The Djokovic Cases in Australia

A paper delivered by Mark Robinson SC to the
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This paper discusses the Novak Djokovic cases in Australia that gripped the nation in January 2022. We found out that the world No 1 tennis player posed a risk to the health, safety or good order of the Australian community under the Migration legislation and that appeal judges do work on the weekends (and in the summer holidays).

The saga began in January 2022 in the Federal Circuit and Family Court of Australia ("FCFC") with the case of *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FedCFamC2G 7 (Kelly J).

In that case, Judge Anthony Kelly (based in Melbourne, appointed in 2017) heard an urgent case. It was so urgent, it was made orally with no originating process or affidavits.

The applicant arrived in Australia on 5 January 2022 in order to play in the Australian Open Tennis Championship. He was described by the FCFC as a "Serbian citizen [and] is a professional tennis player of international renown".

Before he arrived here, he had already been granted a Temporary Activity (Subclass 408) visa. An Australian Travel Declaration made by him had already been assessed by the Department of Home Affairs. Tennis Australia had supplied the Department with a copy of his medical exemption for vaccination against the Covid-19 virus. His medical exemption had been provided to him by two medical specialists comprising an Independent Expert Medical Review Panel commissioned by Tennis Australia for the purposes of assessing such applications. The medical exemption provided to the applicant by that panel had also been assessed and endorsed by an Independent Expert Medical Review Panel commissioned by the State of Victoria.

The applicant contended to the FCFC that he was accordingly entitled to quarantine-free entry into and travel in Australia for the duration of the permission granted by the visa and that

otherwise, he would not have travelled here.

Upon his arrival in Australia, he was taken to immigration clearance and questioned by officers of the Department of Home Affairs until the early hours of 6 January 2022

On 6 January 2022, a delegate of the Minister for Home Affairs purported to decide that the applicant's visa be cancelled and he be removed from Australia (first decision). To that end, the applicant was immediately placed in immigration detention.

Upon cancellation, a person who held a valid visa becomes an "unlawful non-citizen". Persons who are unlawful non-citizens are to be detained and removed from Australia as soon as is reasonably practicable - *Migration Act 1958* (Cth), ss 14, 189, 198.

The applicant commenced FCFC proceedings and on 10 January 2022, the first decision was quashed. This was by agreement of the applicant and the Minister for Home Affairs (it was agreed in Court that the first decision was legally unreasonable by reason of a denial of procedural fairness by the Minister). His visa took effect again and he was released from detention. During the hearing, the Minister's legal representative stated that the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs might go on to consider whether to exercise a personal power of cancellation pursuant to sub-section 133C(3) of the *Migration Act 1958* (Cth).

It was a gratuitous remark made to the Court and it had very little to do with the proceedings. But it flagged the next stage.

The applicant then made formal submissions to the Minister for Immigration. At about 5:45 p.m., on Friday, 14 January 2022 the Minister for Immigration made a decision pursuant to section 133C(3) of the *Migration Act 1958* (Cth), to cancel the applicant's visa, doing so on the stated ground that the power conferred by section 116(1) of the Migration Act was engaged "on health and good order grounds, on the basis that it was in the public interest to do so" (second decision).

There was provided a 10 page statement of reasons of the Minister.

Proceedings were commenced on Saturday 15 January 2022 in the FCFC to challenge the validity of the second decision. It was said it was tainted by material jurisdictional error and should be quashed.

This time, the Commonwealth did not agree.

The FCFC transferred the proceedings to the Federal Court of Australia pursuant to section 153(1) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth). It was reasoned that the Federal Court had wider powers to deal with the matter and it was so important, it should be heard by a Full Court.

The FCFC ordered that the applicant be held in detention by his delivery to his solicitor's offices "subject to the supervision of two officers of the Australian Border Force".

The applicant was ordered to file and serve his written submissions by midday on the Saturday and the respondent was to do the same before 10pm that same Saturday.

The FCFC held (at [58]) that the applicant has demonstrated there was a reasonably arguable case on the judicial review case in that there was a serious question to be tried as to whether a ground for cancellation existed under ss 116 or 133C(3)(a) of the Migration Act.

