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Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD372 of 2023

MEHREEN FARUQI
Applicant

PAULINE HANSON
Respondent

APPLICANT'S OUTLINE OF SUBMISSIONS
APPLICATION TO RE-OPEN THE PROCEEDINGS TO ADDUCE FRESH EVIDENCE

A. INTRODUCTION & OVERVIEW

1. These submissions are made in support of the Applicant's interlocutory application filed on 8 May 2024 for leave to re-open the proceeding for the purpose of adducing fresh evidence. The application is supported by the affidavit of Lauren Rae Gasparini affirmed on 8 May 2024 (**Gasparini Affidavit**).

2. The circumstances giving rise to this application are set out at paragraph 19 below and following. In short, under cross-examination, the Respondent asserted that she did not know at the time of her 9 September 2022 tweet (**Hanson tweet**) that the Applicant was a Muslim. This crucial matter (**Respondent's state of knowledge**) had not been adverted to in the Concise Response, the Respondent's affidavit, in her written or oral opening submissions, or at any other point during the preparation or running of the case. It arose for the first time after the Applicant's evidence at trial was closed.

3. The Applicant submits it is in the interests of justice for the case to be re-opened for the limited purpose of tendering the Gasparini Affidavit, which goes to the Respondent's state of knowledge by placing before the Court evidence relevant to the question of whether the Respondent knew at the time of the Hanson tweet that the Applicant was a Muslim.

4. The evidence in the Gasparini Affidavit is clearly relevant to and may have a significant impact upon the case, and no prejudice arises from the evidence being adduced.

5. The evidence is relevant to the Court's consideration of the Applicant's submission that the Respondent's tweet was done 'because of' the Applicant's race, colour or national or ethnic origin: s18B, s18C(1)(b) *Racial Discrimination Act 1975* (Cth) (**RDA**).

6. The Applicant submits that the Gasparini Affidavit is capable of materially affecting the assessment of both the credit of the Respondent, and the plausibility of the Respondent's evidence as to her

state of knowledge. It does so by placing before the Court copious material identifying the Applicant as Muslim that was available and published at the time of the Hanson tweet.

7. Further, the Gasparini Affidavit buttresses the Applicant's submission that the Respondent has, under cross-examination, given oral evidence that should not be accepted, including her evidence as to her state of knowledge at the time of posting the Hanson tweet. The Applicant put squarely to the Respondent under cross examination that her evidence on that point was "quite straightforwardly… a lie". Of course, the Court would not need to go so far. From the Applicant's perspective the evidence need only be 'not accepted'.

8. The Gasparini Affidavit does not include an assertion that the Respondent was present in the Senate during the Applicant's maiden speech. It is accepted, based on photographic evidence, that she was not present during the speech.

9. While much of the material in the Gasparini Affidavit enables the Court to draw inferences about what the Respondent was likely to have known by virtue of extensive media coverage of the Applicant's religion both before and since being sworn in as a Senator, there is also direct evidence that the Respondent knew the Applicant is a Muslim by 8 July 2020 at the latest.

10. Paragraph 20 to the Gasparini Affidavit deposes to the contents of a recording of the Respondent's appearance on a podcast episode of "Paul Murray Live" with Cory Bernardi (**Bernardi**) and host, Paul Murray (Annexure LG-9). While the Respondent was present and participating in the conversation, Bernardi can be heard to say the following words:

> *We've got our own version of that in the Parliament. Mehreen Faruqi who came from the New South Wales Parliament, from Pakistani origins, Muslim woman who I don't think has given a speech that doesn't say about how racist Australia is, how terrible it is, how misogynistic it is, how Islamophobic it is, everything that's wrong with it. Her son of course is employed by the ABC, you know they've got good jobs, they've got high profiles, from a country that they clearly think so much is wrong with.*

11. As set out in the Gasparini Affidavit at paragraph [21], the Respondent can be heard making a sound in response to these words by Bernardi, indicating that she was present and engaged in the discussion during which the Applicant was clearly identified as a Muslim.

B. RELEVANT PRINCIPLES – POWER TO RE-OPEN

12. The Court has an inherent power to re-open a case until judgment is entered. The power to do so is discretionary, but exceptional, and it must be exercised with regard to the public interest in maintaining the finality of litigation: *Smith v New South Wales Bar Association* (1992) 176 CLR 256 at 265 (Brennan, Dawson, Toohey and Gaudron JJ).

