 CFR §110.1(b)(3)(i) – Where section 304 of *Bipartisan Campaign Reform Act of 2002* ("BCRA") restricted use of post-election contributions by limiting amount candidate could be repaid to \$250,000: 52 USC §30116(j) – Where Federal Election Commission ("FEC") promulgated regulations establishing three rules to implement limitation: first, campaign may repay up to \$250,000 in candidate loans using contributions "at any time" (11 CFR §116.12(a)); secondly, to extent loans exceeded \$250,000, campaign may use pre-election funds to repay portion exceeding \$250,000 only if repayment occurs "within 20 days of election" (§116.11(c)(1)); thirdly, when 20-day post-election deadline expires, campaign must treat any portion above \$250,000 as contribution to campaign (§116.11(c)(2)) – Where Committee began repaying appellee loans after 20-day post-election window closed – Where Committee repaid only \$250,000, leaving \$10,000 of appellee's personal loans unpaid – Where appellee and Committee filed action in Federal District Court, alleging section 304 of BCRA violated First Amendment and raised challenges to FEC's implementing regulation, §116.11 – Where District Court awarded summary judgment on constitutional claim, holding loan-repayment limitation burdened political speech without sufficient justification, dismissing as moot challenges to regulation – Whether loan-repayment limitations violate First Amendment rights of candidates and campaigns to engage in political speech.

Held (6:3): Judgment of United States District Court for the District of Columbia affirmed.

R v Minister for the Cabinet Office

Supreme Court of the United Kingdom: [\[2022\] UKSC 11](#)

Judgment delivered: 27 April 2022

Coram: Lord Reed, Lord Sales, Lord Hamblen, Lord Stephens and Dame Keegan

Catchwords:

Election law – Voting rights – Voter identification – Where respondent announced intention to authorise pilot schemes temporarily changing rules set out in secondary legislation governing local elections – Where changes were to occur in respect of local government elections in May 2019 – Where respondent ordered implementation of pilot schemes in 10 local authorities ("Pilot Orders") – Where pilot scheme introduced new requirement for form of voter identification – Where s 10(1) of *Representation of the People Act 2000* ("RPA 2000") enabled Secretary of State by subordinate legislation to make such provision for and in connection with implementation of scheme as considered appropriate – Where Secretary of State's power limited to scheme within meaning of s 10(2) which relevantly provided for schemes regards how voting at elections to take place (s 10(2)(a)) – Whether Pilot Orders ultra vires, because pilot schemes not "schemes" within meaning of s 10(2)(a) of RPA 2000 – Whether pilot schemes authorised for lawful purpose under s 10(1) of RPA 2000, consistent with policy and objects of Act.

Held (5:0): Appeal dismissed.

Employment Law

Solidarity obo Members v Barloworld Equipment Southern Africa & Ors

Constitutional Court of South Africa: [\[2022\] ZACC 15](#)

Judgment delivered: 6 May 2022

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

Catchwords:

Employment law – Labour – Consultation process – Where s 189(3) of *Labour Relations Act 66 of 1995* stated employer must issue written notice inviting other consulting party to consult and disclose in writing all relevant information pertaining to proposed dismissals – Where s 189A(13) provided consulting party may approach Labour Court for certain orders where employer does not comply with fair procedure – Where Barloworld sent notice, as envisaged by s 189(3), to employees relating to restructuring of operations, allegedly resulting from impact of Covid-19 on entity – Where

Barloworld approached Commission for Conciliation, Mediation and Arbitration and requested appointment of facilitator in terms of s 189A(13) to facilitate joint consensus-seeking process between affected parties – Where, after facilitator appointed, several letters exchanged between Solidarity, trade union acting on behalf of former employees of Barloworld, and Barloworld and various consultation meetings were held – Whether meaningful consultation between parties as required in terms of s 189(2) of LRA – Whether Labour Court correct in refusing to grant order in terms of s 189A(13) – Proper order to remedy defect in consultation process.

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

Extradition

Minister of Justice v Kyung Yup Kim

Supreme Court of New Zealand: [\[2022\] NZSC 44](#)

Judgment delivered: 13 April 2022

Coram: Glazebrook, O'Regan, Ellen France, Arnold and French JJ

Catchwords:

Extradition – Judicial review – Risks of torture and unfair trial upon surrender – Appeal from Court of Appeal's decision allowing appeal by respondent in judicial review of decision of Minister of Justice, under s 30 of *Extradition Act 1999*, surrendering appellant to People's Republic of China ("PRC") to face trial on one count of intentional homicide – Where Court of Appeal quashed Minister's decision on basis of risks to appellant – Where Supreme Court adjourned appeal to give parties opportunity to make further inquiries of PRC on risks of appellant experiencing torture or unfair trial – Whether responses from PRC satisfactorily address concerns of torture and unfair trial.

Held (5:0): Appeal allowed and Minister of Justice's decision to surrender the respondent reinstated.

