



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

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## Administrative Law

*Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims*

Constitutional Court of South Africa: [\[2014\] ZACC 36](#).

**Judgment delivered:** 15 December 2014.

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

### Catchwords:

Administrative law — Judicial review of specialist bodies — Relevant considerations — Rationality — *Promotion of Administrative Justice Act 3 of 2000*, ss 6(2)(e)(iii) and 6(2)(f)(ii)(cc) and (dd) — Dispute arose about whether kingship resorted under lineage of Kgosī Sekhukhune I or of Kgosī Mampuru II, who fought each other for throne in second half of the 1800s — Having considered evidence before it, Commission on Traditional Leadership Disputes and Claims (“Commission”) ruled that Kgosī Mampuru II had been rightful heir to kingship according to Bapedi customary law of succession at relevant time — Commission concluded that Kgosī Mampuru II lost kingship in 1861 when Kgosī Sekhukhune I challenged and drove Kgosī Mampuru II out of kingdom — Kgosī Mampuru II later returned and killed Kgosī Sekhukhune I but did not ascend throne because of ultimate capture and execution by government — Appellant represented descendants of Kgosī Mampuru II and challenged Commission’s decision on basis of irrationality because it had applied “might and bloodshed rule” to

Kgoši Sekhukhune I's driving off of Kgoši Mampuru but not Kgoši Mampuru II's killing of Kgoši Sekhukhune I — Whether Commission's decision failed to consider relevant facts — Whether Commission's decision was rationally connected to information before it.

Administrative law — Error by Commission — Failure to comply with statute — *Traditional Leadership and Governance Framework Act 41 of 2003* ("TLGFA"), s 25(3) — Commission required to establish relevant customary law as it was when events that gave rise to dispute or claim occurred and to apply that law — Whether Commission failed to comply with TLGFA.

**Held (8-2):** Appeal dismissed.

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## *University of Canterbury v The Insurance Council of New Zealand Inc & Ors*

**Supreme Court of New Zealand:** [\[2014\] NZSC 193](#).

**Judgment delivered:** 22 December 2014.

**Coram:** McGrath, Glazebrook, Arnold, O'Regan and Blanchard JJ.

### **Catchwords:**

Administrative law — Judicial review — Policy — *Building Act 2004* ("BA"), ss 122 and 124 — Section 122 of BA stipulates characteristics of earthquake-prone buildings — First characteristic is that building will have its ultimate capacity exceeded in "a moderate earthquake", that is, it does not have seismic strength equating to approximately 34 per cent of building standards for new buildings — Section 124 of BA empowers City Council to issue notice that requires work be carried out on earthquake-prone building to "reduce or remove the danger" it poses — City Council's policy required work to strengthen buildings to 67 per cent — Respondent sought judicial review of policy — Appellant had interest in issue because it owned substantial properties damaged in earthquakes — Whether City Council was entitled to require buildings be strengthened to greater extent than 34 per cent described in regulations — Whether s 124 of BA allows City Council to require work to remove "danger" that building might collapse in earthquake, even one more serious than "moderate".

**Held (5-0):** Appeal dismissed.

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## **Arbitration**

### *Zurich Australian Insurance Limited t/a Zurich New Zealand v Cognition Education Limited*

**Supreme Court of New Zealand:** [\[2014\] NZSC 188](#).

**Judgment delivered:** 19 December 2014.

**Coram:** Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ.

**Catchwords:**

Arbitration — Dispute — Order of application for summary judgment and application for stay of proceedings — *Arbitration Act 1996*, art 8(1) of Sch 1 relevantly provides for stay where proceedings are brought before court in matter which is subject to arbitration agreement unless court finds that there is no dispute between parties — Respondent had several contracts with Education Council for provision of management of public schools — Respondent took out contract frustration cover with appellant — Insurance policy stated that any dispute would be settled by arbitration — Dispute arose between respondent and Council and respondent settled for less than contractual entitlement — Respondent sought to recover shortfall from appellant — Appellant denied claim and respondent sued on policy, seeking summary judgment — Appellant objected on basis of arbitration clause and sought stay of proceedings — Whether there will not be dispute for purposes of art 8(1) unless defendant has arguable basis for disputing plaintiff's claim sufficient to resist application for summary judgment.

**Held (5-0):** Appeal allowed.

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## Constitutional Law

*Khohliso v S and Another*

**Constitutional Court of South Africa:** [\[2014\] ZACC 33](#).

**Judgment delivered:** 2 December 2014.

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

**Catchwords:**

Constitutional law — Validity — *Decree 9 (Environmental Conservation) of 1992* (Transkei) 13(c) and 84(13) — Confirmation jurisdiction — Constitution, ss 167(5) and 172(2)(a) — Applicant convicted of possession of two vulture's feet in violation of Decree 9 — High Court found provisions on which conviction based unconstitutional for inconsistency with presumption of innocence and right to equality — Applicant sought confirmation in Constitutional Court — Whether Decree 9 has status of provincial Act — Whether jurisdiction extends to confirm invalidity of pre-constitutional legislation not endorsed by Legislature.