On 16 January 2022 (the Sunday) the matter came before the Federal Court. The Chief Justice determined it would be heard by a Full Court. The Federal Court heard the judicial review challenge to the second decision. It was heard by Allsop CJ, Besanko and O'Callaghan JJ.

The Court made its decision on the same day. The application was dismissed with costs. Reasons were handed down on 20 January 2020 - *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3.

The first decision and the second decision were based on s 116(1)(e)(i) of the Migration Act 1958 (Cth) (the Act). That provision is in the following terms:

(1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:

…

(e) the presence of its holder in Australia is or may be, or would or might be, a risk to:

(i) the health, safety or good order of the Australian community or a segment of the Australian community …

Sections 133C(3) and (4) are in the following terms:

(3) The Minister may cancel a visa held by a person if:

(a) the Minister is satisfied that a ground for cancelling the visa under section 116 exists; and

(b) the Minister is satisfied that it would be in the public interest to cancel the visa.

(4) The rules of natural justice … do not apply to a decision under subsection (3).

The Court said (at [17]):

"an application for judicial review is one in which the judicial branch of government reviews, by reference to legality or lawfulness, the decision or decisions of the Executive branch of government, here in the form of a decision of the Minister. The Court does not consider the merits or wisdom of the decision; nor does it remake the decision. The task of the Court is to rule upon the lawfulness or legality of the decision by reference to the complaints made about it."

The Court emphasised the elements of section 116(1)(e)(i). It said that as with section 133C(3)(a) and (b), the power in section 116 is engaged by or conditioned upon the Minister being satisfied of certain matters, here, satisfied of the matters in para (e)(i).

The Court said (at [20]-[21]):

"20 Thus it is not the fact of Mr Djokovic being a risk to the health, safety or good order of the Australian community; rather it is whether the Minister was satisfied that his presence is or may be or would or might be such a risk for the purposes of s 116(1)(e)(i), through s 133C(3).

21 The satisfaction of the Minister is not an unreviewable personal state of mind. The law is clear as to what is required. If, upon review by a court, the satisfaction is found to have been reached unreasonably or was not capable of having been reached on proper material or lawful grounds, it will be taken not to be a lawful satisfaction for the purpose of the statute. In such a case the precondition for the exercise of the power will

> not exist and the decision will be unlawful and will be set aside. That is, the lawful satisfaction is a jurisdictional precondition, a form of jurisdictional fact, for the exercise of the power or discretion: *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 at 651 [131] and the cases cited at footnote 109."

The applicant's arguments were based on legal unreasonableness as a ground of judicial review.

The Court then analysed various words and expressions in the two Migration Act sections.

As to the applicant's vaccination status (or lack of it) the Minister said that he was prepared to proceed on the assumption that Mr Djokovic posed a "negligible" risk of infection of others (at [49]). He said he was willing to assume, in the time available, that Mr Djokovic had a medical reason for not being vaccinated (at [50]).

Crucially, the Minister stated in his reasons:

> "Although I make the assumptions above and accept that Mr DJOKOVIC poses a negligible individual risk of transmitting COVID-19 to other persons, I nonetheless consider that his presence may be a risk to the health of the Australian community.
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> 18. In this respect, I have given consideration to the fact that Mr DJOKOVIC is a high profile unvaccinated individual who has indicated publicly that he is opposed to becoming vaccinated against COVID-19 (which for convenience I refer to as 'anti-vaccination'). Mr DJOKOVIC has previously stated that he 'wouldn't want to be forced by someone to take a vaccine' to travel or compete in tournaments (Attachment H).
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> 19. I have not sought the views of Mr DJOKOVIC on his present attitude to vaccinations. Even acknowledging this, the material before me makes it clear that he has publicly expressed anti-vaccination sentiment. Further, just as important is how those in Australia may perceive his views on vaccinations, rather than his presently held opinion should it be different from what has been publicly identified."

This was the core of the Minister's reasoning.