Family Law

Barendregt v Grebliunas

Supreme Court of Canada: [\[2022\] SCC 22](#)

Judgment delivered: 20 May 2022

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

Catchwords:

Family law – Custody – Change of residence – Best interests of child – Where primary residence of children awarded to mother at trial, allowing children to relocate some ten hours away from father's residence – Where father successfully appealed relocation order – Whether trial judge erred in relocation analysis such appellate intervention warranted – Proper approach to framework governing determination as to whether relocation in child's best interests.

Evidence – Additional evidence on appeal – Where father appealed relocation order awarding primary residence of children to mother – Where Court of Appeal admitted new evidence adduced by father about financial situation – Whether Court of Appeal erred in admitting new evidence – Proper test governing admission of additional evidence on appeal.

Held (9:0; 8:1 (Côté J dissenting in part)): Appeal allowed.

Foreign State Immunity

Cassirer v Thyssen-Bornemisza Collection Foundation

Supreme Court of the United States: [Docket No. 20–1566](#)

Judgment delivered: 21 April 2022

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

Catchwords:

Foreign state immunity – Choice-of-law rule – Expropriated property – Where *Foreign Sovereign Immunities Act of 1976*, 28 USC §1602 ("FSIA") governed whether foreign state or instrumentality amenable to suit in American court – Where Cassirer owned Pissarro's *Rue Saint-Honoré in the Afternoon, Effect of Rain* – Where Cassirer surrendered painting to Nazis to obtain exit visa – Where painting purchased in 1990s by Thyssen-Bornemisza Collection Foundation, entity created and controlled by Kingdom of Spain – Where Cassirer's grandson sued Foundation, asserting property-law claims and seeking return of painting – Where, because Foundation "instrumentality" of Kingdom of Spain, complaint invoked FISA to establish court's jurisdiction – Where FSIA provided foreign states and instrumentalities with immunity from suit unless claim fell within specified exception – Where courts below held Nazi confiscation brought painting within FISA §1605(a)(3) exception for expropriated property – Where courts below applied choice-of-law rule to determine what property law governed dispute – Where courts below adopted federal common law, commanding use of Spain's property law, and determining Foundation owner of painting – Proper approach to choice-of-law rule in FISA case raising non-federal claims.

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

Immigration

Patel v Garland

Supreme Court of the United States: [Docket No. 20-979](#)

Judgment delivered: 16 May 2022

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

Catchwords:

Immigration – Noncitizens – Application for lawful permanent residency – Where petitioner, who entered United States illegally with wife, applied to United States Citizenship and Immigration Services ("USCIS") for discretionary adjustment of status, under 8 USC §1255, for lawful permanent residency – Where, because USCIS aware Patel had previously checked box on Georgian driver's license application falsely stating United States citizen, USCIS denied Patel's application for failure to satisfy threshold requirement noncitizen be statutorily admissible for permanent residence (§1255(i)(2)(A)) – Where §1182(a)(6)(C)(ii)(I) rendered inadmissible noncitizen who falsely represents to be a citizen of United States" under state or federal law – Where, years later, Government initiated removal proceedings against petitioner and wife due to illegal entry – Where petitioner sought relief from removal by renewing adjustment of status request – Where petitioner argued before Immigration Judge mistakenly checked "citizen" box on state application and thus lacked subjective intent necessary to violate federal statute – Where Immigration Judge disagreed, denied petitioner's application for adjustment of status, and ordered removal – Where Board of Immigration Appeals dismissed appeal – Where Eleventh Circuit held lacked jurisdiction to consider claim as federal law prohibited judicial review of "judgment regarding granting of relief" under §1252(a)(2)(B)(i) – Where Eleventh Circuit considered determinations which petitioner sought review, being whether testified credibly and subjectively intended to misrepresent as citizen, each qualified as unreviewable judgment – Whether §1252(a)(2)(B)(i) precludes judicial review of factual findings that underlie denial of relief.

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

Property

Melco Property Holdings (NZ) 2012 Limited v Anthony John Hall
Supreme Court of New Zealand: [\[2022\] NZSC 60](#)

Judgment delivered: 12 May 2022

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

Catchwords:

Property – Sale and purchase agreement – Due diligence condition – Non-fulfillment of condition precedent – Where respondent agreed to sell commercial property to appellant under agreement for sale and purchase – Where agreement contained due diligence clause under which appellant to be satisfied property suitable for requirements or waive compliance – Where respondent purported to cancel agreement when, on date for fulfilment, appellant neither given notice of fulfilment nor waived requirement – Where appellant lodged caveat, purporting to waive due diligence requirement and sought settlement of agreement – Where appellant applied to High Court for order under s 143 of *Land Transfer Act 2017* that caveat not lapse – Whether caveat lapsed – Whether respondent validly terminated agreement – Proper nexus required between respondent's actions and ability to comply with condition precedent.

Held (5:0): Appeal allowed.

