HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 07 Feb 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 27E - Reply
Filing party:	Appellant
Date filed:	07 Feb 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 M73 of 2021

BETWEEN:

NARADA NATHANSON
Appellant

and

MINISTER FOR HOME AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELANT'S SUBMISSIONS IN REPLY

1. These submissions are in a form suitable for publication on the internet.

2. The Minister's submissions (**MS**) at [11] and [15] wrongly focus on whether the Appellant knew of the existence of the police material. It is not in dispute that he was aware of that material prior to the Tribunal hearing, and its possible relevance to the best interests of his children for the purposes of para 13.2(4)(h) of Direction 79. The Minister is not assisted by that observation because the procedural unfairness was that the Appellant did not know <u>how</u> such material might be relevant to his case.

3. Contrary to MS [36], this case is comparable to one where an issue was never raised.[1] It is actually worse, in so far as the Appellant was positively misled by the Tribunal into believing that the issue would not be relevant to his case. The Appellant was given false comfort by the Tribunal's assurance (uncontradicted by the Minister's representative) that the changes to Direction 79, including in particular new para 13.1.1(1)(b), were

[1] It is not merely a question of the weight to be given to facts or evidentiary material, or an "additional use" of such material: cf. MS [3], [36]. That impermissibly seeks to reframe and mischaracterise the findings made below as to the nature of the denial of procedural fairness.

"minor" and were "of minor relevance" to the Appellant having regard to his conviction history. The effect of this representation remained operative until the Minister's closing submissions, following which it is common ground that the Appellant was not given any further opportunity to be heard.

4. The Minister has not filed any notice of contention, and does not dispute the findings made below that the Appellant was denied procedural fairness. In particular, it was found below that procedural fairness required the Tribunal at least to afford the Appellant an opportunity to present further evidence and submissions on the issue whether family violence that had not been proven to be a crime could or should be viewed as very serious conduct under Direction 79: see FC [46], [83]-[84].[2]

5. The Minister accepts that it might have been a realistic response for the Appellant, if he had been given a fair hearing, to call his wife to give evidence. Once that is accepted, and taking into account ordinary human experience, it is incredibly difficult to imagine that her testimony might not possibly have persuaded the Tribunal to view the allegations differently, whether by making different or additional findings of fact or by treating the incidents less seriously or giving them less weight in the exercise of discretion.

6. It must be kept in mind that the written statement provided by the Appellant's wife pre-dated any suggestion by the Minister or the Tribunal that the conduct involving family violence might be taken into account and viewed seriously as "other conduct" of the Appellant falling within new para 13.1.1(1)(b) of Direction 79. The Appellant's oral evidence was equivocal on the details of the family violence incidents – he had little independent recollection but accepted the fact that his wife had made statements to the police (as opposed to admitting all of the details of the incidents).[3]

7. In such circumstances, it clearly might have made a difference if the Appellant had been given an opportunity to call oral evidence from his wife about the incidents and their seriousness. Further, his wife might also have been able to give oral evidence about on the attitudes of the family, including the children, towards those events. It cannot be assumed that the pre-hearing statement from the Appellant's wife had said all that could

---

[2] CAB, 117, 129.
[3] See *e.g.* Transcript p 17, lines 5-22 [AFM 100].

be said on such matters. In this regard, a decisive factor might also have been the wife's demeanour when giving oral evidence.[4]

8. The Minister distractingly seeks to place attention on the fact that general topics of information were addressed in evidence from the Appellant and his wife. That is distracting because "character" cases are not mere academic exercises, and the outcome may be affected greatly by emotional or other non-logical or non-rational factors – the "human qualities" that defy verbal formulae.

9. Further, any "knowledge" on the part of the Appellant that the family violence allegations might have been "important" to the consideration of the best interests of his
10 children (for the purposes of para 13.2(4)(h) of Direction 79)[5] does not provide any basis to infer that could not have made submissions or adduced further evidence in response to the contention that such allegations were themselves "serious" conduct that should be weighed against the revocation of the cancellation decision.

10. It cannot be said that such submissions or evidence (which it is accepted the Appellant was denied an opportunity to provide) could not possibly have made any difference to the outcome, in circumstances where it is now accepted that the Tribunal would not have reached the same conclusion without regard to the evidence of domestic violence.[6] The Appellant thereby lost an opportunity to advance his case, and was deprived of a realistic possibility of a successful outcome.

20 11. The Minister concedes that the Appellant was not required to file evidence at trial or on appeal about what he would have said or done if he had been given an opportunity to be heard on the critical issue: MS [39]. Nevertheless, the Minister does not identify precisely what more the Appellant should have done in order to establish a realistic possibility of a different outcome. To pose the question as one concerning *how* evidence before the Tribunal could or might have been used as opposed to *whether* evidence could be used (MS [41]) says nothing about whether there might have been more to say on the topic.

---

[4] On the importance of demeanour to an assessment of evidence, compare *e.g. NAIS v Minister for Immigration and Multicultural Affair*s (2000) 228 CLR 470 at 475-476 [9]-[10] (Gleeson CJ), 502-503 [105] (Kirby J), 526 [172] (Callinan and Heydon JJ).
[5] *Cf.* MS [15], [26.3], [43].
[6] Primary judge at [28] [CAB 73]; FC at [47] (Wigney J), [104] (Steward and Jackson JJ) [CAB 109-110, 126].

Dated: 7 February 2022

.....

.....

Chris Horan

T: (03) 9225 8430

E: chris.horan@vicbar.com.au

Angel Aleksov

T: (03) 9225 6736

E: aleksov@vicbar.com.au