13. In ***Briggs*** *on behalf of the Boonwurrung People v State of Victoria* [2024] FCA 288, Murphy J said (at [20]):

> If an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to inquire why the evidence was not called at the hearing. If there was a deliberate decision not to call it, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending on whether the case is simply one in which the hearing is complete, or one in which reasons for judgment have been delivered. It is difficult to see why, in the former situation, the primary consideration should not be that of embarrassment or prejudice to the other side.

14. "The overriding principle to be applied by the Court in determining whether or not to grant leave to re-open a case for the admittance of further evidence, is that it must be in the interests of justice in the proceeding": *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22, [24] (Kenny J), as cited in *Briggs*, [22].

15. The authorities reveal four recognised categories of cases which may justify the granting of leave to re-open (subject to the interests of the administration of justice), although the categories are not closed: *Briggs* at [23]. The categories include, relevantly, fresh evidence, which brings into consideration whether the evidence is "new" in the sense that the applicant was unaware of it at the time of the original hearing, and whether it is evidence the applicant could not have obtained with reasonable diligence: *Kedem v Johnson Lawyers Legal Practice Pty Ltd* [2014] FCAFC 3 [2014] FCAFC 3 at [74] (North, Barker and Katzmann JJ).

16. The other categories canvassed in *Briggs* include:

    a. inadvertent error (for example, where counsel inadvertently overlooked an issue that arises on the pleadings or during a proceeding: *Urban Transport Authority (NSW) v Nweiser* (1992) 28 NSWLR 471 (1992) 28 NSWLR 471 at 474-5 (Clarke JA));

    b. mistaken apprehension of the facts (for example, where counsel has misapprehended the nature or significance of facts proven or agreed: *Nweiser* at 474-5); and

    c. mistaken apprehension of the law.

17. Other considerations relevant to the discretion to re-open include:

    a. any prejudice likely to be suffered by the party resisting the application: *Briggs* at [25], citing *Nweiser* at 478;

    b. The public interest in the timely conclusion of the litigation: *Australian Securities and Investments Commission v Rich* [2006] NSWSC 826; (2006) 235 ALR 587 at [18];

c. the probability that the additional evidence will affect the result: *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2008] FCA 1436; (2008) 171 FCR 174, [209] (Lindgren J). If re-opening the proceeding is not likely to make a difference to the outcome, that would weigh against the granting of leave to re-open: *Briggs* at [27].

18. In respect of the relevant degree of probability that the additional evidence would affect the result, it has been said that evidence should be admitted "when it is so material that the interests of justice require it" (*Re Australasian Meat Industry Employees' Union (WA Branch); Ex parte Ferguson* (1986) 67 ALR 491, 493-94 per Toohey J) or where the new evidence would "most certainly affect the result" (*Daniel v Western Australia* (2004) 138 FCR 254, 269 per RD Nicholson J: *Briggs*, [27].

C. EVIDENCE IS RELEVANT TO A LIMITED QUESTION ALREADY BEFORE THE COURT

19. During cross-examination, Senator Hanson stated for the first time in the proceeding that she did not know that the Applicant was a Muslim at the time of her tweet on 9 September 2022: T-149 21-31. Further, in cross-examination Senator Hanson gave evidence that she was aware – at the time of swearing her affidavit in this proceeding – that the question of her knowledge of the Applicant's religion was in issue in the proceeding: T-149ff. Despite this, she gave evidence that she did not include any reference to her state of knowledge as to the Applicant's religion in her affidavit "because it did not cross [her] mind": T-149 21 – T-152 12.

20. The Respondent's claimed state of knowledge was not raised by the Respondent in her Concise Response, in her written or oral opening submissions, or in her affidavit. The Applicant could not reasonably have understood or anticipated that the Respondent would give evidence denying that she knew that the Applicant was a Muslim, and it was not a matter of which the Applicant was on notice prior to the conclusion of her evidence in the case.

21. The Gasparini Affidavit is sought to be adduced for the limited purpose of assisting the Court to assess whether the Respondent's oral evidence as to her state of knowledge should be accepted.

