



OVERSEAS DECISIONS BULLETIN

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

Volume 21 Number 1 (1 January – 31 March 2024)

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

Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)

Supreme Court of Canada: [\[2024\] SCC 4](#)

Reasons delivered: 2 February 2024

Coram: Wagner CJ, Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ

Catchwords:

Administrative law – Access to information – Exemptions – Cabinet records – Mandate letters – Where Cabinet records exempted by provincial legislation from general right of public access to government-held information – Where Cabinet records exemption applicable when disclosure would reveal substance of cabinet deliberations – Whether cabinet records exemption protects mandate letters prepared for cabinet ministers by premier from disclosure – *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31, s 12(1).

Held (7:0): Appeal allowed with costs.

Yatar v TD Insurance Meloche Monnex

Supreme Court of Canada: [\[2024\] SCC 8](#)

Reasons delivered: 15 March 2024

Coram: Wagner CJ, Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ

Catchwords:

Administrative law – Judicial review – Where limited statutory right of appeal on questions of law – Where tribunal found insured's application contesting denial of statutory accident benefits by insurer time-barred – Where provincial legislation limited right of appeal from tribunal's decision to questions of law – Where insured appealed decision on questions of law and sought judicial review on questions of fact and mixed fact and law – Where appeal and application for judicial review dismissed – Whether courts should have exercised discretion to undertake judicial review on merits in light of limited statutory right of appeal on questions of law – Proper approach to judicial review where limited statutory right of appeal.

Insurance – Automobile insurance – Statutory accident benefits – Denial – Limitation period – Where insured injured in automobile accident – Where insurer denied statutory accident benefits – Where tribunal found insured's application contesting denial of benefits time-barred – Whether Tribunal's decision reasonable.

Held (9:0): Appeal allowed with costs.

Constitutional Law

Dickson v Vuntut Gwitchin First Nation

Supreme Court of Canada: [\[2024\] SCC 10](#)

Reasons delivered: 28 March 2024

Coram: Wagner CJ, Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ

Catchwords:

Constitutional law – Charter of Rights – Application – Right to equality – Where discrimination based on non-resident status in self-governing Indigenous community – Where self-governing Indigenous community required chief and councillors to reside on settlement land or relocate there within 14 days of election – Where citizen of community wished to stand for election but live away from settlement land – Where Citizen brought constitutional challenge to residency requirement on basis of infringement of Charter right to equality – Whether Charter applies to residency requirement – Whether, if so, residency requirement infringes citizen's right to equality – *Canadian Charter of Rights and Freedoms*, ss 15, 32.

Constitutional law – Charter of Rights – Aboriginal peoples – Aboriginal rights – Whether citizen's right to equality, properly construed, abrogates

or derogates from Aboriginal, treaty or other rights or freedoms that pertain to Aboriginal peoples of Canada – *Canadian Charter of Rights and Freedoms*, s 25.

Held (4:3 (Martin, O'Bansawin and Rowe JJ dissenting in part)): Appeal dismissed; cross-appeal dismissed.

Kottakki Srinivas Patnaik v Attorney-General
Court of Appeal of Singapore: [\[2024\] SGCA 5](#)

Reasons delivered: 1 March 2024

Coram: Sundaresh Menon CJ, Tay Yong Kwang JCA and Woo Bih Li JAD

Catchwords:

Constitutional law – Equal protection of law – Prosecutorial discretion of Attorney-General – *Constitution of the Republic of Singapore* (2020 Rev Ed) ("*Constitution*"), Arts 12(1) and 35(8) – Where appellant faced criminal proceedings on charges of corruption as alleged bribe-giver in private sector corruption scheme – Where charges also brought against two others, Mr S and Mr K, for their roles in scheme – Where no charges brought against three other associates of Mr S involved in scheme, who were based overseas and been uncooperative with Corrupt Practices Investigation Bureau – Where appellant commenced proceedings in High Court arguing charges breach Arts 12(1) and 35(8) of *Constitution* – Where Art 12(1) provides equal protection before law – Where Art 35(8) provides Attorney-General "shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence" – Where High Court dismissed appellant's application – Whether High Court erred in finding appellant only person identified as bribe-giver in corruption scheme and Arts 12(1) and 35(8) of *Constitution* had not been breached, because no question of any other party being similarly situated as he was – Whether High Court erred in finding application should be dismissed even though no evidence put before court at that stage to establish charges beyond reasonable doubt – Whether High Court erred in finding no breach of Art 35(8) of *Constitution*.

Held (3:0): Appeal dismissed.

Lindke v Freed

Supreme Court of the United States: [Docket No. 22-611](#)

Reasons delivered: 15 February 2024

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

Catchwords:

Constitutional law – First Amendment – Social media – City manager's Facebook profile – Prevention of resident from commenting – Where respondent created private Facebook profile and eventually made public – Where respondent updated Facebook page to reflect appointment as city manager of Port Huron, Michigan – Where respondent continued to operate Facebook page himself and post prolifically and primarily about his personal life – Where respondent also posted information related to his job and responded to comments from city residents with inquiries about community matters – Where petitioner commented on some of respondent's posts expressing displeasure with city's approach to COVID-19 pandemic – Where respondent deleted petitioner's comments and then blocked him from commenting at all – Where petitioner sued respondent under 42 USC § 1983, alleging respondent violated his First Amendment rights – Where District Court determined respondent managed Facebook page in private capacity, and because only state action can give rise to liability under § 1983, petitioner's claim failed – Where Sixth Circuit affirmed – Whether public official who prevents someone from commenting on official's social media page engages in state action under § 1983.

