IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 114 of 2014

BETWEEN: **ANDREW O'GRADY**
Appellant

AND

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THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: Certification: This submission is in a form suitable for publication on the internet.

Part II: Reply

1. The appellant does not accept the respondent's statement of issues at RWS [1]. It makes no reference to the "substantial injustice" test or to an assessment of s6(3) *Criminal Appeal Act* 1912 (NSW) (**the Act**) in a "summary fashion".

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2. The appellant lodged an intention to appeal against conviction and sentence (*cf* RS [6.4]) which proceeded as an appeal against conviction alone (**AB 193** [6], **AB 188** [9]). The reply in *Kentwell* (KR) at [6] addresses the procedural reason for the delay, subsequent to identification of error in application of the standard non-parole period provisions, in lodging the notice of appeal in this matter, namely that it was part of an orderly process pursuant to consultation between interested parties and the Supreme Court.

3. It is not correct to describe the only ground of appeal as "that the law has changed"
30 (RS [6.5]). The ground of appeal was that the sentencing judge erred in the application of Division 1A *Crimes (Sentencing Procedure) Act* 1999, an error conceded by the respondent on the application (*cf* RS [6.5]). The Court of Appeal (NSW) in *Sinkovich v AG* [2013] NSWCA 383 rejected an argument that review of a sentence following *Muldrock v The Queen* (2011) 244 CLR 120 was to be seen as a challenge categorised as "change in law" (per Basten JA at [11], Beech-Jones J at [87], Bathurst CJ, Beazley P and Price J agreeing). The respondent does not challenge the correctness of *Sinkovich.*

4. There is no issue in this case of "the retrospective effect of judicial decisions" as the
40 respondent's own concession below, that the sentencing judge erred, accepts. Nor has the appellant ever contended that completed cases are "reopened simply on the basis that the understanding of the law may have changed since they were decided" (*cf* RS [6.10]). As the respondent concedes, the interests of justice must be considered (RS [6.10], RSK [6.4], [6.32]).

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5. The respondent's contention that an "interests of justice" test is the equivalent of one of "substantial injustice" (RS K [6.4], [6.34], RS O [6.10]) or "substantial reasons" or "special reasons" (RS K [6.5]) or "good reasons" or "special circumstances" (RS K [6.14]) or "wholly exceptional reasons" (RS K [6.21]) or "the most exceptional circumstances" (RS K [6.32]) or "whether the sentence represented an injustice which required reopening despite the considerable delay" (RS K [6.57]) is disputed. The respondent goes so far as to equate "all the formulations, whether in terms of "exceptional circumstances", "substantial injustice" or "underlying justice'" (RS O [6.13]).

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6. The appellant disputes that these statutory phrases have the same meanings. In the context of criminal procedure in NSW, "special reasons",[1] "substantial reasons"[2], "special circumstances"[3] and "exceptional circumstances"[4] all have differentiated and particular meanings. Section 6 of the Act itself uses the addition of the term "substantial" in a meaningful way in the context of the proviso. The test of "substantial injustice" in *Abdul v R* [2013] NSWCCA 247 has subsequently been described by the CCA as an "analogue of the proviso in s 6(1)" (*Miles v R* [2014] NSWCCA 72 at [63]) and a "not insignificant hurdle" (*Carlton v R* [2014] NSWCCA 14 at [12]). As in the proviso, it is "more than mere ornamentation"[5] and represents a higher threshold than
20 the "interests of justice" test that the respondent now accepts is correct. That the English cases provide support for the proposition that terms such as "exceptional circumstances" and "special reasons" are there used interchangeably with the term "substantial injustice"[6] supports the appellant's argument that the CCA in fact adopted and applied a test requiring as high a hurdle as exceptional circumstances despite it having seemingly accepted in *Abdul v R* [2013] NSWCCA 247 that there was "no justification for imposing test of 'exceptional circumstances'" in this jurisdiction (*Abdul* at [52], see also *Sinkovich* at [51]). The "underlying justice of the case" was not the test imposed by the CCA in the applicant's case, nor was there an exercise of discretion unfettered by a test of "substantial injustice" and examination of "all of the
30 facts and circumstances of the particular application" (*cf R v Unger* [1972] 2 NSWLR

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[1] "Special reasons" in the context of s48EA *Justices Act* 1901 (NSW) and s93 *Criminal Procedure Act* 1986 (NSW) was considered in *B v Gould* (1993) 67 A Crim R 297, *R v Kennedy* (1997) 94 A Crim R 341.

[2] "Substantial reasons" in the context of s 91(3) *Criminal Procedure Act* 1986 (NSW) was considered in *DPP v Losurdo* (1988) 44 NSWLR 618 affirming *Losurdo* (1998) 101 A Crim R 162 per Hidden J, where it was held at p 166 that " 'substantial' does not mean 'special' and to establish substantial reasons...it is not necessary to show that the case is exceptional or unusual".

