HIGH COURT OF AUSTRALIA

## NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 10 Mar 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

### Details of Filing

| | |
|---|---|
| File Number: | M73/2021 |
| File Title: | Nathanson v. Minister for Home Affairs & Anor |
| Registry: | Melbourne |
| Document filed: | Form 27F - Outline of oral argument - 1st respondent |
| Filing party: | Respondents |
| Date filed: | 10 Mar 2022 |

### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

**IN THE HIGH COURT OF AUSTRALIA**
**MELBOURNE REGISTRY** **NO M 73 OF 2021**

On appeal from the Full Federal Court

**BETWEEN:** **NARADA NATHANSON**
Appellant

**AND:** **MINISTER FOR HOME AFFAIRS AND ANOTHER**
Respondents

# FIRST RESPONDENT'S OUTLINE OF ORAL ARGUMENT

## PART I CERTIFICATION

1. We certify that this outline is in a form suitable for publication on the internet.

## PART II OUTLINE OF ARGUMENT

2. There is no issue in this case about the applicable legal principles. This Court has confirmed the applicable principles in *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441. The relevant principles are identified in summary in the Minister's submissions and no issue is taken with that summary in the appellant's reply. There is no suggestion that *MZAPC* was wrongly decided or does not apply in this case.

   *MZAPC* Vol 3 tab 13, at [35]-[60]

   RWS at [27]-[34]

3. In many, if not most, cases where an applicant is deprived of a chance to make submissions on a topic of relevance, reasonable conjecture from established facts about the decision making process will readily show a reasonable possibility that the outcome would have been different. But that may not be the case (and the applicant may therefore need to show more) in a case where the relevant topic has already been addressed in the evidence and where the applicant has already addressed the topic to some degree. In such a case, the applicant may need to make submissions or put on evidence as to how the opportunity he or she lost would have been used or could have produced a different outcome.

   RWS [39]-[41]

4. In the present case it is accepted that primary material about the domestic violence incidents from the West Australian Police (**WAPOL**) was properly before the Tribunal. The relevance of the material to the topic of the best interests of the appellant's children

was addressed in the Minister's Statement of Facts, Issues and Contentions (ABFM 72 [42]). It is conceded by the appellant that he knew about that material and its relevance to the topic of the best interests of the child prior to the hearing. No procedural fairness error has been alleged in respect of that use of the material.

RWS [10]-[12]; Reply [2]

5. Thus, the denial of procedural fairness found by the primary Judge (and not contested in the Full Court or here) arose when nothing specific was done after it became clear that the Minister was relying on the material about domestic violence in connection with a further topic. The critical question is what might realistically have happened if, at that stage, the appellant had been invited to address that additional reliance on the material by way of further submissions or evidence.

AB 87 [56]-[59]

6. The domestic violence material was always going to be important, even if reliance on it was limited to the issue of best interests of the children. As soon as it was in play the appellant had strong reasons to rebut it if he could, or to minimise its importance.

RWS [43], [49]

7. The appellant had addressed the domestic violence incidents in the evidence, through the letter from his wife. It can be inferred that the relevant parts of the letter from the appellant's wife were produced in response to the material from WAPOL.

RWS [11.2], [13]-[14]

RBFM 11-19

ABFM 78

8. The appellant also gave evidence about the incidents in response to questions in cross-examination and questions from the Tribunal.

RWS [20]

ABFM 96-101

9. There was no suggestion in the evidence of the appellant's wife that the incidents had not occurred. The appellant also accepted the correctness of the police records of his wife's statements. It is therefore extremely unlikely that further evidence could have persuaded the Tribunal that the incidents did not occur.

10. That left the possibility of downplaying the seriousness of the incidents or persuading the Tribunal that they the appellant was a changed man. However:

    10.1. The domestic violence incidents, as recorded in the WAPOL material and as explored in cross-examination, were objectively serious.

    10.2. The wife's evidence (obtained when it was clear that the incidents were likely to be relevant) already said what she could say to put the incidents in context and stress their commitment to the relationship.

ABFM 185

10.3. The appellant's case was already that he was remorseful for everything he had done and was a changed man.

ABFM 90 lines 8-15; 121 lines 9-16

RWS [44]-[46]

11. It has never been a part of the appellant's case that the Tribunal erred in interpreting the Direction or in using the WAPOL material in considering the risk posed by the appellant to the Australian community. In any event, it was open to the Tribunal (subject to procedural fairness considerations) to do so. Loss of a chance to make a *legal* submission about the construction of Direction 79 was not in itself material because it could only have either led the Tribunal into error or been rightly rejected.

RWS [46.3]-[46.5]

*Stead* Vol 2 tab 10, p 279

12. This is not a case where it is obvious that the appellant would "say whatever he could" and where any number of additional, unknown explanations might have been given by the appellant (cf *Degning* Vol 3 tab 11). Rather, this is a case where it was necessary for the appellant, to make out his onus, to identify what he might have said or done that might have provided the possibility of a different outcome.

RWS [49]-[50]

Dated: 10 March 2022

Geoffrey Kennett
Telephone: (02) 9221 3933
Email: kennett@tenthfloor.org
Counsel for the First Respondent

Andrew Yuile
Telephone: (03) 9225 8573
Email: ayuile@vicbar.com.au