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

McElrath v Georgia

Supreme Court of the United States: [Docket No. 22-721](#)

Reasons delivered: 21 February 2024

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

Catchwords:

Constitutional law – Double Jeopardy Clause – Where petitioner killed his mother and State of Georgia charged him with malice murder, felony murder and aggravated assault – Where jury returned split verdict against petitioner, "not guilty by reason of insanity" with respect to malice-murder, and "guilty but mentally ill" as to other counts – Where Supreme Court of Georgia held on appeal jury's verdicts repugnant because they required affirmative findings of different mental states that could not exist at same time – Where court vacated both malice murder and felony murder verdicts pursuant to Georgia's repugnancy doctrine, and authorised retrial – Where on remand, petitioner argued Double Jeopardy Clause of Fifth Amendment prohibited Georgia from retrying him for malice murder given jury's prior "not guilty by reason of insanity" verdict on that charge – Whether jury's verdict petitioner not guilty of malice murder by reason of insanity constitutes acquittal for double jeopardy purposes notwithstanding any inconsistency with jury's other verdicts.

Criminal law – Repugnant jury verdicts – Inconsistent findings of different mental states.

Held (9:0): Judgment of Supreme Court of Georgia reversed; case remanded.

Pulsifer v United States

Supreme Court of the United States: [Docket No. 22-340](#)

Reasons delivered: 15 March 2024

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

Catchwords:

Criminal law – Sentence – "Safety valve" provision, 18 USC §3553 (f)(1) – Where after pleading guilty to distributing at least 50 grams of methamphetamine, petitioner faced mandatory minimum sentence of 15 years in prison – Where at sentencing petitioner sought to take advantage of "safety valve" provision of federal sentencing law, which allows sentencing court to disregard statutory minimum if defendant meets certain criteria – Where respondent argued petitioner could not satisfy "safety valve" requirement because only satisfied two of three conditions in paragraph (f)(1) of 18 USC §3553 – Where petitioner argued his criminal record lacked two-point violent offence, and "safety valve" provision required combination of every item listed in paragraph (f)(1) – Where District Court agreed with respondent and Eight Circuit affirmed – Whether defendant facing mandatory minimum sentence eligible for safety valve relief under 18 USC §3553(f)(1) must satisfy each of provision's three conditions.

Held (6:3 (Sotomayor, Gorsuch, and Jackson JJ dissenting)): Judgment of Court of Appeals for the Eighth Circuit affirmed.

R v Brunelle

Supreme Court of Canada: [\[2024\] SCC 3](#)

Reasons delivered: 26 January 2024

Coram: Wagner CJ, Karakatsanis, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ

Catchwords:

Constitutional law – Charter of Rights – Remedy – Stay of proceedings – Abuse of process – Residual category – Standing – Where some 30 persons arrested during large-scale police operation – Where accused persons filed motion for stay of proceedings on basis police investigation and operation were vitiated by abuse of process in residual category resulting from accumulation of infringements of their constitutional rights, even though several of them were not victims of any of these infringements – Where

first instance judge granted stay of proceedings but Court of Appeal set it aside – Whether all accused had standing to seek stay of proceedings – Whether first instance judge erred in finding abuse of process in residual category and in entering stay of proceedings for all accused – Proper analytical framework that applies where allegation of abuse of process in residual category is based on infringement of other constitutional rights – *Canadian Charter of Rights and Freedoms*, ss 7, 24(1).

Held (7:0): Appeal dismissed.

R v Bykovets

Supreme Court of Canada: [\[2024\] SCC 6](#)

Reasons delivered: 1 March 2024

Coram: Wagner CJ, Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ

Catchwords:

Constitutional law – Charter of Rights – Search and seizure – Where police investigated fraudulent online transactions – Where police contacted payment processing company to request internet protocol ("IP") addresses associated with transactions – Where payment processing company voluntarily provided IP addresses to police and accused consequently arrested – Whether reasonable expectation of privacy attaches to IP address – Whether request by state to third party for IP address constitutes search – *Canadian Charter of Rights and Freedoms*, s 8.

Held (5:4 (Wagner CJ, Côté, Rowe and O'Bonsawin JJ dissenting)): Appeal allowed.

Reference re An Act respecting First Nations, Inuit and Métis children, youth and families

Supreme Court of Canada: [\[2024\] SCC 5](#)

Reasons delivered: 9 February 2024

Coram: Wagner CJ, Karakatsanis, Côté, Brown¹, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ

Catchwords:

Constitutional law – Division of powers – Aboriginal peoples – Child and family services – Where Parliament enacted statute establishing national standards to protect Indigenous children and affirming Indigenous peoples' inherent right of self-government in relation to child and family services –

¹ Brown J. did not participate in the final disposition of the judgment.

Whether statute is ultra vires Parliament's jurisdiction under Constitution of Canada – *Constitution Act, 1867, s 91(24) – Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24.*

Held (8:0): Appeal of Attorney General of Quebec dismissed; appeal of Attorney General of Canada allowed.