**Held (11-0):** Application dismissed.

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## *H v Fetal Assessment Centre*

**Constitutional Court of South Africa:** [\[2014\] ZACC 34](#).

**Judgment delivered:** 11 December 2014.

**Coram:** Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J and Van der Westhuizen J.

### **Catchwords:**

Constitutional law — Rights of child — Constitution, s 28(2) — Appellant brought claim for damages on behalf of minor child whose high risk of Down syndrome was misdiagnosed due to respondent's alleged negligent conduct — High Court upheld exception that claim brought by child, as opposed to parent, is not recognised in South African law — Whether child's best interests must be considered in determining whether to allow the child to claim compensation for a life with disability in "wrongful life" cases.

Constitutional law — Interpretation — Constitution, s 39(1) — Consideration of foreign law when interpreting Bill of Rights — Whether child's claim exists.

**Held (9-0):** Appeal upheld.

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## *R v Fearon*

**Supreme Court of Canada:** [2014 SCC 77](#).

**Judgment delivered:** 11 December 2014.

**Coram:** McLachlin CJ, LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

### **Catchwords:**

Constitutional law — *Canadian Charter of Rights and Freedoms*, ss 8, 24(2) — Search and seizure — Search incident to arrest — Cell phone found on accused and searched without warrant — Text message and photos on cell phone introduced as evidence at trial — Whether general common law framework for searches incident to arrest needs to be modified in case of cell phone searches incident to arrest — Whether search of cell phone incident to arrest was unreasonable and contrary to accused's right to be secure against unreasonable search or seizure — If so, whether evidence discovered in search should be excluded.

**Held (4-3):** Appeal dismissed.

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*Heien v North Carolina*

Supreme Court of the United States: [Docket 13-604](#).

**Judgment delivered:** 15 December 2014.

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

**Catchwords:**

Constitutional law — Fourth Amendment — Unreasonable search and seizures — Police officer pulled over driver of car with one brake light — While issuing warrant, officer became suspicious of actions and answers of two occupants — Petitioner car owner gave officer consent to search vehicle — Search produced cocaine and petitioner was arrested and charged with attempted trafficking — Petitioner filed motion to suppress seized evidence on Fourth Amendment grounds — Whether stop initiated by officer was objectively reasonable — Whether officer's mistaken understanding of law was reasonable.

**Held (8-1):** Judgment affirmed.

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*Stratford and Others v Investec Bank Limited and Others*

Constitutional Court of South Africa: [\[2014\] ZACC 38](#).

**Judgment delivered:** 19 December 2014.

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

**Catchwords:**

Constitutional law — Validity — Constitutional rights to equality, dignity, fair labour practices and access to courts — Notice provisions — *Insolvency Act 24 of 1936*, ss 9(4A) and 12(1) — Stratfords are indebted to respondent — Respondent granted provisional sequestration order — Stratfords and their domestic employees (appellants) launched counter-application contending that s 9(4A) was unconstitutional because it does not require notice of employer's provisional sequestration application to be given to domestic employees — Whether "employees" in s 9(4A) included domestic employees — Whether "advantage" to creditors in s 12(1) means reasonable prospect that some pecuniary benefit will result.

**Held (11-0):** Appeal dismissed.

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# Employment Law

*Integrity Staffing Solutions, Inc v Busk et al.*

Supreme Court of the United States: [Docket 13-433](#).

**Judgment delivered:** 9 December 2014.

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

## Catchwords:

Employment law — Security screening of employees — *Fair Labor Standards Act 1938* ("FLSA") — Petitioner required employees to undergo security screening each day — Respondent employees sued claiming entitlement to compensation for roughly 25 minute screenings — Respondents also argued that time could have been reduced and that screenings benefited employer and customers only — Whether post-shift activities compensable — Whether post-shift activities necessary to principal work.

**Held (9-0):** Judgment reversed.

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*National Union of Metal Workers of South Africa v Intervolve (Pty) Ltd and Others*

Constitutional Court of South Africa: [\[2014\] ZACC 35](#).

**Judgment delivered:** 12 December 2014.

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

## Catchwords:

Employment law — Claim for unfair dismissal — Practice and procedure — Application for joinder of employer in unfair dismissal dispute — *Labour Court Rules*, r 22 — The appellant represented employees dismissed after participating in strike — Strike was against three separate employers which shared human resources services — Appellant referred unfair dismissal dispute to appropriate bargaining council but cited only one employer — Appellant attempted second referral citing all three employers but this was not condoned — Appellant took first referral to Labour Court along with application to join two other employers — Labour Court permitted joinder, later overturned by Labour Appeal Court — Whether joinder permitted.

