IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S160 of 2019

BETWEEN:

ZEKI RAY KADIR
Appellant

AND:

THE QUEEN
Respondent

APPELLANT'S REPLY

Filed on behalf of the appellant by
Michael Bowe Solicitor
Suite 42, Level 9
5 Farrell Avenue
DARLINGHURST NSW 2010

Dated: 23 August 2019
Tel: (0411) 422 242
Fax: 9360 6571
Email: mbowe@marsdens.net.au

CERTIFICATION

1. It is certified that this document is suitable for publication on the internet.

SUBMISSIONS

2. This document responds to the Crown's submissions ("RS") on Mr Kadir's appeal.

3. The discussion of factual matters at RS [4]-[12] is notable. It contains a mix of facts found below plus references to evidence and veiled suggestions as to additional and alternative factual findings. However, none of the further factual matters raised in RS is the subject of a notice of contention. Nor is there any clear articulation of any additional (or alternative) findings which the Crown is asking this court to make. There does not seem to be any dispute about the factual summary in Mr Kadir's written submissions ("AS") at [7]-[24].

4. It is also noteworthy that a number of matters dealt with in AS are not disputed in RS. The summaries of the primary judge's reasoning on the three species of evidence, the articulations of errors found by the CCA in the judge's reasoning and the summaries of the CCA's reasoning on the redeterminations appear not to be in dispute. The essential areas of debate appear to relate to three matters: whether the errors found by the CCA in the primary judge's reasoning were in truth errors; whether the CCA erred in its redeterminations; and the notice of contention issue (whether *House v R* (1936) 55 CLR 499, at 504-505 is the standard of review).

5. Much of RS is devoted to an extensive examination of whether an appeal in relation to a s.138 determination is based on the need to show *House v R* error or on some broader test. The notice of contention filed in the two appeals simply asserts that the Crown wishes to contend that the CCA erred in holding that, to succeed on the appeal to the CCA, the Crown was required to demonstrate that the trial judge erred in the sense referred to in *House* at 504-505. This runs into the initial difficulty that it is difficult to see how the CCA "erred" in adopting *House* when the appeal to the CCA

proceeded upon the express agreement of all parties that the *House* approach should be adopted: CCA [69]. The Crown was free to confine its challenge to the primary judge's reasoning in that way and should be bound by that decision. Also notable is the absence of any alternative reasoning in the notice of contention: no attempt is made to indicate the detail of the suggested substitute reasoning if the *House* test is not adopted.

6. One other notable feature of the Crown's approach on the notice of contention is that although an acceptance by this court of the argument put by the Crown *may* make it easier for the Crown to defend the CCA's overturning of the primary judge's reasoning, it may also make it easier for Mr Kadir to overturn the CCA's redeterminations: on the Crown's approach it is not necessary for Mr Kadir to establish a *House* error in order for his challenge to the CCA's redeterminations to succeed. Acceptance by this court of the Crown's argument on the appropriate standard of review would involve a more nuanced and broader approach to the examination of the CCA's redeterminations than that contained in AS.

7. One matter which would arise is whether the CCA's statement at [109] that privacy "is not a factor that weighs heavily against the admission of the evidence" was an appropriate conclusion. That issue arises under s.138(3)(f) which obliges the court to take into account "whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights". Article 17 of that Covenant provides as follows:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

8. The CCA accepted (at [109]) that there was an "invasion of privacy" but did not accord it any particular weight and certainly did not treat it as an important factor.

9. Mr Kadir submits that the invasion of privacy was significant and should have been accorded substantial weight in the s.138 weighing process. The repeated unlawful video and audio surveillance occurred on a property on which Mr Kadir's home was

situate (although no activity inside his house was recorded). All citizens have a very high expectation of privacy in relation to their place of residence. The illicit and repeated capturing of his private activities by video and audio recording was an unlawful interference with both Mr Kadir's privacy and the sanctity of his home.

10. Another matter which was not accorded appropriate importance and weight by the CCA was the improper deception practised by the Animals Australia operative in obtaining the alleged admissions. Section 138(2)(b) deems questioning to be improper if a false statement is made in the course of questioning, ought reasonably to have been known to be false and was likely to cause the person who was being questioned to make an admission. In the present case the operative posed as a greyhound owner seeking to have two dogs broken in and questioned Mr Kadir about the methods which were to be used to train the dogs (CCA at [136] and [16]). This questioning was conducted upon the express and false basis that the operative wished Mr Kadir and Ms Grech to train her greyhounds. Such questioning was clearly likely to elicit an admission about the use of live baiting as a method used by Mr Kadir to train the dogs. And it was clearly based upon the operative's knowledge of Mr Kadir's methods. That knowledge had in turn been garnered by the use of the illegal surveillance. That the admissions were obtained by such deception was a matter which was significant and to which substantial weight should be accorded.

11. At RS [74] the Crown suggests that any redetermination should be made by the CCA (rather than the primary judge). On that issue Mr Kadir adopts the observations of Branson J in the Full Federal Court in *Employment Advocate v Williamson* (2001) 111 FCR 20 at [101]:

> "In my view, it would not be appropriate for this Court to determine the admissibility of the tape recording and transcript. The nature of the judgment required to be made under s.138 of the *Evidence Act* suggests that in all but very clear cases the judgment should be made by a judge who has heard the evidence and seen the witnesses."

.....
G. O'L. Reynolds
Counsel for the appellant

.....
D. P. Hume
Counsel for the appellant

Tel: (02) 9232 5016
Fax: (02) 9233 3902
Email: guyreynolds@sixthfloor.com.au

Tel: (02) 8915 2694
Fax: (02) 9233 3902
Email: dhume@sixthfloor.com.au

Dated: 23 August 2019