Trump v Anderson

Supreme Court of the United States: [Docket No. 23-719](#)

Reasons delivered: 4 March 2024

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

Catchwords:

Constitutional law – Fourteenth Amendment – Removal from ballot for insurrection – Enforcement of Fourteenth Amendment by States – Where six Colorado voters, respondents, filed petition in Colorado state court against former President Donald J Trump and Colorado Secretary of State Jena Griswold, contending s 3 of Fourteenth Amendment to Constitution ("Section 3") prohibits former President Trump from becoming President again – Where Section 3 provides, inter alia, no person who has "engaged in insurrection or rebellion" against United States shall become President – Where respondents argued Section 3 applies to former President Trump because after taking Presidential oath in 2017, he intentionally incited breaching Capitol on January 6, 2021, in order to retain power – Where state District Court found former President Trump had "engaged in insurrection" within meaning of Section 3, but nonetheless denied respondents' petition because Presidency not "office... under the United States" – Where divided Colorado Supreme Court reversed District Court's operative holding that Section 3 did not apply to former President Trump and otherwise affirmed, ordering Secretary Griswold not to list former President Trump on Presidential primary ballot or count any write-in votes cast for him – Whether States, in addition to Congress, may also enforce Section 3.

Held (9:0): Judgment of Supreme Court of Colorado reversed.

Courts

Federal Bureau of Investigation v Fikre

Supreme Court of the United States: [Docket No. 22-1178](#)

Reasons delivered: 19 March 2024

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

Catchwords:

Courts – Jurisdiction – Dismissal of claims as moot – Requirements to establish claims as moot – Where respondent, United States citizen and Sudanese emigree, brought suit alleging government placed him on No Fly List ("NFL") unlawfully – Where respondent alleged he travelled from his home in US to Sudan in 2009 to pursue business opportunities there – Where at visit to US embassy, two FBI agents informed respondent he could not return to US because government had placed him on NFL – Where respondent then travelled to United Arab Emirates, where he alleges authorities interrogated and detained him for 106 days at behest of FBI – Where respondent filed suit alleging government violated his rights to procedural due process by failing to provide either meaningful notice of his addition to NFL or any appropriate way to secure redress – Where respondent also alleged government placed him on list for constitutionally impermissible reasons related to his race, national origin, and religious beliefs – Where government later notified respondent he had been removed from NFL and sought dismissal of his suit in District Court, arguing its administrative action rendered case moot – Where District Court agreed with government, but Ninth Circuit Reversed, holding party seeking to moot case based on its own voluntary cessation of challenged conduct must show conduct cannot "reasonably be expected to recur" – Where on remand, government submitted declaration asserting based on currently available information, respondent would not be placed on NFL in future, and District Court again dismissed claim as moot – Where Ninth Circuit once again reversed, holding government failed to meet its burden because declaration did not disclose conduct that landed respondent on NFL and did not ensure he would not be placed back on list for engaging in same or similar conduct in future – Whether the government's action suffices to render respondent's claims moot.

Held (9:0): Judgment of Court of Appeals for the Ninth Circuit affirmed.

Criminal Law

HKSAR v Chan Chu Leung

Hong Kong Court of Final Appeal: [\[2024\] HKCFA 1](#)

Reasons delivered: 5 January 2024

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and Gleeson NPJ

Catchwords:

Criminal law – Privilege against self-incrimination – Right to silence – Where in 2010 appellant convicted of attempting to traffic dangerous drug, namely

cocaine – Where in 2009 police intercepted 20 cartons of air cargo containing cocaine – Where bags of cocaine replaced with dummy bags dusted with fluorescent powder – Where traces of fluorescent powder found on appellant's nail clippings – Where sole issue at trial whether appellant knew he was dealing with dangerous drugs – Where appellant testified person ("AC") asked him to transport goods as casual job – Where appellant stated fluorescent powder on his nails caused by police officer during handcuffing – Where during cross-examination prosecution questioned appellant why he failed to mention AC and did not complain about fluorescent powder evidence to his lawyer or authorities – Where trial judge gave direction to jury to ignore part of cross-examination about appellant's first mentioning of AC – Where no specific direction given in relation to cross-examination regarding lack of complaint about fluorescent powder – Where trial judge did give general direction accused persons have right to silence, and their exercise of that right should not be used against them in any way – Where appellant argued on appeal his right to silence infringed by cross-examination concerning involvement of AC and fluorescent powder evidence – Where Court of Appeal dismissed appeal – Whether, when it is common ground defendant maintained pre-trial right to silence, it is permissible for prosecution to question or make use of (1) defendant's pre-trial lack of or late complaint regarding police impropriety during investigation giving rise to charge; or (2) defendant's pre-trial lack of or late disclosure, whether in form of complaint or not, about matter other than "the occurrence of an offence, the identity of the participants and the roles which they played" but nonetheless addressing piece of incriminating evidence.

Held (5:0): Appeal dismissed.

