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Supreme Court of Pakistan

1. *Naimatullah v. Federation of Pakistan*

2020 SCMR 622

Present

Present: **Gulzar Ahmed, C.J.**, Faisal Arab and Sajjad Ali Shah, JJ

Progressive and dynamic interpretation of fundamental right to life: provision of transportation facility is included in the fundamental right to life

The Court while hearing a Constitution Petition under Article 184(3) of the Constitution of Pakistan that involved questions of public importance with reference to the enforcement of Fundamental Rights of the citizens in Karachi city, dealt with the matter regarding non-functioning of Karachi Circular Railway (KCR). The Court after highlighting public transportation issues in Karachi city and discussing the reasons for delay in revival of KCR directed the Pakistan Railways to revive the operation of KCR within a period of six months, with the aid and assistance of all relevant agencies.

The Court held that the provision of transportation facility is included in the fundamental right to life, with the observations: “Most sacred among [the fundamental rights] ... is the 'right to life' and such right to life is not restricted only to the [protection against unlawful] prosecution of a person but the State is required ... to ensure that all aspects of citizens' life are protected and dealt with. - - The provision of drinking water, is a right to life; provision of electricity, is a right to life; provision of education, is a right to life; provision of health facility, is a right to life; provision of civic infrastructure and civil infrastructure, is a right to life; so is the subject of transportation of the citizens, is a right to life, for without transportation neither can the citizen get education, engage in his trade, business or profession, nor can a citizen reach the healthcare institutions nor can a citizen obtain necessities of life, like,

food, clothes, etc. and such needs keep on going 'ad infinitum'.” (Paras 4, 5)

2. *Collector of Custom v. Filters Pakistan (Pvt.) Ltd.*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1077_2011.pdf

Present

Mr. Justice Umar Ata Bandial, Mr. Justice Faisal Arab, and Mr. Justice Yahya Afridi

Exemption operates as exception from general rule; it requires strict construction

The question before the Court was: whether the item imported by the respondent falls within the items exempted from sale tax.

The Court answered the question in negative with the observations: “Being a case for exemption from a taxing provision, the rule laid down is that the assess/taxpayer must bring his case within the terms of the exemption, which are to be read strictly because the exemption operates as an exception from the general rule regarding the burden of taxes. ... Exemptions are an exception to the general liability imposed by a tax. Therefore, when an exempting provision is susceptible to two interpretations, the one going against the tax-payer is preferred.” (Paras 2, 4)

3. *Allah Dino v. Election Commission of Pakistan*

https://www.supremecourt.gov.pk/downloads_judgements/c.r.p._218_2013.pdf

Present

Mr. Justice Umar Ata Bandial, Mr. Justice Faisal Arab and Mr. Justice Mazhar Alam Khan Miankhel

Finding of Returning Officer is not a declaration by a court of law

The Court considered the question: Does the finding of the Returning Officer given during scrutiny of nomination papers qualify as a declaration given by a court of law within the terms of Article 62(1)(f) of the Constitution?

The Court answered the question in negative, observing: “[A] disqualification under

Article 62(1)(f) of the Constitution can only be imposed by or under a declaration made by a court of law. ... [T]he determination of a dispute relating to a right or liability, the recording of evidence including the right of cross-examination, a hearing of the arguments of the parties and a reasoned judgment are essential attributes of a court of law. ... [T]he summary finding given by the Returning Officer .. [does] not comply with the requirement laid out in Article 62(1)(f) of the Constitution as amended in the year 2010, namely a declaration by a court of law. This is because a Returning Officer does not record evidence in his proceedings which are summary in nature. His finding .. lack[s] the attributes of a declaration given by a court of law, [and] .. unless set aside, is .. valid only for the corresponding election.” (Paras 5, 6)

4. *Beena v. Raj Muhammad*

https://www.supremecourt.gov.pk/downloads_judgements/c.p._4129_2019.pdf

Present

Mr. Justice Mushir Alam and **Mr. Justice Qazi Faez Isa**

Right to custody (Hizanat) of a child cannot be surrendered: agreement containing such terms is against law, injunctions of Islam, and public policy

The Court while dealing with the questions whether a mother can, by an agreement, give up her right to the custody (Hizanat) of her child, and whether such an agreement is valid and enforceable under the law, held: “Muslim personal law prescribes rules of hisanat (custody); a mother in whom hisanat vests cannot be compelled to surrender it nor can such surrender constitute consideration for an agreement of khula. The custody of a child or rights to his/her custody cannot be surrendered to obtain khula nor can the husband demand such surrender. ... The agreement to the extent that the mother surrendered the custody of her child or which stopped the mother to claim his custody is not lawful consideration; it is contrary to the Islamic principles governing hisanat and the law determining the custody of minors and

thus forbidden. An agreement the object or consideration of which is against public policy is void, as stipulated in section 23 of the Contract Act ... The welfare of a minor cannot be subsumed by the interest of his father, and if this is done it will be against public policy, and such clause or condition will be void.” (Paras 7, 8)

5. *Khawaja Salman Rafique v. NAB*

https://www.supremecourt.gov.pk/downloads_judgements/c.p._2243_1_2019.pdf

Present

Mr. Justice Maqbool Baqar and **Mr. Justice Mazhar Alam Khan Miankhel**

Pre-conviction imprisonment and bail: perspective of enforcement of fundamental right to liberty

