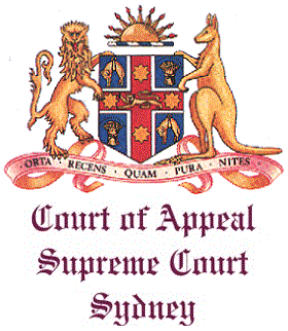


# Decisions of interest

## 29 April 2019 – 10 May 2019

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

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# New South Wales Court of Appeal decisions of interest

1. **Administrative law: reasons for decision; justice must be seen to be done**

***Li v Attorney General for New South Wales*** **[2019] NSWCA 95**

**Decision date:** 3 May 2019

Basten JA, White JA, Brereton JA

Mr Li was sentenced to 19 years and 6 months imprisonment (with a non-parole period of 12 years and 3 months) after pleading guilty to supplying a large commercial quantity of a prohibited drug. After an unsuccessful sentence appeal in the Court of Criminal Appeal, he made an application for an inquiry into his sentence under Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW). The Attorney-General filed submissions opposing that inquiry on 9 March 2018, and Mr Li filed a response on 30 April 2018. A judge of the Supreme Court dismissed the application on 28 May 2018. The reasons given for the decision were similar in substance to the Attorney's submissions. By summons, Mr Li sought judicial review of the judge's decision to dismiss his application. As distilled by the Court of Appeal, there were five grounds of review put to the Court: (i) that the judge had not formed the level of satisfaction required in order to dispose of the proceedings under the Act; (ii) that the decision did not take Mr Li's reply submissions into account; (iii) that the decision did not fully address the grounds relied upon by Mr Li; (iv) that the judge did not consider all of the relevant material; and (v) because the reasons of the judge substantially repeated the submissions of the Attorney, justice was not seen to be done.

**Held:**

- By majority (Basten and White JJA, Brereton JA dissenting), Mr Li's summons was dismissed: [6], [100].
- As to ground (i): the reasons provided no basis to find that the judge had failed to form the opinion required under the Act: [23], [79].
- As to grounds (ii)-(iv): the reasons demonstrated that the judge had taken Mr Li's reply submissions into account, had addressed the grounds he relied on, and had considered all the relevant material. And even if the judge had not taken Mr Li's reply submissions into account, that would not have been material, as they did not raise new issues: [37], [53], [54], [97], [103].
- As to ground (v): Basten and White JJA held that a requirement that justice 'must be seen to be done' is not a free-standing ground of review of an administrative decision: [67], [77].
- In dissent, Brereton JA held that in certain circumstances, if justice is not seen to be done, that can go to the adequacy of the reasons offered for a decision: [104].

2. **Civil procedure: permanent stay of proceedings; historic sexual abuse; limitation periods**

***Moubarak by his tutor Coorey v Holt*** **[2019] NSWCA 102**

**Decision date:** 9 May 2019

Bell P, Leeming JA, Emmett AJA

In 2016 Ms Holt commenced proceedings in the District Court against her uncle, Mr Moubarak. She claimed damages from him for sexual assaults that she alleges he committed against her on some four occasions in 1973 or 1974 when she was 12 years old. Ms Holt is able to bring those claims so long after the events in question by operation of s 6A of the *Limitation Act 1969* (NSW), a provision inserted into the Act in 2016 following recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. Section 6A(1) abolishes, with retrospective effect, any statutory limitation period that might apply to child abuse, which includes sexual abuse. Section 6A(6) provides that s 6A does not limit a court's powers to dismiss or permanently stay proceedings. By notice of motion, Mr Moubarak, by his tutor, sought a permanent stay of the proceedings in the District Court on the basis that Mr Moubarak has advanced dementia and could not participate in the proceedings, either through giving instructions or evidence. It was contended, therefore, that a fair trial would not be possible in the circumstances, and that continuing the proceedings would be an abuse of process. The primary judge rejected this argument, and dismissed the notice of motion with costs. Mr Moubarak, by his tutor, sought leave to appeal from that order. On the leave application, heard concurrently with the appeal, the key issues were: (1) what role, if any, does delay in bringing proceedings play in an assessment of whether a defendant would be deprived of a fair trial?; (2) is it an essential element of a fair trial that a defendant be able to participate personally in the proceedings?; (3) what relevance, if any, does the public interest in allowing claims for damages for historical sexual assault to be heard have in assessing whether a fair trial is available?