HKSAR v Chow Hang Tung

Hong Kong Court of Final Appeal: [\[2024\] HKCFA 2](#)

Reasons delivered: 25 January 2024

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and Gleeson NPJ

Catchwords:

Criminal law – Inciting others to knowingly take part in unauthorised assembly – *Public Order Ordinance* (Cap 245) – Collateral challenge to legality of administrative act or order as defence in criminal proceedings – Where *Public Order Ordinance* established notification regime for organising public meetings – Where police notified by Hong Kong Alliance in Support of Patriotic Democratic Movements of China ("Alliance") of their intention to hold meeting on 4 June 2021 in Victoria Park "to commemorate the 32nd anniversary of 'June 4'" – Where Commissioner gave notice to Alliance proposed meeting prohibited – Where Alliance and organisers lodged appeal against prohibition with Appeal Board – Where Appeal Board confirmed Commissioner's decision and dismissed appeal – Where despite Appeal Board's decision, respondent published posts on personal Facebook and

Twitter pages, as well as newspaper article – Where both magistrate and Court of First Instance found publications incited others to attend prohibited meeting – Where respondent convicted after trial by magistrate who decided not open to respondent to challenge validity of prohibition by way of defence during criminal trial, holding such challenge should have been dealt with by way of judicial review – Where respondent's appeal against conviction allowed by Court of First Instance on basis prohibition invalid – Whether and on what basis accused may raise collateral challenge to legality of administrative act or order as defence in criminal proceedings.

Held (5:0): Appeal allowed.

R v Kruk

Supreme Court of Canada: [\[2024\] SCC 7](#)

Reasons delivered: 8 March 2024

Coram: Wagner CJ, Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ

Catchwords:

Criminal law – Appeals – Standard for appellate intervention – Credibility and reliability assessment – Common-sense assumptions – Where accused both convicted of sexual assault at trial – Where Court of Appeal found trial judges' credibility and reliability assessments were based on common-sense assumptions not grounded in evidence – Where Court of Appeal overturned convictions on basis trial judges erred in law by failing to abide by rule against ungrounded common-sense assumptions – Whether error of law based on rule against ungrounded common-sense assumptions should be recognised.

Held (7:0): Appeals allowed.

Damages

Hassam & Anor v Rabot & Anor

Supreme Court of the United Kingdom: [\[2024\] UKSC 11](#)

Reasons delivered: 26 March 2024

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

Catchwords:

Damages – Negligent driving – Calculating damages for pain, suffering and loss of amenity ("PSLA") – Where both respondents injured in separate car accidents caused by negligence of other drivers – Where both respondents suffered whiplash injuries and non-whiplash injuries which caused them

PSLA – Where amount to be awarded for PSLA for whiplash injuries fixed by regulations at "tariff amount" – Where District Judge reduced total damages for both respondents – Where appellants appealed to Court of Appeal arguing any PSLA caused by both whiplash injuries and non-whiplash injuries already compensated for in tariff amount, so only PSLA caused exclusively by non-whiplash injuries could be compensated for in addition to tariff amount ("first approach") – Where respondents cross-appealed, arguing tariff amount and PSLA damages for non-whiplash injuries should simply be added together without any deduction for overlap ("second approach") – Where Court of Appeal found District Judge's approach, in adding tariff amount and non-whiplash PSLA damages together and reducing latter to avoid overcompensation for concurrently caused PSLA correct ("third approach") – Proper approach to assessing damages for PLSA in tort of negligence where claimant suffered PSLA caused by both whiplash injury, which attracts tariff award, and non-whiplash injury, which does not attract tariff award.

Held (5:0): Appeals dismissed; cross-appeals dismissed.

Employment Law

Murray v UBS Securities, LLC

Supreme Court of the United States: [Docket No. 22-660](#)

Reasons delivered: 8 February 2024

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

Catchwords:

Employment law – Whistleblower protections – *Sarbanes-Oxley Act of 2002* – Proof of employer's retaliatory intent – Where congress enacted whistleblower protections of *Sarbanes-Oxley Act of 2002* to prohibit publicly traded companies from retaliating against employees who report what they reasonably believe to be instances of criminal fraud or securities law violations – Where petitioner filed whistleblower action in federal court alleging respondent terminated his employment in violation of § 1514A of *Sarbanes-Oxley Act of 2002* – Where respondent terminated petitioner shortly after he informed his supervisor two leaders of respondent trading desk engaging in what he believed to be unethical and illegal efforts to skew his independent reporting – Where District Court jury found petitioner established claim and respondent failed to prove it would have fired petitioner even if he had not engaged in protected activity – Where Second Circuit held trial court erred by not instructing jury on petitioner's burden to prove respondent's retaliatory intent – Whether phrase "discriminate against an employee... because of" in § 1514A(a) requires whistleblower additionally to prove his employer acted with "retaliatory intent".

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

Extradition

Bertino v Public Prosecutor's Office, Italy

Supreme Court of the United Kingdom: [\[2024\] UKSC 9](#)

Reasons delivered: 6 March 2024

Coram: Lord Hodge, Lord Sales, Lord Burrows, Lord Stephens and Lord Burnett

Catchwords:

Extradition – Deliberate absence from trial – Knowledge requirement – Where appellant's extradition sought pursuant to European Arrest Warrant ("EAW") issued by public prosecutor's office of Court of Pordenone ("requesting judicial authority") – Where appellant had not been arrested or questioned formally after alleged offence – Where appellant attended police station in Sicily and signed document which recorded he was under investigation and in which he elected Italy as his domicile – Where document warned if appellant did not notify any change of domicile service of any document would be executed by delivery to defence lawyer either of appellant's choosing or of court's appointment – Where appellant left Italy and came to United Kingdom – Where requesting judicial authority subsequently unsuccessful in serving writ of summons on appellant, and trial took place in his absence – Where question of whether to extradite appellant pursuant to EAW determined by district judge – Where only issue for determination before district judge whether requested person "deliberately absented himself from his trial" pursuant to s 20(3) of *Extradition Act 2003* – Where district judge concluded appellant left country so he could not be served with court papers or future dates for his trial and he demonstrated "manifest lack of diligence" in moving address without notifying requesting judicial authority – Where High Court dismissed appellant's appeal but certified point of law of general public importance arising from his appeal – Whether for requested person to have deliberately absented himself from trial for purpose of s 20(3), must requesting judicial authority prove he has actual knowledge he could be convicted and sentenced in absentia.