The Court, in the case, explored the scope of jurisdiction of High Courts to grant bail, in NAB cases, in exercise of their jurisdiction under Article 199 of the Constitution, and while elaborating it observed:

“Imprisonment of a person and deprivation of his liberty, cannot be described other than being a punishment, unless no less restrictive alternative is available to ensure that the accused will stand his trial when called upon to do so. ... Courts while dealing with the grant of bail and the justifiable exercise of power of arrest have to maintain a balance between two fundamental but conflicting demands of personal liberty of the accused on one hand and the investigational right of the police on the other hand, [o]r between Individual rights versus societal interests. ... [T]he constitutional rights of a person can only be curtailed when there exists a proper purpose, a rational connection and necessary means, and further that proper relation between the benefit gained by realizing the proper purpose, and the harm caused to the constitutional right. ... [T]his principle of proportionality is applied to achieve a balance between the benefit gained and the resultant prejudice that is caused to the rights. ... Thus, any deprivation of liberty or curtailment of rights guaranteed by the constitution has to be adequately justified on

the touchstone of the principle of proportionality, unreasonableness and necessity. The limitation must be for proper purpose, rational and necessary, and the prejudice caused to the constitutional rights thereby must be proportional to the benefit achieved.” (Paras 80, 88, 89, 90)

6. *Muhammad Mansha v. Industrial Development Bank of Pakistan*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._51_2011.pdf

Present

Mr. Justice Maqbool Baqar, Mr. Justice Mazhar Alam Khan Miankhal and Mr. Justice Qazi Muhammad Amin Ahmad

Change in law does not affect pending actions and vested rights

The Court, in the case, examined the question: whether Section 23(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 applies to sale transactions effected before the promulgation of that Ordinance.

The Court answered the question in negative with the observations: “[W]hen the legislator alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. ... [S]tatute changing the law ought not, unless the intention appears with reasonably certainty to be understood as applied to facts, or events that have already occurred in such a way as to confer or impose or otherwise effect rights or liabilities which the law had defined with references to past events.” (Para 8)

7. *Khurshid Soap (Pvt.) Ltd v. Federation of Pakistan*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1113_2017.pdf

Present

Mr. Justice Mushir Alam, **Mr. Justice Faisal Arab** and Mr. Justice Syed Mansoor Ali Shah

GIDC Act, 2015 fulfils the requirement of quid pro quo for levy of the Cess (fee)

The Court, in the case, dealt with the question whether the GIDC Act, 2015 fulfils the requirement of *quid pro quo* for levy of the Cess (fee). The majority comprising Justice Mushir Alam and Justice Faisal Arab answered the question in affirmative. Justice Syed Mansoor Ali Shah, however, dissented and answered it in negative.

Majority view

The majority while dealing with the said question observed: “The whole purpose of enacting GIDC Act, 2015 was to facilitate import into the country a very important source of energy i.e. natural gas / LNG from nearby countries in order to meet the ever expanding energy needs of the country as our own resources of energy are fast depleting and the cheapest way to import it is through overland transnational pipelines. The supply of imported LNG to various parts of the country after its import on ships through trans-provincial pipeline is also a project of the Federal Government. The incidence of the cost involved in doing so falls on the industrial and commercial consumers whose consumption account for more than three-fourth of the total supply of natural gas. ... Such consumers, apart from being major beneficiaries of the imported gas, would on account of their business activity pass on the burden to their clients/customers being part of the cost of their goods or services which they sell to their customers / clients. The object which the Parliament has promised in the GIDC Act, 2015 is clearly ‘purpose based’ which is distinctly defined and carries with it an element of *quid pro quo*”

Minority view

Law must provide a timeline for quid pro quo

Justice Mansoor Ali Shah while disagreeing with the majority opinion raised the questions: “Whether a fiscal levy imposed for a service to be rendered – a service dependent on the completion of long-term

multinational infrastructural projects tied to the vagaries of international politics, exist without a reasonable timeline? Is reasonable time an essential constituent of quid pro quo? Can a fee levying legislation, resting on reciprocity, impose a one sided obligation on the gas consumers to pay the levy while providing no timeline nor any consequences for failure to deliver the proposed service?”

After discussing various aspects and constitutional dimensions of “fee”, his lordship came to the conclusion that “any fiscal legislation that imposes a Fee, must clearly spell out the nature of service to be rendered and the reasonable timeline for the delivery of such service. The legislation (including subordinate legislation) must provide a complete mechanism including the consequences of stoppage of collection of Fee or extension of time or refund of Fee in case the project is delayed or cannot be executed in the proposed timeline, respectively. The legislation must safeguard and protect the reciprocity behind a Fee (unlike a tax) by providing corresponding obligations and duties on the parties to the levy.”

8. Owais Shams Durrani v. V.C., Bacha Khan University

https://www.supremecourt.gov.pk/downloads_judgements/c.p._2911_2018.pdf

Present

Mr. Justice Gulzar Ahmed, HCJ and **Mr. Justice Ijaz ul Ahsan**

Relief in constitutional jurisdiction is dependent upon showing denial of some statutory or constitutional right

The Court examined the question: whether the contract or temporary appointment confers on the appointee any right to regularization.