**Held:**

- Leave to appeal was granted and the appeal was allowed; a permanent stay of the District Court proceedings was ordered: [13], [15], [181], [182], [204], [207].
- On the delay issue: delay – understood neutrally, merely as the passage of time, not as a matter of culpability on the part of a plaintiff – can affect the fairness of the trial process; here, it did, affecting the availability of evidence and witnesses: [77], [160]
- On the participation issue: on these facts, nothing a trial judge could do in conducting a trial would relieve the unfairness suffered by the defendant being subjected to proceedings from which he would be involuntarily absent: [158]-[159], [196].
- On the public interest issue: the public interest in allowing cases like this to be tried does not preclude the grant of a permanent stay in appropriate cases: [157].

# Other Australian intermediate appellate decisions of interest

3. **Administrative law: migration; s 438 certificates**

***MZAOL v Minister for Immigration and Border Protection* [2019] FCAFC 68**

**Decision date:** 29 April 2019

Bromberg J, Farrell J, Davies J

The appellants were a mother and her child. The mother came to Australia from China as a student in December 2007. Her student visa was cancelled in 2010. Her child was born in Australia in September 2012. The appellants applied for protection visas in April 2013. The mother claimed to fear persecution on the basis that she was a Christian, and that she was a member of a particular social group – namely, single mothers in China who had a child outside of wedlock. One issue on the appeal was whether she further claimed that she feared physical harm – particularly, forced sterilisation – because she would not be able to pay the fines imposed for breaching family planning laws. The child's claim was based on fear of facing discrimination in China as a 'black child'.

The Minister's delegate refused their protection visa applications in January 2014. The Administrative Appeals Tribunal ('AAT') affirmed that refusal decision in November 2014. The AAT had before it material prejudicial to the appellants that had been subject to a certificate purportedly issued under s 438 of the *Migration Act 1958*, but the AAT did not disclose the existence of that certificate (or the information it concerned) to the appellants. The appellants sought review of the AAT's decision in the Federal Circuit Court, but their application for review was dismissed. They appealed from that dismissal to the Full Court of the Federal Court. On the appeal, they relied on three grounds: first, that the primary judge had erred in holding that the claim based on fear of forced sterilisation was not raised before the AAT; second, that the primary judge had erred in finding that the AAT's non-disclosure of the certificate purportedly issued under s 438 did not deprive the appellants of the possibility of a successful outcome; and third, that the AAT's decision was affected by jurisdictional error in the form of apprehended bias.

**Held:**

- Appeal allowed with costs; orders of the FCCA set aside; the AAT's November 2014 decision quashed; matter remitted to the AAT for redetermination: [90]-[91].
- Ground 1: the primary judge did err in the manner alleged; the claim based on fear of forced sterilisation was raised before the AAT. But further, the AAT also erred on this point, failing to deal with a claim made by the mother. That failure was a jurisdictional error: [39].
- Ground 2: the non-disclosure of the certificate and impugned information will only be a breach of procedural fairness amounting to a jurisdictional error if the breach is material. The appellants did not demonstrate materiality: [78].
- Ground 3: there was no apprehended bias proved in the circumstances: [88].