Statutory Interpretation

Minister of Police & Ors v Fidelity Security Services (Pty) Limited
Constitutional Court of South Africa: [\[2022\] ZACC 16](#)

Judgment delivered: 6 May 2022

Coram: Zondo ACJ, Madondo AJ, Majiedt, Mhlantla JJ, Pillay, Rogers AJJ, Theron and Tshiqi JJ

Catchwords:

Statutory interpretation – Statutory licences – Possession of firearms – Where gun owner's licence to possess firearm lapsed without seeking renewal of licence – Where ss 13 to 20 of *Firearms Control Act 60 of 2000* regulated issuing possession licenses – Where s 24 required licence holder who wished to renew licence to apply to Registrar "at least 90 days before" expiry – Where s 28 provided licence terminated, relevantly, upon expiry "unless renewed" – Whether gun owner whose licence expires entitled to make new application for possession licence.

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

Taxation

Commissioners for Her Majesty's Revenue and Customs v Coal Staff Superannuation Scheme Trustees Ltd

Supreme Court of the United Kingdom: [\[2022\] UKSC 10](#)

Judgment delivered: 27 April 2022

Coram: Lord Reed, Lord Hodge, Lord Briggs, Lord Sales and Lord Hamblen

Catchwords:

Taxation – Income tax – Stock lending transactions – Free movement of capital – Where respondent corporate trustee of British Coal Staff Superannuation Scheme, tax-exempt pension fund with stock holdings in UK and overseas companies – Where respondent engaged in stock lending of portfolio, whereby, for agreed fee, investor transfers legal and beneficial ownership of shares to borrower, on contractual terms borrower will (i) return equivalent shares to lender at end of lending period and (ii) in meantime pay to lender amounts equivalent to dividend stream which shares would have yielded ("manufactured dividends") – Where dividend income received by UK taxpayer subject to UK income tax and, where dividend income from overseas company, UK taxpayer also subject to tax levied by overseas country – Where UK introduced tax regime to ensure manufactured dividends and manufactured overseas dividends treated in same way real dividends, with manufactured overseas dividends treated payable on gross basis and subjected to form of deemed withholding tax payable by borrower – Where respondent received deemed withholding tax credits amounting to over £8.8m – Whether UK's manufactured overseas dividend tax regime constituted restriction of free movement of capital, contrary to Article 63 of Treaty on Functioning of European Union.

Held (5:0): Appeal allowed.

Zipvit Ltd v Commissioners for Her Majesty's Revenue and Customs

Supreme Court of the United Kingdom: [\[2022\] UKSC 12](#)

Judgment delivered: 11 May 2022

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

Catchwords:

Taxation – VAT – Meaning of "VAT due or paid" – Where general terms and conditions governing supply contract between supplier (Royal Mail) and trader (Zipvit) provided trader should pay commercial price for supply plus such amount of VAT (if any) chargeable in respect of supply – Where, determined by subsequent judgment of Court of Justice, supply should have

been treated standard rated for VAT and trader charged VAT assessed at relevant percentage of commercial price for supply – Where at time of supply both supplier and trader, acting in good faith and on basis of common mistake, understood supply exempt from VAT, so trader only charged and only paid sum equal to commercial price for supply – Where tax authorities (Her Majesty's Revenue and Customs Commissioners or "HMRC") made same mistake in good faith and inadvertently contributed to mistake by parties, by issuing tax guidance containing statements to same effect – Where Article 168(a) of Principal VAT Directive (2006/112/EC) provided trader who is taxable person has entitlement to deduct from VAT which liable to pay "VAT due or paid ... in respect of supplies" – Whether, under article 168(a), trader entitled against HMRC to claim deduction of input VAT – Whether VAT "due or paid" where trader and supplier mistakenly assumed, on basis of incorrect interpretation of EU law by national authorities, supplies at issue VAT exempt.

Held (5:0): Appeal dismissed.

Torts

AK v Minister of Police

Constitutional Court of South Africa: [\[2022\] ZACC 14](#)

Judgment delivered: 5 April 2022

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

Catchwords:

Torts – State agency – Delict – Negligence – Causation – Wrongfulness – Where South African Police Service ("SAPS") one of primary state agencies responsible for protection of public, in particular women and children, against invasion of fundamental rights by perpetrators of violent crimes – Where Minister of Police responsible for conduct of members of SAPS in executing constitutional obligations to prevent, combat and investigate crime – Where applicant experienced gender based violence – Where High Court of South Africa held Minister of Police delictually liable for wrongful omissions of SAPS, which negligently failed to protect applicant from harm by not conducting reasonably effective search, or reasonably effective investigation thereafter into crimes committed against applicant – Where Supreme Court of Appeal upheld appeal against decision of High Court – Whether negligently conducted police search and investigation, which causes person harm, can be wrongful and give rise to delictual liability – Whether SAPS acted reasonably in circumstances – Proper approach to negligence, delict, causation and wrongfulness.

Held (6:3): Leave to appeal granted; appeal upheld.