The Court answered the question in negative with the observations: “[N]o law has been pointed out to us on the basis of which the petitioners could seek regularization. ... [W]here a citizen seeks relief in

constitutional jurisdiction he must point to a right statutory or constitutional which vests in him and has been denied in violation of the law. The petitioners have failed to point out any right to seek regularization on the basis of any constitutional guarantee or statutory law or instrument which may have been denied to them. Their terms and conditions of service were governed by their appointment notifications and ... there was no right of regularization available to the petitioners and their services were correctly terminated as per terms and conditions of service on the basis of which they were appointed...” (Paras 9, 10)

9. Mujib-ur-Rehman v. Returning Officer

https://www.supremecourt.gov.pk/downloads_judgements/c.a._171_2019.pdf

Present

Mr. Justice Umar Ata Bandial, **Mr. Justice Ijaz Ul Ahsan** and Mr. Justice Munib Akhtar

Reading “or” in Section 95(5) of the Elections Act, 2017 conjunctively as “and”

The Court examined the question: whether the word “or” used in Section 95(5) of the Elections Act, 2017 can be read conjunctively as “and”. The Majority comprising Justice Umar Ata Bandial and Justice Ijaz Ul Ahsan answered the question in affirmative. Justice Munib Akhtar dissented and answered it in negative.

Majority view

The Majority observed: “[O]nce the words “or the Returning Officer considers such request as not unreasonable” at the end of the sentence are read along with the remaining conditions it becomes clear that ‘such’ an application for a recount must be considered reasonable by the Returning Officer in addition to meeting the other pre-conditions imposed by the provision. To our mind, this is the correct reading of section 95(5) of the Act based on the linguistic construction of the sentence, which makes it abundantly clear that the last part of the sentence

(concerning reasonableness) is to be read conjunctively with the remaining conditions imposed on an application for a recount to qualify. With this interpretation in mind, therefore, in order for the Returning Officer to order a recount under section 95(5) of the Act, (i) a written application must be made by a contesting candidate or his election agent before the commencement of consolidation proceedings, (ii) the application must be in relation to an election where the margin of victory was less than five percent of the total votes polled in the constituency or ten thousand votes, whichever was less, and (iii) the Returning Officer must consider such a request to be reasonable (or not unreasonable as the law states).” (Para 18)

Dissent

Justice Munib Akhtar dissented and observed: “In my view, the word “or” is to be given its natural meaning and read disjunctively. In other words, the subsection contemplates two separate and distinct conditions, and a recount is permissible if either one of them is met. - - It is of course well settled that in appropriate circumstances the word “or” can be read as “and” and vice versa. However, in my respectful view s. 95(5) requires no such exercise and does not call for any such conclusion. The reason is that the first and second conditions are qualitatively distinct, inasmuch as the first contains no element of discretion with the Returning Officer, while the second one does ... The first condition becomes applicable simply on an affirmative answer to an arithmetical question: is the margin of victory the lesser of (a) ten thousand votes or (b) less than five percent of the total votes polled in the constituency? ... there is no discretion at all with the Returning Officer. Insofar as the second condition is concerned, there is an element of discretion: the Returning Officer must be satisfied that the request is not unreasonable. ... In my view, with respect, to yoke these conditions together is to misread, and hence misapply, the legislative intent.” (Paras 3,4)

10. *Brikhna v. Faiz Ullah*

https://www.supremecourt.gov.pk/downloads_judgements/c.p._989_2015.pdf

Present

Mr. Justice Mazhar Alam Khan Miankhel and Mr. Justice Qazi Muhammad Amin Ahmed

Transfer of ownership of property in inheritance is not dependent on sanction of mutation

The Court while dealing with the claim of the petitioner in the inheritance of her father observed: “[P]etitioner, claiming her share in the legacy left by her father, was on the basis of operation of law and not on the basis of any mutation. ... [M]utation is not a document of title. The sole purpose of a mutation is to keep the record of rights updated and to maintain the fiscal records straight. When she being one of the legal heir of deceased Habib Khan then she becomes entitled to inherit the legacy of her father from the day her father died and as such becomes co-sharer/co-owner in the property and this entitlement of petitioner is based on operation of Mohammadan Law and the Law of Inheritance.” (Para 2)

11. *NAB v. Muhammad Shafique*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1618_2019.pdf

Present

Mr. Justice Gulzar Ahmed, HCJ, Mr. Justice Ijaz ul Ahsan and **Mr. Justice Sajjad Ali Shah**

Treating the period of unauthorized absence as extraordinary leave without pay, does not undo the penalty imposed because of that absence

The Court was, in the case, faced with the question: Does the order for treating the period of unauthorized absence as extraordinary leave without pay, undo the order imposing major penalty of compulsory retirement passed because of that absence?