[3] "Special circumstances" in the context of s 44 *Crimes (Sentencing Procedure) Act* 1999 was considered in Simpson v R (2001) 53 NSWLR 704.

[4] "Exceptional circumstances" in the context of the common law in relation to whether to take into account the impact of a sentence on family members is not the same as interest of justice: *R v Edwards* (1996) 90 A Crim R 510; *R v Togias* (2001) 127 A Crim R 23.

[5] *Weiss v The Queen* (2005) 224 CLR 300 at [18].

[6] See *R v R* [2007] 1 Cr App R 10 at 161 [30] refers to "special reasons", *R v Hawkins* [1997] 1 Cr App R 234 at 241 refers to "exceptional cases", *R v Mitchell* [1977] 1 WLR 753 refers to "the very rare case" (see *R v Hawkins* at p.240).

990 at 995; *R v Ramsden* [1972] Crim R L 549). Instead, the CCA applied *Abdul* (**AB198** [29], [32]) and on this test dismissed the application for an extension of time (**AB 201** [47]).

7. The respondent accepts that the Act does not in terms impose a test of "substantial injustice" (RS [6.13]). The English case of *R v Lesser* [1939] Cr App R 69 at 71, an application for leave to appeal *against conviction* brought out of time, relied on by the respondent does not assist in resolution of this issue as it was: (a) not a sentence appeal; (b) was a conviction appeal where the powers of the Court of Appeal
10 (England) under the *Criminal Appeal Act* 1907 (UK) were substantially different to those of the Court of Criminal Appeal;[7] (c) did not state any test, let alone one of 'substantial injustice'; and (d) examined the merits, thereafter dismissing the application. There is no doubt that *in England* there has been a substantial injustice test adopted in what is there described as 'change of law' *conviction* appeals, particularly since amendments introduced by the *Criminal Appeal Act* 1995 (UK) came into force, adding a leave provision for all conviction appeals and removing the common form proviso.[8]

8. The respondent's reliance on cases from the UK where there have been applications
20 for an extension of time to prosecute a *conviction appeal* in "*change of law*" cases (as opposed to extensions of time in an ordinary case or on a sentence appeal) in this case is misplaced.[9] It is the statutory language and purpose of the Act that concerns this Court in the applicant's case, not the UK legislation.[10] It is incorrect to submit that in this jurisdiction the "substantial injustice" test is "not novel" (RS K [6.4]), and that what are said to be equivalent statements have "long been accepted" (RS K [6.5]). *Abdul* was the first time that such a test was said to apply to the NSW legislation.

9. In any case, in England, the term "substantial injustice" appears to have first been adopted in *R v Hawkins* [1997] 1 Cr App R 234. In that case the Court of Appeal was
30 considering whether to grant an extension of time to an applicant who had pleaded guilty to appeal his convictions out of time on the basis of a "change in law". That is, the conviction appeal involved withdrawal of guilty pleas where there was no suggestion that there had been any misapprehension as to the basis for his guilty plea at the time it was entered. The applicant had "roundly and on advice accepted that he

[7] See *Weiss v The Queen* (2005) 224 CLR 300 at 306 [12]-314 [34].
[8] The *Criminal Appeal Act 1995* (UK) provides simply that "the Court of Appeal (a) shall allow an appeal against conviction if they think the conviction is unsafe; and (b) shall dismiss an appeal in any other case". This is to be contrasted with s 6 the Act which also permits a conviction to be quashed on the basis of error of law or miscarriage of justice and retains the proviso.
[9] The *Criminal Appeal Act* 1968 s 11(3) powers on sentence appeal provision is different in terms to s 6(3).
[10] The decision in *A v Governor of Arbour Hill Prison* [2006] 4 IR 88 has been held to be *" based on the constitutional arrangements which apply in Ireland"*: *R v R and ors* [2007] 1 Cr App R 10 at [44]. Thus the Irish position is also particular to its jurisdictional framework, as is the Scottish: *Cadder v HM Advocate* [2010] 1 WLR 2601.

had acted dishonestly and fraudulently, and pleaded guilty". It was in the context of an out of time conviction appeal seeking to challenge convictions based on guilty pleas that Lord Bingham said "the general practice is plainly one which sets its face against the reopening of convictions *recorded in such circumstances*" (at p 240, emphasis added) and later described the question as being "whether this is one of those exceptional cases in which an extension of time should be granted to apply for leave to appeal *against the convictions recorded on the applicant's plea of guilty*" (p.241, emphasis added). On the renewed application for leave to appeal *against sentence*, Lord Bingham did not suggest that a "substantial injustice" test should be applied. The
10 sentence appeal was upheld on the basis of error of fact (pp 241-243).