4. **Building and construction: statutory termination of building contract; overpayment; restitution**

***Shao v AG Advanced Construction Pty Ltd (CAN 089 153 597)*** **[2019] VSCA 93**

**Decision date:** 30 April 2019

Whelan JA, Kyrou JA, and McLeish JA

Under s 41 of the *Domestic Building Contracts Act 1995* (Vic), a building owner has a right to end a major domestic building contract if 'the contract has not been completed within 1.5 times the period it was to have been completed by'. If the owner exercises this right, the builder is entitled to 'a reasonable price for the work carried out under the contract to the date the contract is ended.'

The appellant, a building owner, ended a domestic building contract with the respondent builder pursuant to s 41. Having ended the contract, the owner commenced proceedings in the Victorian Civil and Administrative Tribunal ('VCAT') seeking damages of $547,450 owing to the delay and for alleged defects. A substantial portion of the damages was referable to a claim for the costs of completing the home after termination. Relevantly, VCAT found that termination under s 41 gives rise to no claim in damages resulting from termination of the contract. Because s 41 does not require the owner to show that there has been a breach of contract on the part of the builder, no damages are recoverable for the costs of completing the work. In calculating the reasonable value of the work completed at the time of termination, the Tribunal subtracted the cost of rectifying the defects from the value of the work done. As it happened, the owner had already paid the builder, by instalments, a sum greater than the resulting figure. VCAT declined to rectify the overpayment, but did order that the builder pay the owner damages of $93,153 for the costs of rectifying defects in the works completed prior to termination.

The builder appealed to the Supreme Court of Victoria on the question of law as to whether an owner is entitled to recover damages from a builder for defective workmanship after having elected to terminate under s 41. An Associate Judge held that an owner who elects to terminate under s 41 is not precluded from claiming damages for defective works. She further held that the cost of rectifying defects may be used in calculating the reasonable value of the work done, or may be the subject of a separate award of damages, but not both. Accordingly, she ordered that the appeal be allowed, and VCAT's order that the builder pay damages to the owner be set aside. Because the issue of restitution for overpayment had not been properly argued before VCAT, her Honour considered it inappropriate to order the builder to refund the overpaid monies to the owner. The owner appealed to the Victorian Court of Appeal.

**Held:**

- Appeal allowed in part: the Associate Judge's judgment was upheld so far as her conclusions concerning the consequences of termination under s 41 were concerned; but an order was added to her orders, remitting the matter to VCAT so that the question of whether the builder should refund any monies overpaid by the owner could be properly ventilated: [58]-[59].

# Asia Pacific decisions of interest

## 5. Costs: extradition proceedings; where state has funded prosecution and defence

**Court of Appeal of New Zealand/Te Kōti Pīra o Aotearoa**

***Curtis v Commonwealth of Australia*** **[2019] NZCA 126**

**Decision date:** 1 May 2019

French J, Asher J, Clifford J

The Commonwealth of Australia sought the extradition of Mr Curtis from New Zealand. Initially, it was decided that Mr Curtis would be surrendered for extradition. He appealed from that decision, and in the New Zealand Court of Appeal, that appeal was allowed on the basis that to extradite him would be oppressive. In those proceedings, the extradition had been sought by the New Zealand Police, acting on behalf of the Commonwealth, pursuant to an agreement between Australia and New Zealand. Further, Mr Curtis was granted legal aid by the Commissioner of Legal Services. The costs of the litigation, therefore, had been borne by two New Zealand agencies.

The proceedings summarised here concerned the costs of Mr Curtis' successful appeal. There were two issues as to costs. First, the Commonwealth urged the Court not to exercise its discretion to award costs in Mr Curtis' favour. This point had two limbs: first, that the litigation concerned a matter of public interest and the Commonwealth had acted reasonably in the conduct of the appeal; and second, the New Zealand public purse had ultimately funded both parties to the litigation, so there was nothing to be gained from making one state agency bear the costs of another.

The second issue was whether Mr Curtis has actually incurred any costs, since he had been legally aided.