The Court answered the question in negative with the observations: “[S]ince the penalty imposed by the competent authority was of compulsory retirement which follows the payment of salaries and other dues till the date of imposing such penalty, therefore, ... it was necessary to give finding as to how such absence is to be treated. ... [W]here the authorized officer after due application of mind upon examining/adjudging the misconduct has imposed one of the major penalties and thereafter keeping in mind that the gap between the unauthorized absence of the employee and the imposition of major penalty is to be provided with some kind of treatment provides for accordingly, then such treatment may it not be necessary would [not] undo the major penalty. ... [T]he conversion of unauthorized absence, as EOL without pay is not a penalty/punishment so that one can say that such treat cannot coexist with the major penalty/minor penalties.” (Paras 9, 10, 11)

12. Raza v. State

https://www.supremecourt.gov.pk/downloads_judgements/crl.p._1124_1_2015.pdf

Present

Mr. Justice Manzoor Ahmad Malik, **Mr. Justice Syed Mansoor Ali Shah** and Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

Meaning and scope of Article 27 of the QSO

The learned Judges differed on the applicability of Article 27, QSO to the statement of the accused (first version) recorded during investigation, in order to make that statement relevant and admissible in evidence.

Majority View

Justice Syed Mansoor Ali Shah, with whom Justice Manzoor Ahmad Malik agreed, while elaborating the scope of Article 27, QSO observed: “Article 27 deals with such external or collateral facts which show the existence of any state of mind. Evidence of such external or collateral facts is admitted to prove a person's state of mind, and not to prove the occurrence itself. Thus, the scope of this Article is that there must be a cluster

of facts outside and around the fact in issue or the occurrence from which inference can be drawn to show and support the state of mind in question; such surrounding facts become relevant under Article 27. ... These surrounding facts are obviously other than the facts in issue. (Para 32, 36)

Minority view

Justice Sayyed Mazahar Ali Akbar Naqvi held: “First plea of the accused is admissible in evidence under Article 27 of the Qanun-e-Shahdat Order, 1984. ... Article 27 of Order 1984 is general principle enabling the Investigating Officer to record the same whereas Article 28 is mere an exception. As a general rule evidence not forming part of the transaction is not admissible, whereas Articles 27/28 are an exception to the said general principle by laying down a rule that admissibility of those fact[s] which might not be tendered in evidence to prove it but these facts are relevant to prove the status [of the] mind [of] the person committing it. For example, the guilt, intent, knowledge, negligence, malice etc.” (Para 9)

Section 161, CrPC is the provision of law under which statement of an accused is recorded during investigation

Justice Syed Mansoor Ali Shah explored the provision of law under which the statement of an accused is recorded by the Police Officer, during the investigation. His lordship observed: “This expression “any person” has to be understood in the context of section 161 Cr.P.C. It requires a police officer making an investigation to examine “any person” supposed to be acquainted with the facts and circumstances of the case. This expression is extensive and, in its plain and ordinary meaning, includes all persons who are supposed to be acquainted with the facts and circumstances of the case, and not only the witnesses but also those who are alleged to have committed the offence under investigation in a case. A person who is alleged to have committed the offence, is as much supposed to be acquainted with the

facts and circumstances of the case as an alleged eye-witness is. (Para 18)

Reasonable possibility of the defence plea of being true can benefit the accused

Justice Syed Mansoor Ali Shah also dealt with the question: whether reasonable possibility of the defence plea of being true can benefit the accused. His lordship answered the question in affirmative, with the observations: “[I]f after examination of the whole evidence, the Court is of the opinion that there is reasonable possibility that the defence put forward by the accused might be true, then the whole of the prosecution case is viewed in context of this reasonable possibility, entitling the accused to the benefit of the doubt.” (Para 38)

13. Malik Ubaidullah v. Government of Punjab

PLD 2020 SC 599

https://www.supremecourt.gov.pk/downloads_judgements/c.p._140_1_2015.pdf

Present

Mr. Justice Manzoor Ahmad Malik, **Mr. Justice Syed Mansoor Ali Shah** and Mr. Justice Qazi Muhammad Amin Ahmed

Right based approach for the persons with disabilities in employment cases

In this case the petitioner (a differently-abled person) was denied employment on disability quota. It was observed that, “[t]he paradigm in disability has shifted from charity to investment, exclusion to inclusion and sympathy to rights-based approach towards disability. Disabled people initially were not considered worthy of any rights. The disabled were treated as abnormal or different from society, and thus needed to be given medical treatment under the medical model. Under the social model, disability is explained as a condition created by society and the environment, and not the result of an individual's impairment. The human rights model or rights-based model embodies the values or principles of dignity, respect, equality, and social justice to the disabled. The UN Convention on the Rights of Persons

with Disabilities of 2006 (“CRPD” or “Convention”) created a binding framework for the rights-based model of disability law. Disabled persons by virtue of being a human have the right to enjoy life, liberty, equality, security and dignity.”

The court held that Section 10 of the Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 provides that not less than 2% of the total number of persons employed by an establishment at any time shall be Persons with Disabilities. The total number of persons employed means the total sanctioned posts of the establishment, i.e., an Organization, Authority, Department or Ministry. 2% of the total sanctioned posts or workforce of the establishment becomes the Disability Quota for the establishment.