22. Both the Applicant and the Respondent addressed this issue in closing submissions. It is therefore not a matter that the Applicant seeks to agitate beyond the matters already in issue before the Court.

D. SUBMISSION: FRESH EVIDENCE

23. The material annexed to the Gasparini Affidavit is not 'fresh evidence' in the sense that it has only recently come into existence. However, it is 'fresh' in the sense of its relevance and significance to the proceeding. It is evidence responsive to the Respondent's assertion as to her state of knowledge that arose for the first time after the Applicant's evidence was closed. The material annexed to the Gasparini Affidavit is the fruit of searches conducted since the end of trial and is responsive only to the narrow issue of the Respondent's state of knowledge.

24. This application was foreshadowed in closing submissions shortly before the Court rose on the final day of trial (2 May 2024): T-336-338. The searches deposed to in the Gasparini Affidavit took place on 2, 3 and 7 May 2024, and the affidavit was deposed to on 8 May 2024: Gasparini Affidavit, [2].

25. The application was filed and served on the Respondent on 8 May 2024.

E. SUBMISSION: EVIDENCE MAY HAVE A SIGNIFICANT EFFECT

26. The evidence in the Gasparini Affidavit is relevant to and may have a significant impact upon the case. Seen in the context of:

    (a) the fact that the Applicant and Respondent are both Senators who sit in the same political chamber and had done so for over four years at the time of the Hanson tweet;

    (b) the fact that the Respondent knew the Applicant is from Pakistan;

    (c) the Respondent's particular interest in and tendency to comment unfavourably on Islam and Muslims; and

    (d) the Respondent's particular concern over many years that 'bad' Muslims might pretend to be 'good' Muslims so that they can 'infiltrate government',

    the Applicant contends that it is entirely implausible that the Respondent did not know the Applicant's religion at the time of the Hanson tweet.

27. The Gasparini Affidavit demonstrates the existence of a large volume of material, comprising media articles and social media posts and comments that expressly refer to the Applicant's religion and makes the likelihood that the Respondent knew that she was a Muslim overwhelming.

28. The tweets posted to the Applicant's Twitter account and annexed at Annexures LG-2 to LG-7 of the Gasparini Affidavit should be read in light of paragraph [20] of Senator Hanson's affidavit (CB2078) which accepts that she has "been aware" of the Applicant's Twitter account since around 2018, has "followed her tweets", was "familiar with the sort of posts that Senator Faruqi often made" and had specific awareness of tweets from her which she claimed were offensive.

29. The material exhibited to the Gasparini Affidavit includes:

    (a) the 'Migrant Muslim Mother' Tweet dated 20 August 2018, which is 'pinned' to the Faruqi Twitter account. The effect of 'pinning' the Migrant Muslim Mother Tweet is that any person who accesses or views the Faruqi Twitter account will see the Migrant Muslim Mother Tweet as the first tweet on the Faruqi Twitter account. This was the case as at 22 September 2018 after the Applicant took her oath as a Senator, and as at 9 September 2022 being the date of the Respondent's tweet: Gasparini Affidavit, [6]-[8];

(b) tweets referencing the Applicant's maiden speech in Parliament, including the traditional Islamic greeting and the Applicant's religion: Gasparini Affidavit, [10]-[11];

(c) tweets tagging the Respondent's Twitter account from the Applicant directly referencing the fact that the Applicant is a Muslim: Gasparini Affidavit, [13];

(d) tweets posted to the Applicant's Twitter account referring to the Applicant's religion: Gasparini Affidavit, [14];

(e) commentators on the Applicant's Twitter account referring to the Applicant's religion and tagging the Respondent's Twitter account: Gasparini Affidavit, [15]-[17];

(f) podcast episodes featuring the Respondent in which the Applicant's religion is referred to: Gasparini Affidavit, [19]-[22] and [24]-[26];

(g) media reporting between 15 August 2018 and 23 June 2022 that expressly refers to the Applicant's religion: Gasparini Affidavit, [28]-[29] and [54]-[59];

(h) videos uploaded by the Applicant to her own Facebook and YouTube pages identifying the Applicant as a Muslim and addressing the Respondent directly: Gasparini Affidavit, [30]-[33];