10. Since *Hawkins*, the "substantial injustice" test has been expanded in England to apply to conviction appeals in "change of law" cases other than convictions entered on guilty pleas and in relation to challenges to confiscation orders.[11] This approach has never been expressed as being conducted in a "summary fashion" (*cf* **AB 198** [29], *Abdul* at [53]). An examination of the cases relied on by the respondent demonstrates that when applied, it is only after a detailed consideration of the merits of the appeal.[12] Further, in NSW, neither the statutory language nor symmetry and comity, support the adoption of a test of substantial injustice at the point of an application for extension of time. By
20 way of contrast, in *R v Cottrell* [2007] 1 WLR 3262, the Court of Appeal (UK) noted that there was a lack of "symmetry" between its practice and the approach of the Criminal Cases Review Commission to referring matters to the Court of Appeal in the wake of a decision[13] that the Commission was not obliged to have regard to the "substantial injustice" approach taken in conviction appeals when determining whether to make a reference by reason of its legislative powers (p 3278-3282). The Court of Appeal also noted tension with the legislative provisions as to the Court of Appeal's powers on conviction appeals:

> "Under the present legislation a conviction must be quashed if it is unsafe. The
> 30 declaratory theory of the common law appears remote from the practical realities...We share the views of the Divisional Court in R (Director of Revenue and Customs Prosecutions) v Criminal Cases Review Commission [2007] 1 Cr App R 395 that these issues merit the attention of Parliament".

The interpretation of the *Criminal Appeal Act* 1912 (NSW) pre-*Abdul* and the *Crimes (Appeal and Review) Act* 1912 involved no such asymmetry or conflict with the

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[11] *R v R and Others* [2007] 1 Cr App R 10; *R* v Cottrell [2007] 1 WLR 3262; and *R v Bestel* [2014] 1 WLR 457.

[12] See the summary in *R v Bestel* [2014] WLR 457 at [24] of the non-substantive basis of preceding appeals. Lord Bingham in *R v Mitchell* [1997] 1 Cr App 234 at 240F referred to attention having been drawn to such cases (wherein expressions such as "purely technical" *McHugh* [1977] 64 Cr App R 92, "purely academic" *R v Ayres* (1984) 78 Cr App R 232, "no prejudice" *Pickford* [1995] 1 Cr App R 420 were used but no test of "substantial injustice opposed").

[13] *R (Director of Revenue and Customs Prosecutions) v Criminal Cases Review Commission* [2007] 1 Cr App R 395.

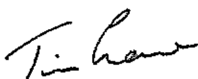
statutory language in NSW. The imposition of a test of "substantial injustice" in a "summary fashion" involves a significant departure from the settled interpretation of the NSW Act.

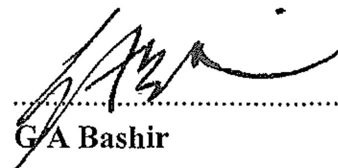
11. In summarising the appellant's complaints the respondent has neglected to address the substance of the appellant's arguments as to "substantial injustice" and "summary fashion", the latter not being addressed at all. Justice Bellew did not state the applicable standard non-parole period was 7 years – the trial judge did (*cf* RS [22]). In his consideration, Bellew J said that the standard non-parole period was 8 years (**AB 193** [4]). This cannot be dismissed as either a slip or a probable typographical error (*cf* RS [22]-[23]). The appellant had his application erroneously determined on the basis of: (1) a test of substantial injustice; (2) his argument as to s 6(3) dealt with in a summary fashion (and the other considerations said to inform the discretion, not said to be subject to consideration in a summary fashion) thereby excluding consideration of relevant matters; and (3) an incorrect and higher standard non-parole period (that is a misapplication of the correct guidepost).

12. Section 6(3) does not impose a test of "whether the applicant is serving a sentence that is not warranted *but for* the error" or *"because* of the Muldrock error" or whether the error *"necessarily* produce[d] a longer sentence" (*cf* RS [6.13], [6.16]-[6.17] and [6.33]). The respondent has not challenged the correctness of *Baxter v R* (2007) 173 A Crim R 284 or *Douar v R* (2005) 159 A Crim R 154. The preliminary issue is whether there has been *House* error, a matter conceded by the respondent and accepted by the Court, and then s 6(3) is engaged in the sense discussed in *Baxter* and *Douar*.

13. The appellant notes the respondent's concession that s 6(3) was not addressed on its merits (RS O [6.26]) and that a summary approach was instead adopted at the preliminary stage of determining the application for leave to appeal. There was, in these circumstances, no *"conclusion that no lesser sentence was warranted"* made by the Court in the sense required by the Act (*cf* RS [6.28]).

14. The appellant otherwise adopts the Submissions in Reply of the appellant Kentwell in the related matter.





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