Held (5:0): Appeal allowed.

Merticariu v Judecatoria Arad, Romania

Supreme Court of the United Kingdom: [\[2024\] UKSC 10](#)

Reasons delivered: 6 March 2024

Coram: Lord Hodge, Lord Sales, Lord Burrows, Lord Stephens and Lord Burnett

Catchwords:

Extradition – Deliberate absence from trial – *Extradition Act 2003* – Where appellant arrested in England pursuant to European Arrest Warrant ("EAW") issued by respondent ("requesting judicial authority") – Where EAW issued on basis of sentence imposed on appellant by Romanian court for burglary – Where district judge in determining extradition found appellant not been present at trial and not deliberately absented himself from trial – Where district judge therefore required by s 20(5) of *Extradition Act* to ask whether appellant "would be entitled to a retrial or (on appeal) to a review amounting to a retrial" on return to Romania – Where district judge concluded appellant had right to retrial in Romania even though required to make application for retrial in Romania and success of application contingent on appellant demonstrating he had not deliberately absented himself from trial – Where district judge ordered appellant's extradition – Where High Court dismissed appellant's appeal but certified points of law of general public importance for Supreme Court to determine – Whether in case where appropriate judge has decided questions in ss 20(1) and (3) of *Extradition Act* in negative, can appropriate judge answer question in s 20(5) in affirmative if (a) law of requesting state confers right to retrial which depends on finding by judicial authority of that state as to whether requested person deliberately absent from his trial; and (b) it is not possible to say that finding of deliberate absence is "theoretical" or "so remote that it can be discounted" and if so, in what circumstances.

Held (5:0): Appeal allowed.

Family Law

Potanina v Potanin

Supreme Court of the United Kingdom: [\[2024\] UKSC 3](#)

Reasons delivered: 31 January 2024

Coram: Lord Lloyd-Jones, Lord Briggs, Lord Leggatt, Lord Stephens and Lady Rose

Catchwords:

Family law – Application for financial relief – "Without notice" hearing – Procedural fairness – Where parties divorced in 2014 – Where in 2019, wife sought permission to apply for financial relief pursuant to Part III of *Matrimonial and Family Proceedings Act 1984* – Where after day of reading and hearing argument from wife alone without notice to husband, judge made order in wife's favour under s 13 of *Matrimonial and Family Proceedings Act* – Where husband later notified of order and applied to have it set aside – Where husband's application to set permission aside succeeded on basis judge misled – Where Court of Appeal allowed wife's

appeal – Whether Court of Appeal erred in holding power to set aside may only be exercised where there is some "compelling reason" to do so and in practice only where court misled – Whether Court of Appeal erred in holding must be possible to demonstrate such a compelling reason by "knock-out blow".

Held (3:2 (Lord Briggs and Lord Stephens dissenting)): Appeal allowed.

Human Rights

In the matter of an application by Stephen Hilland for Judicial Review
Supreme Court of the United Kingdom: [\[2024\] UKSC 4](#)

Reasons delivered: 7 February 2024

Coram: Lord Lloyd-Jones, Lord Briggs, Lord Sales, Lord Burrows and Lord Stephens

Catchwords:

Human rights – European Convention on Human Rights ("ECHR") – Revocation of prisoner's licence and recall to prison – Where appellant sentenced to two consecutive 12-month determinate custodial sentences ("DCS") – Where shortly after his automatic release on licence appellant arrested and, following recommendation of Parole Commissioner, Department of Justice revoked appellant's licence and recalled him to prison – Where appellant brought judicial review proceedings in High Court challenging decision to revoke licence and recall to prison – Where appellant argued unjustifiable discrimination between DCS prisoners and other categories of prisoners, because significant element of Offender Recall Unit's practice is to recall DCS prisoners if considered necessary for the protection of public from harm whereas practice in respect of other prisoners is to recall if considered necessary for protection of public from serious harm – Where High Court dismissed claim and Court of Appeal dismissed appeal – Whether practice of applying lower threshold test for recall of DCS prisoners than is applied for recall of other prisoners unjustifiably discriminates against DCS prisoners in enjoyment of their right to liberty, contrary to Art 14 of ECHR taken together with Art 5.

Held (5:0): Appeal dismissed.