(i) media articles between 2015 and 2019 referring to both the Applicant and the Respondent and in which the Applicant is identified as a Muslim: Gasparini Affidavit, [34]-[44];

(j) tweets directed to the Respondent's Twitter account from commentators directly referencing the fact that the Applicant is a Muslim: Gasparini Affidavit, [45]-[50];

(k) a screenshot of a post on the Respondent's Facebook page dated 16 July 2017, referring to Sami Shah's book The Islamic Republic of Australia, Muslims down under, from halal to hijabs and everything in between with the caption, "How do you feel about Dymocks book range? #auspol #OneNation #PaulineHanson #Dymocks #Sale #Islam": Gasparini Affidavit, [51]-[53]; and

(l) comments on the Respondent's Facebook account identifying the Applicant as a Muslim: Gasparini Affidavit [60]-[63].

30. If the evidence annexed to the Gasparini Affidavit is accepted, it discloses to the Court public social media and media reporting about the Applicant's religion that provides context in which the Respondent's oral evidence must be considered.

31. In addition, the Gasparini Affidavit puts before the Court a range of social media posts directed at and to the Respondent directly referencing the Applicant's religion.

32. The Applicant submits that, seen in the context of the matters at paragraph 26 above and the material annexed to the Gasparini Affidavit, the Respondent's evidence that she did not know the Applicant was a Muslim at the time of the Hanson tweet is entirely implausible and should not be accepted.

33. The evidence is also material to the Court's consideration of whether the Respondent's tweet was done 'because of' the Applicant's race, colour or national or ethnic origin: s18B. The question of the Respondent's state of knowledge is squarely relevant as it arises in the context of s18C(1)(b) and is therefore central to the proceeding.

F. SUBMISSION: THE INTERESTS OF JUSTICE

34. The application seeks to re-open the case only to adduce evidence about an issue that arose after the Applicant's evidence had closed, and could not have been anticipated by the Applicant.

35. This is evidence that may very well affect the outcome of the proceeding. The probative value of the evidence is high: if accepted, it supports an inference that the Respondent's tweet was – either solely or in part – 'because of' the Applicant's religion. This is a significant question before the Court, which the Applicant should be permitted to litigate thoroughly by placing all relevant evidence before the Court.

G. SUBMISSION: NO PREJUDICE ARISES

36. The Applicant submits that no prejudice arises from the evidence being adduced.

37. The matter arose for the first time as a result of cross-examination during trial.

38. The evidence does not require the Respondent or the parties to attend Court, nor does it require the Respondent to be cross-examined further, or re-examined.

39. The Applicant has complied with her obligations in *Browne v Dunn* by putting squarely to the Respondent during cross examination that her evidence as to her state of knowledge was "a lie… quite straightforwardly, it's a lie": T-151 11.

40. The question of the Respondent's state of knowledge was addressed in closing submissions by each party, and the application has been served, with notice on the final day of trial, and mere days after judgment was reserved.

41. It is unlikely that there will be significant costs consequences if the application is granted. This is because the Respondent has already given oral evidence on the matter, and the Applicant contends that it is unnecessary to recall the Respondent. The evidence sought to be adduced does not change the Respondent's evidence, nor affect the Respondent's submissions. If the evidence is accepted, the Court will still be required to consider the Respondent's oral evidence as against the context and tendency evidence adduced by the Applicant. At most, the Respondent may incur modest costs in responding to this application. Such costs would have been avoided by the Respondent putting the Applicant on notice of her case so that all necessary evidence could be adduced in the usual course of trial.

42. If accepted, the evidence will not result in an inefficient use of judicial and administrative resources. The application is made to the presiding trial judge who is familiar with the issues in dispute, the evidence, and this specific question as it arises. The imposition on the Respondent and the Court is very limited.

H. CONCLUSION

43. The Applicant submits that it is in the interests of the justice that leave be granted to re-open the case for the purposes of adducing the Gasparini Affidavit.

44. Should this application be acceded to, the Applicant is content for the application to be dealt with on the papers and, if granted, that the submissions made herein in writing to constitute her submissions on the evidence without a further oral hearing. The Applicant will, of course, appear and provide such further assistance to the Court as may be required.

8 May 2024

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