14. Sikandar Hayat v. State

https://www.supremecourt.gov.pk/downloads_judgements/crl.s.m.r.p._84_2018.pdf

Present

Mr. Justice Maqbool Baqar, **Mr. Justice Yahya Afridi** and Mr. Justice Qazi Muhammad Amin Ahmed

There were, before the Court, mainly two questions: (1) Can a delay of 5844 days in filing the criminal review petition be condoned, in the circumstances of the case? (2) Can the mitigating circumstances be considered in review jurisdiction for awarding lesser punishment, i.e., from death to life imprisonment?

The majority comprising Justice Maqbool Baqar and Justice Yahya Afridi, answered the questions in affirmative. The majority condoned the delay in the peculiar circumstances of the case, viz, the petitioners had been pursuing their remedy as to claim of their juvenility during the period of delay and had undergone imprisonment for a period more than 25 years, and altered the sentence of the petitioners from death to imprisonment for life after condoning the delay, in exercise of review jurisdiction.

Justice Qazi Muhammad Amin Ahmed dissented on both the questions.

Condoning delay of 5844 days in filing criminal review petition

The majority observed: “There is judicial consensus to condone the delay in entertaining petitions filed by condemned prisoners, especially, when they face the capital sentence or a long imprisonment sentence or for being in jail and having no access to legal assistance or safe administration of justice for the reappraisal of evidence. ... [I]n the circumstances of the present case, the petitioners who are, through the instant petition, seeking after 16 years, the review of the judgment passed by this Court in the year 2002, cannot be outrightly denied a hearing without considering the merits of the case, and more so, when the petitioners are facing capital punishment.” (Paras 11, 12)

Dissent

Justice Qazi Muhammad Amin Ahmed dissented with the observations: “The Court is generous in condoning delay to the convicts having regard to the corporal consequences of their sentences; the generosity, however, is mostly extended in appeals; condonation of delay for review is a different regime..... Horrors of the sentence proposed upon the petitioners, notwithstanding, the explanation put forth for condonation of delay of 5844 days sans both logic as well as truth.” (para 3)

Considering mitigating circumstances in review jurisdiction for awarding lesser punishment

The majority held: “This Court is mindful of the judicial reluctance to positively apply mitigating circumstance in review petition. However, taking cue from the principle laid down by a five member bench of this court in Dilawar Hussain’s case ... , wherein it was held that: “Although it is very rare phenomenon to discuss the mitigating circumstances in the review petition, yet, the same are being taken note of as the aforesaid

petition is alive before us only to consider the quantum of sentence as such, the same are being discussed here considering those factors to be legal error apparent on the face of record.” In the present case, as in Dilawar Hussain’s case ... , the petitioners are also seeking review of the quantum of the death sentence maintained by this court in its judgment under review. None denies that the parties had no previous enmity, and the tragic incident took place suddenly at their common workplace. One cannot loose sight of the fact that four persons including the petitioners were tried for the crime, and two with the similar role have been acquitted without any challenge by the prosecution or the complainant party. And most importantly, the right of expectancy of life had genuinely accrued to the petitioners having admittedly being incarcerated in the death cell for a period more than twenty-five years, while they were seeking justice from the appropriate judicial courts of our country. All these factors, which are apparent on the face of the record, when taken in a cumulative manner, cannot go unheeded, more so when the petitioners are facing capital punishment. Thus, these mitigating circumstances coupled together make out a case for review of the judgment of this Court dated 13-6-2002 ...” (Paras 21, 22)

Dissent

Justice Qazi Muhammad Amin Ahmed dissented on this question also and observed: “[I]t does not lie within our competence to re-examine or revisit conscious and considered analysis undertaken by our predecessors so as to take retrospectively a different view by taking into account consequences of acquittal of co-accused or on the manner whereunder the occurrence took place with a view to reassess the quantum of sentence; such a course cannot be adopted without tossing the finality of this Court into peril. ... The choice lies between the lives of unanimously adjudicated assassins and a jurisprudence wisely contoured over the centuries, I shall behold the latter.” (Paras 3, 5)

Foreign Superior Courts

US SUPREME COURT

1. *Chiafalo v. Washington*

140 S. Ct. 2316 : 2020 U.S. LEXIS 3543
https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf

Coram

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

The constitutionality of law enforcing a presidential elector's pledge

In this case, the question before the Court was whether a state could penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State's popular vote.

The Court held that a state might constitutionally enforce a presidential elector's pledge to support his party's nominee and the state voters' choice for President. Article II, § 1 gave the states the authority to appoint electors "in such Manner as the Legislature thereof may direct," which the Court has interpreted as conveying to the states "the broadest power of determination" over who becomes an elector. Thus, the appointment power of the states is extensive, and nothing in the Constitution prohibits states from taking away the discretion of presidential electors, as Washington does. The electors do not have the discretion to vote and are required to vote for the candidate whom the state's voters have chosen.

2. *Calvary Chapel Dayton v. Steve Sisolak*

https://www.supremecourt.gov/opinions/19pdf/19a1070_0811.pdf

Coram

The application for grant of injunctive relief was initially refused by Justice Kagan. On referral to the Court, the same was dissented by Justice Alito, with whom Justice Thomas and Justice Kavanaugh joined.

Discriminatory treatment of places of worship---- violation of both Free Exercise Clause and the Free Speech Clause of the First Amendment.