**Held:**

- The Commonwealth was ordered to pay Mr Curtis' costs: [25].
- As to the first limb of the first issue: while, from the perspective of the state seeking extradition, extradition proceedings are in the public interest, for the person in question, what is at stake in such proceedings is both personal and profoundly significant. Given that reality, it was not inappropriate to apply the ordinary rule as to costs in these extradition proceedings. Further, the Commonwealth was responsible for some delay in the proceedings: [9]-[10].
- As to the second limb of the first issue: state agencies have specific funds allocated to them and labour under financial limitations; it is to be expected that they will pursue legitimate avenue to recover expended funds: [11]-[12].
- As to the second issue: recipients of legal aid can, under the Court of Appeal (Civil) Rules 2005 recover the costs paid by the Commissioner: [21].

## 6. Family law: distribution of matrimonial assets; lottery winnings

**Court of Appeal of the Republic of Singapore**

***BOI v BOJ* [2019] SGCA 30**

**Decision date:** 2 May 2019

Andrew Phang JA, Belinda Ang J, Woo Bih Li J

In 2002, a couple won approximately $1.25 million in a lottery. They used those winnings to purchase a home. Some years later, after a 23 year marriage, they were parties to divorce proceedings.

The primary judge, sitting in the High Court of Singapore, divided the matrimonial assets in the proportion of 42% for the wife and 58% for the husband, and did not order maintenance for the wife. In arriving at this distribution, the primary judge considered the lottery winnings to be matrimonial assets, and attributed the lottery winnings to the husband for the purposes of determining the parties' contributions to the pool of matrimonial assets. The judge attributed the winnings in this way on the basis of her finding that the husband had purchased the lottery ticket in question.

On appeal, the wife challenged the division of the assets and the primary judge's attribution of the winnings to the husband. There were essentially two live issues in the appeal. First, are lottery winnings 'matrimonial assets' within the meaning of s 112 of the Women's Charter? That section relevantly defines 'matrimonial asset' to mean 'any … asset of any nature acquired during the marriage by one party or both parties to the marriage', but excludes 'any asset (not being a matrimonial home) that has been acquired by one party at any time by gift or inheritance…'. Second, if the first question is answered 'yes', how should a court attribute the winnings for the purposes of determining the parties' contributions to the pool of matrimonial assets to be divided?

**Held:**

- Appeal allowed in part; division of assets adjusted such that the assets were divided in the proportion of 49.1% for the wife and the remainder for the husband: [39]-[40].
- On the first issue: the winnings were matrimonial assets; they fell within the statutory definition, and could not be characterised as a 'gift' or 'inheritance': [18].
- On the second issue: the primary judge erred in only considering who purchased the winning lottery ticket; other factors are relevant to the attribution of lottery winnings for the purposes of determining the parties' contributions to the pool of matrimonial assets. Given the *sui generis* nature of lottery winnings, the purchaser's intention as to who should benefit from any winnings is a particularly salient consideration. In the absence of a clear intention, the essentially fortuitous nature of lottery winnings means that they should be presumed to be attributed in equal portions to the parties to a marriage. That presumption was applied by the Court of Appeal: [20], [25], [29], [39].

# Other international decisions of interest

7. **Constitutional law: constitutional rights; right to a fair trial; equal protection under law**