Immigration

Wilkinson v Garland

Supreme Court of the United States: [Docket No. 22-666](#)

Reasons delivered: 19 March 2024

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

Catchwords:

Immigration – Power to cancel removal of noncitizen – Review of immigration judge's decision – Distinction between questions of law and questions of fact – Where 8 USC §§ 1229b(a)–(b) provides immigration judges discretionary power to cancel removal of noncitizen and instead permit noncitizen to remain in country lawfully – Where petitioner arrested and detained for remaining in United States beyond expiration of tourist visa – Where petitioner applied for cancellation of removal based in part on hardship to his 7-year-old, US born son ("M") who suffers from serious medical condition and relies on petitioner for emotional and financial support – Where to meet hardship standard, petitioner had to show M "would suffer hardship that is substantially different from or beyond that which would ordinarily be expected to result from [his] removal, but need not show that such hardship would be 'unconscionable'" – Where immigration judge held M's situation did not meet statutory standard for "exceptional and extremely unusual" hardship and denied petitioner's immigration – Where Board of Immigration Appeals affirmed – Where Third Circuit held it lacked jurisdiction necessary to review immigration judge's discretionary hardship determination – Whether immigration judge's "exceptional and extremely unusual" hardship determination is mixed question of law and fact reviewable under § 1252(a)(2)(D) or whether that determination is discretionary and therefore unreviewable under § 1252(a)(2)(B)(i).

Held (6:3 (Roberts CJ, Thomas and Alito JJ dissenting)): Judgment of Court of Appeals for the Third Circuit reversed in part, vacated in part; case remanded.

Mental Health

In the matter of an application by RM (a person under disability) by SM, his father and next friend for Judicial Review (Northern Ireland); In the matter of an application by RM (a person under disability) by SM, his father and next friend for Judicial Review (Northern Ireland) No 2

Supreme Court of the United Kingdom: [\[2024\] UKSC 7](#)

Reasons delivered: 21 February 2024

Coram: Lord Reed, Lord Sales, Lord Stephens, Lady Rose and Lady Simler

Catchwords:

Mental health – Detention – Where first respondent suffers from severe mental impairment – Where first respondent charged with series of violent and sexual offences – Where first respondent committed for trial but found

unfit to be tried – Where Crown Court made order admitting him to hospital for medical treatment under Mental Health (Northern Ireland) Order 1986 – Where first respondent made application for discharge to Mental Health Review Tribunal ("Tribunal"), which denied him discharge – Where first respondent applied for judicial review, arguing his continued detention unlawful in light of treatment plan, which did not envisage further treatment in hospital – Where High Court dismissed appeal, but Northern Ireland Court of Appeal ("NICA") overturned decisions of Tribunal and High Court – Whether NICA correct to conclude differences in wording of 1986 Order, as compared to legislation in England and Wales, supports conclusion lower threshold test for compulsory detention applies in England and Wales – Whether grant of leave of absence inconsistent with conclusion patient still satisfies test for detention in hospital for medical treatment and should have no bearing on decision whether detention for medical treatment warranted.

Held (5:0): Appeal allowed.

Private International Law

Great Lakes Insurance SE v Raiders Retreat Realty Co., LLC
Supreme Court of the United States: [Docket No. 22-500](#)

Reasons delivered: 21 February 2024

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

Catchwords:

Private international law – Maritime contract – Choice-of-law provision – Presumption of enforceability – Where petitioner and respondent entered maritime insurance contract – Where petitioner organised in Germany and headquartered in United Kingdom, and respondent headquartered in Pennsylvania – Where parties' contract selected New York law to govern any future disputes – Where respondent's boat ran aground in Florida – Where petitioner denied coverage for accident and filed related declaratory judgment action in US District Court for Eastern District of Pennsylvania – Where respondent advanced contract claims against petitioner under Pennsylvania law – Where District Court enforced choice-of-law provision in parties' contract and rejected respondent's Pennsylvania-law contract claims – Where Third Circuit recognised presumptive validity and enforceability of choice of-law provisions in maritime contracts, but held presumption must yield to strong public policy of State where suit is brought – Whether there is established federal maritime rule regarding enforceability of choice of-law provisions – Whether exception applies to presumption choice-of-law clauses enforceable.

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

Privilege

MK V Director of Legal Aid

Hong Kong Court of Final Appeal: [\[2024\] HKCFA 6](#)

Reasons delivered: 22 March 2024

Coram: Ribeiro, Fok, Lam PJJ, Tang and Phillips NPJJ

Catchwords:

Privilege – Legal professional privilege ("LPP") – LPP after grant of legal aid – *Legal Aid Regulations* (Cap 91A) ("LAR"), reg 21(1) – Duty to report abuse of legal aid – Abrogation of LPP by necessary implication – Where appellant sought to commence judicial review proceedings regarding non-recognition of same-sex couples – Where appellant and her partner attended conference to obtain advice on intended judicial review with one solicitor and three barristers – Where legal aid certificate granted to appellant for those proceedings – Where on appellant's nomination, one barrister not assigned and two remaining barristers later ceased to act – Where Director of Legal Aid, respondent, received anonymous email stating appellant and her partner jointly owned and operated pet shop, querying grant of legal aid to appellant – Where respondent received email from barrister not nominated by appellant, stating legal team informed of pet shop business during conference – Where respondent requested copy of conference notes – Where appellant's solicitors claimed LPP on conference notes – Where respondent requested from appellant's counsel information and documents relevant to appellant's financial circumstances – Where one barrister stated she was not aware of any statement by appellant that she owned or contributed to pet shop – Where other barrister stated he was mindful of his duty under reg 21(1) of LAR to report abuse of legal aid, and said appellant told him about pet shop business during conference – Where respondent revoked appellant's legal aid certificate on ground appellant wilfully failed to disclose her financial resources – Where High Court dismissed appeal against respondent's decision – Where appellant commenced judicial review challenging High Court's decision and Court of First Instance held information provided should not have been considered because privileged – Where Court of Appeal allowed respondent's appeal – Whether reg 21(1)(b) of LAR has any abrogating effect by necessary implication against LPP at common law, a constitutionally guaranteed right – Whether abrogation by necessary implication extends to communications protected by LPP prior to application for and/or granting of legal aid to client.