The Minister then referred to some religious information from the Commonwealth Department of Health, cleared by the Chief Medical Officer, which stated as follows:

- Immunisation is one of the most successful public health interventions of the past 200 years. The Australian Government has supported immunisation and has strongly

encouraged vaccination in the context of SARS-CoV-2. Vaccination was the fifth element of Australia's COVID-19 Vaccine and Treatment Strategy released in August 2020. The Strategy supports early access to, and delivery of, safe and effective COVID-19 vaccines and treatments. It was developed to provide Australians with safe and effective vaccines under a targeted and responsive national COVID-19 vaccination policy and immunisation program based on up-to-date health advice.

- COVID-19 vaccinations provided significant protection against infection, transmission and severe disease against earlier variants. This protection was viewed as extremely important [in] managing transmission and also in protecting individuals, the community, health system capacity and the economy. The Omicron variant has impacted vaccine efficacy and current vaccines now provide less protection against infection and transmission but do continue to provide significant protection against severe disease. This protection is essential to protect individuals from severe disease and also from resultant morbidity and potential mortality. In the context of widespread community transmission and large case numbers vaccination remains essential in preventing health system overload related to presentations of people with severe COVID-19 disease.

The Minister's conclusions as to the health risk in his decision were set out in the Court's reasons (at [56]) as follows:

> "Because of this, I consider that Mr DJOKOVIC's presence in Australia may pose a health risk to the Australian community, in that his presence in Australia may foster anti-vaccination sentiment leading to (a) other unvaccinated persons refusing to become vaccinated, (b) other unvaccinated persons being reinforced in their existing view not to become vaccinated, and/or (c) a reduction in the uptake of booster vaccines. Specifically this may lead to one or more of the following:
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> i. An increase in anti-vaccination sentiment being generated in the Australian community, leading to others refusing to become vaccinated or refusing to receive a booster vaccine; and/or
> ii. A reinforcing of the views of a minority in the Australian community who remain unvaccinated against COVID-19 and who are at risk of contracting COVID-19 (as to which, there are media reports that some groups opposed to vaccination have supported Mr DJOKOVIC's presence in Australia, by reference to his unvaccinated status) (Attachments K and L); and/or
> iii. An increased number of people deciding to not receive a booster vaccine; and/or
> iv. Unvaccinated persons becoming very unwell and/or transmitting it to others; and/or
> v. Increased pressure placed on the Australian health system, a significant contributing factor being the number of unvaccinated persons contracting COVID-19 and requiring medical attention or assistance (Attachment M)."

One of the grounds argued by the applicant was that it was not open to the Minister to make a finding on the applicant's "well-known stance on vaccination".

The Full Court gave that ground short shrift (at [71] to [77]). It held that there was sufficient evidence before the Minister to establish the applicant's views on anti-vaccination were well known for years. Further, the Minister could infer that matter from the fact that the applicant was still unvaccinated after a year of the covid vaccines being available.

The central proposition of the applicant's next argument was that the Minister lacked any evidence and cited none that his presence may "foster anti vaccination sentiment". There was no evidence, it was submitted, that he had urged people not to be vaccinated. Nor was there any evidence that in the past his circumstances had fostered such a sentiment in other countries.

The Court dismissed this argument (at [79] to [90]). The Court held that it was open to infer that it was perceived by the public that the applicant was not in favour of vaccinations. It was also established that that anti vaccination groups had portrayed the applicant as a hero and an icon of freedom of choice in relation to being vaccinated.

The Full Court said (at [81]-[82]) in reasoning central to its judgment:

> "81 The evidence concerning the support or galvanising of the former group concerned the circumstances of the cancellation of Mr Djokovic's visa by the delegate of the Minister for Home Affairs, rather than Mr Djokovic's views regarding vaccination. Nevertheless, the evidence did display an affinity of these groups with his views.
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> 82 The possible influence on the second group comes from common sense and human experience: An iconic world tennis star may influence people of all ages, young or old, but perhaps especially the young and the impressionable, to emulate him. This is not fanciful; it does not need evidence. It is the recognition of human behaviour from a modest familiarity with human experience. Even if Mr Djokovic did not win the Australian Open, the capacity of his presence in Australia playing tennis to encourage those who would emulate or wish to be like him is a rational foundation for the view that he might foster anti vaccination sentiment."

Finally, the applicant contended that that decision was affected by jurisdictional error because the Minister reached his alleged state of satisfaction illogically, irrationally or unreasonably and the discretion to cancel the visa was unreasonably exercised, because the Minister did not consider whether cancelling Mr Djokovic's visa may itself foster anti-vaccination sentiment in Australia.