In this case, the Governor of Nevada issued a directive that severely limited attendance at religious services. A church, synagogue, or mosque, regardless of its size, may not admit more than 50 persons, but casinos and certain other favored facilities may admit 50% of their maximum occupancy—and in the case of gigantic Las Vegas casinos, this means that thousands of patrons are allowed.

Alito J. held, "Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this Court's willingness to allow such discrimination is disappointing. We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility." Consequently, the injunctive order was dissented.

HIGH COURT OF AUSTRALIA

3. *Queensland v. Masson*

[2020] HCA 28
<http://eresources.hcourt.gov.au/downloadPdf/2020/HCA/28>

Coram

Kiefel CJ, Bell, Keane, Nettle & Gordon JJ

Standard of care for intensive care paramedic

A woman suffering from severe asthma attack was treated by ambulance officers including intensive care paramedic. The paramedic elected to administer intravenous ("IV") salbutamol rather than IV adrenaline in initial phase of treatment due to woman's high heart rate and high blood pressure. However, the Clinical Practice Manual ("CPM") required that ambulance officers "consider" IV adrenaline. The question before the court was, whether decision to administer IV salbutamol contrary to CPM fell below standard of care expected of ordinary skilled intensive care paramedic.

The court held that the expected standard of care was that of the ordinary skilled intensive care paramedic operating in the field in circumstances of urgency and this is a less exacting standard than that expected of specialists in emergency medicine. The intensive care paramedics cannot be expected to make fine professional judgments of a kind that require the education, training and experience of a medical specialist. This is not to say, however, that an intensive care paramedic is not expected to exercise clinical judgment.

Supreme Court of New Zealand

4. *127 Hobson Street Ltd v Honey Bees Preschool Ltd*

[2020] NZSC 53

Coram

Winkelmann CJ, O'Regan, Ellen France, Williams and Arnold JJ

The scope of contractual penalties

In this case the Supreme Court of New Zealand examined the scope of contractual penalties. The judgement of the Court of Appeal was affirmed by observing, “a clause stipulating a consequence for breach of a term of the contract would be an unenforceable penalty if the consequence was out of all proportion to the legitimate interests of the innocent party in performance of the primary obligation. Legitimate interests in performance here included an interest in enforcing performance or some appropriate alternative to performance. A consequence would be out of all proportion if the consequence could fairly be described as exorbitant when compared with those legitimate interests.”

The court also explained the term legitimate interests as, “an interest in performance of the primary obligation. A party to a contract might therefore impose consequences for a breach which protected its interest in performance of the contract.”

SUPREME COURT OF UNITED KINGDOM

5. *Unwired Planet International Ltd. v. Huawei Technologies (UK) Co. Ltd.*

[2020] UKSC 37

<https://www.supremecourt.uk/cases/docs/uksc-2018-0214-judgment.pdf>

Coram

Lord Reed, Lord Hodge, Lady Black, Lord Briggs and Lord Sales JJ

Global FRAND Licensing Powers of UK Courts

The cases concern a number of patents, which are declared to be essential to the practice of numerous telecommunications standards, held by the Respondents who commenced proceedings against the Appellants for infringing those patents. The Respondents are under an obligation to make available standard essential patents ("SEPs") on fair, reasonable and non-discriminatory terms ("FRAND") terms. In the first case, two of Unwired's patents were found to be valid and essential to the standards, and Unwired obtained an injunction against Huawei for the latter's infringement of the SEPs. Huawei, with the permission of the first-instance judge, appealed to the Court of Appeal. Huawei's appeal was dismissed and Huawei now appeals to the Supreme Court. The proceedings in the second case were brought after the High Court judgment was handed down in the first one. The defendants in these proceedings challenged the jurisdiction of the English court. The application was dismissed but Huawei and ZTE appealed to the Court of Appeal. The appeal was dismissed and Huawei and ZTE now appeal to the Supreme Court.

The Supreme Court was asked to decide the following issue:

Does the English court have the power or jurisdiction, or is it a proper exercise of any such power or jurisdiction without the parties' agreement: to grant an injunction restraining infringement of a UK SEP unless the defendant enters into a global licence under a multinational patent portfolio; to determine the rates/terms for such a licence; and to declare that such rates/terms are FRAND?

The Supreme Court confirmed that the Patents Court in England & Wales has the jurisdiction, without the parties' agreement, to grant an injunction restraining infringement of a UK SEP unless the defendant enters into a global licence under a multinational patent portfolio. The UK courts have the power to set the royalty rates and other terms of the worldwide licence, and to declare that such terms are FRAND. The Supreme Court also confirmed that England is the proper forum for such a claim in the circumstances of the Conversant proceedings, where Huawei and ZTE sought to challenge jurisdiction and applied for a stay of the UK case in favour of the Chinese court. The Supreme Court further reinforces the prominence of the UK Patents Court as forum for SEP cases, and notably even where the parties have only a relatively small commercial stake, or patent interest, in the UK.

THE SUPREME COURT OF THE IRELAND

6. Friends of the Irish Environment v. The Government of Ireland

[2020] IESC 49
https://www.courts.ie/view/judgments/681b8633-3f57-41b5-9362-8cbc8e7d9215/981c098a-462b-4a9a-9941-5d601903c9af/2020_IESC_49.pdf/pdf

Coram

Irvine P., O'Donnell J., MacMenamin J., Dunne J., O'Malley J., Baker J.