Held (5:0): Appeal dismissed.

Real Property

Donora Company Limited v The Incorporated Owners of Tsuen Kam Centre

Hong Kong Court of Final Appeal: [\[2024\] HKCFA 3](#)

Reasons delivered: 8 February 2024

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

Catchwords:

Real property – System of co-ownership of multi-storey building in Hong Kong – Deed of mutual covenant ("DMC") – Meaning of "common parts" – Classification of external walls as common parts – Where in June 1986 DMC entered into between appellant developer, first purchaser and manager in respect of mixed-use building made up of two residential blocks overlaying multi-storey podium ("building") – Where DMC conferred on individual owners limited rights to use external walls and provided for proportion of common expenses to be borne by them – Where manager classified external walls into four categories corresponding to DMC's classification of common areas – Where each category had designated account from which costs for repair and maintenance of relevant walls debited – Where Lands Tribunal held external walls of building are common parts and upheld manager's budgetary treatment of costs of repair and maintenance – Where Court of Appeal relied on reservation in first assignment entered into between first purchaser and appellant in reversing judge's determination – Whether external walls are common parts of building – Whether costs for repair and maintenance of those walls should be divided into four categories in manner manager did.

Held (5:0): Appeal allowed.

Shipping

Herculito Maritime Ltd & Ors v Gunvor International BV & Ors

Supreme Court of the United Kingdom: [\[2024\] UKSC 2](#)

Reasons delivered: 17 January 2024

Coram: Lord Hodge, Lord Hamblen, Lord Leggatt, Lady Rose and Lord Richards

Catchwords:

Shipping – Insurance – General average including ransom payment – Where first respondent registered owner of vessel which it chartered for voyage – Where first appellant lawful holder of all six bills of lading issued by vessel's master – Where first respondent took out insurance – Where vessel seized by Somali pirates whilst transiting designated "High Risk Area" in Gulf of Aden – Where vessel held captive for 10 months before release following payment of ransom on behalf of respondent – Where general average

adjustment issued, which ransom payment formed major component – Where appellants argued no liability in general average in respect of ransom payment – Whether on proper interpretation of voyage charter, and in particular war risk clauses and additional Gulf of Aden clause, and/or by implication, shipowner precluded from claiming against charterer in respect of losses arising out of risks for which additional insurance had been obtained pursuant to those clauses – Whether all material parts of those clauses incorporated into bills of lading – Whether on proper interpretation of those clauses in bills of lading and/or by implication shipowner similarly precluded from claiming for such losses against bill of lading holders – Whether, if necessary, wording of clauses should be manipulated so as to substitute words "the Charterers" with "the holders of the bill of lading" in parts of those clauses allocating responsibility for payment of additional insurance premia.

Held (5:0): Appeal dismissed.

Sovereign Immunity

Department of Agriculture Rural Development Rural Housing Service v Kirtz

Supreme Court of the United States: [Docket No. 22-846](#)

Reasons delivered: 8 February 2024

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

Catchwords:

Sovereign immunity – Supplying of false information under *Fair Credit Reporting Act of 1970* ("FCRA") – Federal government's sovereign immunity from liability under FCRA – Where ("FCRA") allows consumers to sue lenders who wilfully or negligently supply false information about them to entities that generate credit reports – Where respondent secured loan from division of petitioner and later sued agency for money damages under FCRA – Where respondent alleged petitioner falsely told credit reporting agency his account past due, thus damaging his credit score and ability to secure loans at affordable rates – Where petitioner moved to dismiss, invoking sovereign immunity – Where District Court sided with petitioners – Where Third Circuit reversed – Whether federal government susceptible to suit when it supplies false information, or may it invoke sovereign immunity to avoid liability.

Held (9:0): Judgment of Court of Appeals for the Third Circuit affirmed.

Taxation

Jersey Choice Ltd v His Majesty's Treasury
Supreme Court of the United Kingdom: [\[2024\] UKSC 5](#)

Reasons delivered: 14 February 2024

Coram: Lord Lloyd-Jones, Lord Briggs, Lord Leggatt, Lady Rose and Lord Richards

Catchwords:

Taxation – Value Added Tax ("VAT") – Treaty on the Functioning of the European Union ("TFEU") – Where appellant Jersey-registered company grows horticultural products in Jersey and sells to customers in United Kingdom by mail order – Where appellant claims removal of Value Consignment Relief ("LVCR") caused it loss in excess of £15 million – Where appellant sought damages in High Court on grounds 199(3) of *Finance Act 2012* enacted in breach of European Union ("EU") law, because it unjustifiably treated Jersey and Guernsey differently from other third territories within common customs area, contrary to free movement of goods provisions in Arts 28, 30 and 34 of TFEU – Where High Court struck out appellant's claim on basis it had no prospect of success and abuse of process – Where Court of Appeal agreed claim should be struck out on basis pleadings disclosed no reasonable grounds, though not abuse of process – Whether Court of Appeal erred in its formulation and application of distinction between charges to tax and charges equivalent to customs duties – Whether business such as appellant, which is established and operates in territory within EU customs union and single internal market for goods but is outside VAT Directive area, can find claim for *Francovich* damages against Member State on basis in exercising its discretionary power in secondary EU VAT law, Member State breached general principles of EU law – Whether Court of Appeal failed to provide effective legal protection for appellant's EU law rights under art 19(1) TEU, Art 47 of Charter of Fundamental Rights and European Convention on Human Rights.