The Court held (at [95] to [102]) that the Minister did not have to consider the situation where the applicant had left the country. The presence of the applicant in Australia was the primary consideration. The Minister reached that state of satisfaction on grounds that cannot be said to be irrational or illogical or not based on relevant material. The Full Court said (at [105]):

> "105 That is the position in this case. Another person in the position of the Minister may have not cancelled Mr Djokovic's visa. The Minister did. The complaints made in the proceeding do not found a conclusion that the satisfaction of the relevant factors and the exercise of discretion were reached and made unlawfully."

And there it all ended.

In my own view, a differently constituted Full Court may well have come to a different view on the legality of the Minister's decision. The decision was a surprise for me because the Chief Justice and Besanko J are not known for always siding with the Commonwealth in such cases (see, for example, *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44; [2014] FCAFC 39).

The Court was swayed by its own rationale (set out above) that the applicant was always going to influence the anti-vaxers in Australia, old and young. Given these views, the applicant's attack on the legality of the Minister's reasoning never had a chance.

The saga must have proved an expensive exercise for the applicant. Not only was he deported from Australia and denied a chance to play in the Australian Open, he was exposed to pay his own legal costs and he was ordered to pay the costs of the two Ministers. There were two silks and two juniors and solicitors who acted for him and one silk and three juniors and solicitors for the Minister for Immigration. At, say, three days allowed, that comes to about $70,000 in legal fees. And that does not allow for weekend rates (and the summer holiday)!

The Aftermath

The Novak Djokovic cases received wide attention in Australia in the TV news, print media and social media. It was saturation coverage, impossible to avoid. Everyone had an opinion about it.

The Court made available internet links so that the public could follow the oral hearings. That only served to make the issues more pervasive.

The day after the Full Court's orders were pronounced, the aftermath commenced.

The ALA itself published a press release (on 17 January 2022) titled "Djokovic case sets 'dangerous precedent'".

It argued that legal experts say that "other high-profile individuals could be refused entry into Australia if they hold views contrary to the government".

It also said "Australian Lawyers Alliance spokesman Greg Barns SC described the minister's powers as "God-like" and said the government would have been justified if Djokovic was coming as part of an anti-vaccination campaign." But he was only here to play tennis.

The President of Liberty Victoria (a civil rights group) was quoted as saying: "Deportation of a person because of a purported risk as to how others might perceive them can and will be used in the future to justify the suppression of legitimate political expression because others might engage in unrest. Mr Djokovic's case is a far way removed from examples of other people who have had their visas refused or cancelled for inciting violence, wilfully flouting quarantine, or engaging in hate speech."

Amnesty International released a press release on 16 February 2022 expressing hope that the plight of Novak Djokovic's case would shed light on the refugees who were held in the same detention centre as he was. Many had been there for 6 years, left over from Manus Island or Nauru. One refugee had been there for 9 years.

On 25 February 2022, the Sydney Morning Herald published an article by Malcolm Knox, Journalist titled "Quiet please: Tennis Australia's lack of response to Djokovic farce speaks volumes" where he criticised Tennis Australia's role in the saga. He said they had failed to explain themselves and there was no accountability for its role in the affair. He said they firmly believed they needed Djokovic for the Australian Open to be a success (which turned out to be

wrong). He said:

> "The federal government had consistently said unvaccinated people would not be allowed to enter. All the other finagling about quarantine or no quarantine was therefore immaterial, but TA chose not to tell the tennis player that if he didn't get the shot, he wouldn't be allowed in. It set up a process to get around the federal government's powers and intentions, and it failed."

https://www.smh.com.au/sport/tennis/quiet-please-tennis-australia-s-lack-of-response-to-djokovic-farce-speaks-volumes-20220225-p59zlh.html

PostScript:

Djokovic may be able to participate in the French Open which begins 22 May 2022. France has some of the world's toughest entry restrictions due to covid-19. Djokovic was able to apply for a vaccine passport which can be granted to those who have recovered from Covid in the last six months. Djokovic last tested positive for Covid for a second time on 16 December 2021.

Thank You