Employment law — Labour Court — Jurisdiction — Conciliation precondition for adjudication by Labour Court — *Labour Relations Act 66 of 1995*, s 191 — Whether failure to cite all employers in referral to

conciliation robbed Labour Court of jurisdiction — Whether close association between companies was sufficient for compliance with s 191.

**Held (6-5):** Appeal dismissed.

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## Equity

*West City Construction Limited v Henry Levin and David Vance as liquidators*

**Supreme Court of New Zealand:** [\[2014\] NZSC 183](#).

**Judgment delivered:** 15 December 2014.

**Coram:** McGrath, William Young, Glazebrook, Arnold and Blanchard JJ.

**Catchwords:**

Equity — Assignment — Oral agreement — Appellant carried out construction work on basis of oral agreement by St George to assign to it bond held by Council — Bond was later formally assigned to appellant — St George placed into liquidation — Whether voidable preference provisions of Companies legislation engaged — Whether agreement to assign bond was made when St George was unable to pay its debts and within specified period starting two years prior to commencement of liquidation proceedings.

**Held (5-0):** Appeal allowed.

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## Expropriation

*Arun Property Development (Pty) Ltd v City of Cape Town*

**Constitutional Court of South Africa:** [\[2014\] ZACC 37](#).

**Judgment delivered:** 15 December 2014.

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

**Catchwords:**

Expropriation — Compensation — *Land Use Planning Ordinance 15 of 1985* (“LUPO”), s 28 — Appellant sought to develop residential property and obtained planning approvals from respondent as required by LUPO — Before appellant purchased property provincial structure plan was approved — Plan reserved land for constructing public roads that traversed appellant's development — Whether appellant entitled to compensation for

vested public land which exceeds normal needs of development — Whether plan is “policy” contemplated by s 28.

Constitutional law — Constitution, s 25 — Arbitrary deprivation — Whether interpretation consistent with s 25.

**Held (10-0):** Appeal allowed.

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## Extradition

*Kim Dotcom & Ors v Her Majesty’s Attorney-General*  
Supreme Court of New Zealand: [\[2014\] NZSC 199](#).

**Judgment delivered:** 23 December 2014.

**Coram:**

**Catchwords:**

Extradition — Search warrants — Validity — *Mutual Assistance in Criminal Matters Act 1992* (“MACMA”) — United States of America (USA) sought to extradite appellants to face trial — USA requested assistance from New Zealand under MACMA — New Zealand police obtained search warrants and seized items belonging to appellants, including computers and electronic equipment — Appellants brought judicial proceedings challenging search warrants — Whether warrants invalid because they were not issued in form prescribed by MACMA and regulations — Whether warrants inadequately described offences under USA’s law — Whether warrants were too broad in description of material to be seized.

**Held (4-1):** Appeal dismissed.

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## Housing

*Loveridge v Mayor and Burgesses of the London Borough of Lambeth*  
Supreme Court of the United Kingdom: [\[2014\] UKSC 65](#).

**Judgment delivered:** 3 December 2014.

**Coram:** Lord Neuberger, Lord Wilson, Lord Sumption, Lord Carnwath and Lord Toulson.

**Catchwords:**

Housing — Eviction — Calculation of damages — *Housing Act 1988*, ss 27 and 28 — Appellant rented flat owned by respondent — Appellant made overseas trip for six months and respondent, mistakenly believing appellant

had died, changed locks on property, removed appellant's possessions and rented to another tenant — Appellant sued respondent for damages — Parties took different approaches to calculation of damages — Whether valuation for purposes of subsections 28(1)(a) and (b) should be calculated on basis that property was sold subject to secured or assured tenancies.

**Held (5-0):** Appeal allowed.

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## Human Rights

*R (on the applications of Haney, Kaiyam, and Massey) v The Secretary of State for Justice; R (on the application of Robinson) v The Governor of HMP Whatton and The Secretary of State for Justice*  
**Supreme Court of the United Kingdom:** [\[2014\] UKSC 66](#).

**Judgment delivered:** 10 December 2014.

**Coram:** Lord Neuberger, Lord Mance, Lord Hughes, Lord Toulson and Lord Hodge.

### Catchwords:

Human rights — Prisoners — Indeterminate prison sentences — *European Convention on Human Rights*, arts 5 and 14 — Appellants received (a) fixed “tariff” period and indeterminate “post-tariff” period — “Post tariff” detention to continue until appellants satisfied Parole Board that they were no longer danger to public — Appellants claimed “post tariff” detention unlawful because Secretary of State failed to provide them with reasonable opportunity to progress rehabilitation and release — Whether detention unlawful.