Irish government's climate mitigation policies do not comply with the law

Friends of the Irish Environment (FIE), a non-profit company, claimed that the 2017 National Mitigation Plan, adopted under the 2015 Climate Act, was ultra vires the 2015 Climate Act and violated constitutional and ECHR rights. FIE relied on the fact that the Plan envisages a significant increase (c.10%) in emissions over the period 1990 to 2020 (and an increase over the life of this Plan, which was meant to cover an initial period between 2017 and 2022), despite the fact that

the government had repeatedly endorsed the Intergovernmental Panel on Climate Change's (IPCC) advice that emissions would need to fall by at least 25 to 40% between 1990 and 2020 to help limit warming to +2°C above pre-industrial levels. The High Court held that the Plan was intra vires the 2015 Climate Act because the government enjoys a "considerable margin of discretion" in the area of climate policy.

The Supreme Court focused on section 4 of the 2015 Climate Act, which stipulates that a Plan must "specify" the manner in which it is proposed to achieve the national transition objective and the policy measures required to achieve same and held that a National Mitigation Plan must be "sufficiently specific" as to how the National Transition Objective would be realised over the whole period to 2050, even though the Plan itself would be subject to revision every five years. The Court explained that the purpose of requiring the Plan to be specific is transparency such that any "interested member of the public" can decide whether the Plan is "effective and appropriate" for meeting the National Transition Objective by 2050. The Court attached "significant weight" to the views of Ireland's Climate Change Advisory Council, an expert body established under the 2015 Climate Act, which had described Ireland's emissions projections to 2035 in its 2018 Annual Report as "disturbing." It also found that whether the Plan meets the specificity requirements of section 4 is a matter of law and is justiciable. By enacting the 2015 Climate Act, what might once have been "policy became law" and the Supreme Court was entitled to review the Plan for compliance with the requirements of the 2015 Climate Act.

In reviewing the Plan, the Supreme Court found that it fell "well short of the level of specificity required" to provide transparency and comply with section 4 of the 2015 Climate Act. The Supreme Court characterised the policies contained in the Plan as "excessively vague" and

“aspirational,” leaving “too much... to further study or investigation” citing examples from the agriculture chapter. At the hearing, the Supreme Court considered the below chart from the Plan, which showed projections of emissions out to 2035 and the precipice between 2035 and 2050, requiring an extremely steep trajectory of emission reductions over this 15-year period. The Court ultimately concluded that “a reasonable and interested observer” would not know from the information in the Plan how the government is intending to achieve the National Transition Objective by 2050. The Supreme Court therefore quashed the Plan for non-compliance with the 2015 Climate Act and a new Plan will now need to be drawn up.

SUPREME COURT OF CANADA

7. 1704604 Ontario Ltd. v. Pointes Protection Association

2020 SCC 22

<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18458/index.do>

Coram

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

The ability to express oneself helps create a healthy democracy by generating fruitful public discourse and corresponding public participation in civil society

In 2015, Ontario amended the Courts of Justice Act (“CJA”) to mitigate the harmful effects of strategic lawsuits against public participation (“SLAPPs”) which are filed against people or organizations that take a position on an issue of public interest, with the aim of limiting their free speech.

“Freedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society.” “..... strengthening the integrity of

the justice system by encouraging truthful and open testimony is inextricably linked to the freedom of participants to express themselves in the forums concerned without fear of retribution.” The Court dismissed the developer's suit as a SLAPP suit.

8. Uber Technologies Inc. v. Heller

2020 SCC 16

<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do>

Coram

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

The law of unconscionability applicable to the arbitration agreements

David Heller to become a driver for Uber had to accept, without negotiation, the terms of Uber's standard form services agreement, which required that any disputes with Uber be resolved through mediation and arbitration in the Netherlands. The mediation and arbitration process required up-front administrative and filing fees of US\$14,500, plus legal fees and other costs of participation. Heller started a class proceeding against Uber for violations of the Employment Standards Act (“ESA”). Uber brought a motion to stay the class proceeding in favour of arbitration in the Netherlands pursuant to the arbitration clause and the International Commercial Arbitration Act (“ICAA”). The motion judge held that he did not have the authority to decide whether the arbitration agreement was valid and stayed Heller's proceeding. The Court of Appeal reversed the order. Uber appealed to the Supreme Court.

The question to be determined in the appeal was who had the authority to decide whether an Uber driver was or was not an “employee” within the meaning of ESA: the courts of Ontario or an arbitrator in the Netherlands, as provided for in the contracts of adhesion between Uber and its drivers?