**Constitutional Court of South Africa**

***Phaahla v Minister of Justice and Correctional Services and Another (Tlhakanye Intervening)*** **[2019] ZACC 18**

**Decision date:** 3 May 2019

Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ, Theron J

Under the Correctional Services Act 1959, persons serving sentences of life imprisonment are not eligible for parole until they have served 20 years. Under the Correctional Services Act 1998, however, the period is 25 years. Section 136(1) of the 1998 Act governed the transition from the 1959 Act to the 1998 Act so far as eligibility for parole was concerned. Under s 136(1), persons sentenced before 1 October 2004 are subject to the 1959 Act; persons sentenced after 1 October 2004 are subject to the 1998 Act. Mr Phaahla is serving a sentence of life imprisonment. He was convicted on 25 September 2004, but was sentenced on 5 October 2004. Accordingly, he is subject to the longer non-eligibility period under the 1998 Act. He commenced proceedings in the High Court, challenging the validity of s 136(1) on two grounds. First, by using the date of sentence, not the date of the commission of the offence, he submitted that s 136(1) violated his right to a fair trial under s 35(3)(n) of the South African Constitution. Section 35(3)(n) provides that 'Every accused person has a right to a fair trial, which includes the right – … (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing'. Second, he argued that s 136(1) of the 1998 Act discriminates against him on the basis of his date of sentence and accordingly breaches his right to equal protection under law in s 9 of the Constitution. The High Court upheld Mr Phaahla's challenge, declaring it to be constitutionally invalid by reason of the breach of s 9. The High Court held that there was no relevant breach of s 35(3)(n) because parole is not a part of punishment. Mr Phaahla then applied to the Constitutional Court for confirmation of the declaration of invalidity. The Minister of Justice and Correctional Services and the National Commissioner of Correctional Services opposed the application and appealed from the High Court's orders.

**Held:**

- The Constitutional Court unanimously confirmed the High Court's declaration of invalidity on the equal protection basis: [51], [54], [72], [80].
- Further, the Court held that parole is part of punishment, and s 136(1) amounts to a retroactive increase in the severity of punishment in a manner that violates s 35(3)(n) of the Constitution: [34], [39], [69], [72], [73], [80].

## 8. Courts: exceptions to *habeas corpus* jurisdiction of superior courts

**Supreme Court of Canada**

***Canada (Public Safety and Emergency Preparedness) v Chhina* 2019 SCC 29**

**Decision date:** 10 May 2019

Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ

Mr Chhina was in immigration detention in a maximum security facility following the vacating of his refugee status and the issue of a deportation order concerning him. After approximately six months in immigration detention – in a facility that keeps inmates on lockdown 22.5 hours per day – he filed an application for *habeas corpus* with the Court of Queen's Bench of Alberta. He argued that his detention had become unlawful on two grounds: it had become lengthy and indeterminate, and the conditions of his detention were inappropriate. By the time his application was heard, he had spent 13 months in detention. The inherent jurisdiction of provincial superior courts to determine *habeas corpus* applications is subject to the *Peiroo* exception. That exception provides that where the legislature has put in place 'a complete, comprehensive and statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous', a provincinal superior court can decline to exercise its *habeas corpus* jurisdiction. The chambers judge who heard Mr Chhina's application considered that the *Immigration and Refugee Protection Act* ('*IRPA*') was a statutory scheme that satisfied the exception, and declined to exercise jurisdiction. Mr Chhina appealed to the Alberta Court of Appeal, which reversed the decision of the chambers judge. The matter was remitted to the Court of Queen's Bench for a hearing on its merits. Mr Chhina subsequently obtained travel documents, and he was removed from Canada in September 2017. Despite the fact that these events made an appeal moot, given the importance of clearly delineating the exceptions to *habeas corpus*, the Supreme Court still heard an appeal brought by the relevant state agencies from the Court of Appeal's decision. The issue on the appeal concerned the scope and application of the *Peiroo* exception, and specifically, whether it precludes *habeas corpus* proceedings in respect of all immigration decisions.

**Held:**

- Appeal allowed: [71].
- *IRPA* does not provide review at least as broad and no less advantageous than that available by way of *habeas corpus* so far as one of Mr Chhina's specific grounds of review was concerned – namely, his claim that his detention was unlawful due to its length and uncertain duration. This was for three reasons. First, the onus in detention review under *IRPA* is less advantageous to detainees than in *habeas corpus* proceedings. Second, the scope of review in Federal Courts under *IRPA* is narrower than that in a provincial superior court's inherent jurisdiction. And third, *habeas corpus* is a more timely remedy than the remedies available through judicial review : [59], [63]-[66].