Held (5:0): Appeal dismissed.

Tort

Armstead v Royal & Sun Alliance Insurance Company Ltd
Supreme Court of the United Kingdom: [\[2024\] UKSC 6](#)

Reasons delivered: 14 February 2024

Coram: Lord Briggs, Lord Leggatt, Lord Burrows, Lord Richards and Lady Simler

Catchwords:

Tort – Negligence – Claiming contractual liability as damages – Where appellant involved in two road traffic collisions neither of which her fault – Where after first collision appellant hired car on credit hire terms while her

car was being repaired – Where business model of credit hire companies is they rent out substitute car on credit to accident victim believed not to have been at fault while victim's car is repaired – Where hire company seeks to recover hire cost on behalf of victim from other driver's insurers and only looks to victim for payment if claim fails – Where while driving hire car, appellant involved in second accident – Where appellant brought claim against negligent driver's insurance company, respondent – Where appellant sought damages for cost of repair of hire car but also for sum contractually liable to pay hire company for its loss of use – Whether damages recoverable by hirer from other driver (or their insurer) include, as well as cost of repair, sum which hirer agreed to pay to hire company for company's loss of use of car while it is unavailable for hire because it is off road for repairs.

Held (5:0): Appeal allowed.

Michael John Smith v Fonterra Co-operative Group Limited
Supreme Court of New Zealand: [\[2024\] NZSC 5](#)

Reasons delivered: 7 February 2024

Coram: Winkelmann CJ, Glazebrook, Ellen France, Williams and Kós JJ

Catchwords:

Tort – Climate change – Damage caused by climate change – Public nuisance – Negligence – Proposed climate system damage tort – Strike out application – Where plaintiff elder of Ngāpuhi and Ngāti Kah – Where plaintiff filed statement of claim in High Court against seven New Zealand Companies said to be involved in industry that either emits greenhouse gases ("GHGs") or supplies products which release GHGs when burned – Where plaintiff alleges respondents contributed materially to climate crisis and have damaged, and will continue to damage, his whenua and moana – Where plaintiff raised three causes of action in tort: public nuisance, negligence and proposed new tort – Where proposed new tort involves duty to cease materially contributing to damage to climate system; dangerous anthropogenic interference with climate system; and adverse effects of climate change – Where respondents applied to strike out proceeding on basis plaintiff's statement of claim raised no reasonably arguable cause of action – Where primary judge struck out claims in public nuisance and negligence, but not proposed climate system damage tort – Where Court of Appeal struck out all three causes of action – Whether plaintiff's claim bound to fail and should be struck out.

Held (5:0): Appeal allowed.

Paul & Anor v Royal Wolverhampton NHS Trust; Polmear & Anor v Royal Cornwall Hospitals NHS Trust; Purchase v Ahmed
Supreme Court of the United Kingdom: [\[2024\] UKSC 1](#)

Reasons delivered: 11 January 2024

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

Catchwords:

Tort – Negligence – Witnessing wrongful death or injury of another person – Where claimants in three cases claimed compensation in tort of negligence for psychiatric illness caused by experience of witnessing death of close family member in distressing circumstances – Where in each case death allegedly caused by negligence of defendant doctor or health authority in failing to diagnose and treat life threatening medical condition – Where Court of Appeal dismissed all three claims – Where limited category of cases recognised by common law in which damages may be recovered for personal injury consequent on death or injury of another person – Whether this exceptional category of case includes, or can and should be extended to include, cases where claimant's injury is caused by witnessing death or injury of close relative, not in accident, but from medical condition which defendant has negligently failed to diagnose and treat.

Held (6:1 (Lord Burrows dissenting)): Appeal dismissed.

Trade Marks

Lifestyle Equities CV & Anor v Amazon UK Services Ltd & Ors
Supreme Court of the United Kingdom: [\[2024\] UKSC 8](#)

Reasons delivered: 6 March 2024

Coram: Lord Hodge, Lord Briggs, Lord Hamblen, Lord Burrows and Lord Kitchin

Catchwords:

Trade marks – Infringement – Targeting of consumers – Application of European Union ("EU") and United Kingdom ("UK") trade mark law to cross-border marketing and sale of goods on internet – Where respondents owners and exclusive licensees of number of EU and UK trade marks relating to "BEVERLY HILLS POLO CLUB" brand – Where corresponding trade marks in USA owned by commercially unrelated entity, which produces goods identical to those for which respondents' trade marks registered in EU and UK ("USA Branded Goods") – Where appellants marketed and sold USA Branded Goods on their USA website, which respondents claims infringed its rights in EU/UK Marks – Where High Court dismissed respondents claims on basis listings of USA Branded Goods on appellants' USA website not targeted at consumers in EU/UK – Where Court of Appeal overturned High Court's decision and granted injunction against

appellants – Whether listings of USA Branded Goods on appellants' website targeted at consumers in EU/UK.

Held (5:0): Appeal dismissed.