The court held that an employment dispute is not covered by the word “commercial” and

“this is an arbitration agreement that makes it impossible for one party to arbitrate. It is a classic case of unconscionability.” Unconscionability involved both inequality and improvidence. There was clearly inequality of bargaining power between Uber and Heller. The arbitration agreement was part of a standard form contract. Heller was powerless to negotiate any of its terms. His only contractual option was to accept or reject it. There was also a significant gulf in sophistication between the parties. The arbitration agreement contained no information about the costs of mediation and arbitration in the Netherlands. Heller could not be expected to appreciate the financial and legal implications of agreement to arbitrate in the Netherlands. The improvidence of the arbitration clause was also clear. The mediation and arbitration processes required US\$14,500 in up-front administrative fees. That amount was close to Heller's annual income and did not include the potential costs of travel, accommodation, legal representation or lost wages. The arbitration clause effectively made the substantive rights given by the contract unenforceable by a driver against Uber. The mandatory arbitration requirement was held invalid and the appeal was dismissed.

Brown J agreed with the majority but did not rely on the doctrine of unconscionability to reach his conclusion. He was of the view that contractual stipulations that foreclosed access to legally determined dispute resolution were are unenforceable being contrary to public policy. Cote J dissented to hold, “One of the most important liberties prized by a free people is the liberty to bind oneself by consensual agreement”. She allowed the appeal and grant of stay of proceedings on the condition that Uber advanced the funds needed to initiate the arbitration proceedings.

ONTARIO COURT OF APPEAL

9. *R. v. Sharma*

2020 ONCA 478

<https://www.ontariocourts.ca/decisions/2020/2020ONCA0478.pdf>

Coram

K.N. Feldman, E.E. Gillese and B. Miller JJ.A.

The law prohibiting conditional sentence for Indigenous woman a Charter breach

Sharma, a young Indigenous woman, pleaded guilty to importing cocaine and received a sentence of 17 months' incarceration. At her sentencing hearing, she asked the court to strike down section 742.1(c) of the Criminal Code, which removed the availability of a conditional sentence for offences, prosecuted by indictment, where the maximum penalty was 14 years or life in prison, under section 15 of the Charter of Rights and Freedoms, because its effect was to discriminate against Aboriginal offenders on the basis of race. The sentencing judge rejected the application and imposed the custodial sentence.

The appellant asked the Court of Appeal to strike down section 742.1(c) of the Criminal Code, and a similar provision in section 742.1(e)(ii), on the basis that they contravened two sections of the Charter: they contravened section 15 because their effect was to discriminate against Aboriginal offenders on the basis of race, and they contravened section 7 because they were arbitrary and overbroad in relation to their purpose.

In a 2-1 ruling, the Court of Appeal found that the impugned provisions run afoul of the Charter because of their impact on Indigenous offenders. “The impugned amendments deprive the court of an important means to redress systemic discrimination against Aboriginal people when considering an appropriate sanction”. Barring conditional sentences contravened the Charter because it had led to “discrimination against Aboriginal offenders on the basis of race.” The prohibition violated the Charter guarantee of the right to life, liberty and security of the person because the rules were “arbitrary and overbroad in relation to their purpose.” Both violations could not be justified under the

reasonable limits clause of the Charter. The ruling also recognized that Parliament had created conditional sentences, in part, to address the “significant problem of overrepresentation of Aboriginal people in prisons in Canada.” The appeal was allowed and the sentence was reduced to time served. Miller J.A. dissented to say that if Parliament could enact legislation expected to benefit an historically disadvantaged group - legislation it had no obligation to enact - a later Parliament could amend or repeal it, having concluded the legislation was misconceived as according to the bedrock constitutional principle a Parliament could not bind its successor.

COURT OF JUSTICE OF THE EUROPEAN UNION

10. Privacy International v. Secretary of State for Foreign and Commonwealth Affairs

ECLI:EU:C:2020:790

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=232083&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=6978832>

Coram

K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, M. Safjan, P.G. Xuereb and L.S. Rossi, Presidents of Chambers, J. Malenovský, L. Bay Larsen, T. von Danwitz (Rapporteur), C. Toader, K. Jürimäe, C. Lycourgos and N. Piçarra, Judges.

No mass surveillance without limits in European Union

Privacy International, a non-governmental organisation, brought an action before the Investigatory Powers Tribunal (United Kingdom) against the Secretary of State for Foreign and Commonwealth Affairs and others challenging the lawfulness of the practices of the acquisition and use of bulk communications data by the various security and intelligence agencies of the country.

The Tribunal examined the lawfulness of said practices in the light of national law, European Convention for the Protection of

Human Rights and Fundamental Freedoms and European Union (“EU”) law. It found the measures for the acquisition and use of data to be consistent with national law. The Tribunal referred the issue to the Court of Justice in order to determine whether a regime such as that resulting from section 94 of the Telecommunications Act 1984 of the UK falls within the scope of EU law and, if so, whether and in what way the requirements laid down by the case-law.

The matter before the Court of Justice concerned the legality of legislation authorising the acquisition and use of bulk communications data by the security and intelligence agencies.

The Court of Justice considered the issue in the light of related EU law to hold that applicable law “must be interpreted as meaning that national legislation enabling a State authority to require providers of electronic communications services to forward traffic data and location data to the security and intelligence agencies for the purpose of safeguarding national security falls within the scope” of relevant directive of European Parliament and that related provisions of EU law “must be interpreted as precluding national legislation enabling a State authority to require providers of electronic communications services to carry out the general and indiscriminate transmission of traffic data and location data to the security and intelligence agencies for the purpose of safeguarding national security.”

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