**Held (5-0):** Haney and Massey's article 5 appeals allowed.

**Held (5-0):** Haney's article 14 appeal and Kaiyam's article 5 appeal dismissed.

**Held (4-1):** Robinson's article 5 appeal dismissed.

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*Moohan and another v The Lord Advocate*

**Supreme Court of the United Kingdom:** [\[2014\] UKSC 67](#).

**Judgment delivered:** 17 December 2014.

**Coram:** Lord Neuberger, Lady Hale, Lord Kerr, Lord Clarke, Lord Wilson, Lord Reed and Lord Hodge.

### Catchwords:

Human rights — Free elections — Referendum — *Representation of the People Act 1983*, s 3(1) — *Human Rights Act 1998*, Sch 1, Pt I, art 10, Pt

11, art 3 — *Scottish Independence Referendum (Franchise) Act 2013*, ss 2, 3 — Statutory ban on convicted prisoners voting in Scottish independence referendum — Whether contravened Convention rights — Whether incompatible with European Union law — Whether common law right to vote.

**Held (5-2):** Appeal dismissed.

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## Insurance

*Tower Insurance Ltd v Skyward Aviation 2008 Ltd*  
Supreme Court of New Zealand: [\[2014\] NZSC 185](#).

**Judgment delivered:** 15 December 2014.

**Coram:** McGrath, William Young, Glazebrook, Arnold and O'Regan JJ.

**Catchwords:**

Insurance — Policy — Interpretation — Respondent owned residential property affected by earthquakes — Respondent accepted offer to sell property to Christchurch Earthquake Recovery Authority at land value recorded in 2007 rating while retaining right to pursue Earthquake Commission (“EQC”) and its appellant insurer — Respondent settled claim against EQC for damage to house and sleep out — Respondent had separately insured both properties with appellant — Parties could not agree on basis for settlement in respect of house — Policy was for full replacement of value of house and provided for four payment options — Whether appellant entitled to choose payment settlement option — Whether entitlement to choose was inconsistent with policy wording and would compromise ability of respondent to obtain replacement value recovery on new for old basis contemplated by policy.

**Held (5-0):** Appeal dismissed; cross appeal allowed.

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## Jury

*Warger v Shauers*  
Supreme Court of the United States: [Docket 13-517](#).

**Judgment delivered:** 9 December 2014.

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

**Catchwords:**

Jury — Deliberations — Evidence of deliberations — *Federal Rule of Evidence* 606(b) — Petitioner sued respondent for negligence for injuries suffered in motor vehicle accident — After jury's verdict delivered, one juror claimed that jury foreperson revealed during deliberations that her daughter had been at fault in fatal motor vehicle accident and lawsuit would have "ruined her daughter's life" — Petitioner moved for new trial arguing that foreperson lied during *voir dire* about impartiality — Whether Rule barred evidence of foreperson's statement contained in affidavit — Whether exceptions to Rule applied.

**Held (9-0):** Judgment affirmed.

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## Medical Profession

*Greater Glasgow Health Board v Doogan and another*  
Supreme Court of the United Kingdom: [\[2014\] UKSC 68](#).

**Judgment delivered:** 17 December 2014.

**Coram:** Lady Hale, Lord Wilson, Lord Reed, Lord Hughes, and Lord Hodge.

**Catchwords:**

Medical profession — Abortion — Conscientious objection — Abortion Act 1967, ss 1(1), 4(1)(2) — Practitioner's right to object to participation in process of terminating pregnancy — Extent of right — Labour ward coordinators with managerial responsibilities for ward on which terminations occurred had conscientious objection to abortion — Whether right of objection extended to tasks ancillary to actual treatment involved in termination process — Whether limited to "hands on" treatment and care of patient undergoing process.

**Held (5-0):** Appeal allowed.

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## Practice and Procedure

*Dart Cherokee Basin Operating Co, LLC et al. v Owens*  
Supreme Court of the United States: [Docket 13-719](#).

**Judgment delivered:** 15 December 2014.

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

**Catchwords:**

Practice and procedure — Removal from state to federal court — Grounds — Respondent filed putative class action in state court seeking compensation for damages class members allegedly sustained when petitioners underpaid royalties due under oil and gas leases — Petitioners removed case to Federal District Court invoking *Class Action Fairness Act* (“CAFA”) — CAFA gives federal courts jurisdiction where amount in controversy exceeds \$5 million — Respondent moved to remand to state court asserting that removal notice was deficient because it included “no evidence” proving amount exceeded \$5 million — Petitioners submitted executive’s detailed declaration supporting amount in excess of \$11 million — Whether proof required — Whether plausible allegation sufficient.

**Held (5-4):** Judgment vacated and remanded.

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