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Details of Filing

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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

No VID18 of 2022

NOVAK DJOKOVIC
Applicant

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
Respondent

RESPONDENT'S WRITTEN SUBMISSIONS

A. INTRODUCTION

1. This is an application for judicial review of the decision of the Minister to cancel the visa of Mr Djokovic. The Court has jurisdiction to hear and determine it having accepted a transfer from the Federal Circuit and Family Court of Australia.

2. The amended application raises three narrow grounds of jurisdictional error. For summary purposes, it aids comprehension to go from last to first.

3. Ground three is that it was not open to the Minister to find that **Mr Djokovic was personally opposed to vaccination against COVID-19**. This finding was clearly open on the material before the Minister, and this ground thus fails.

4. Ground two is that there was no evidence to support a finding, and it was not open to find, that **Mr Djokovic's presence in Australia may foster sentiment against vaccination against COVID-19**. There was evidence (indeed, ample evidence) before the Minister to support this finding, and so this ground fails.

5. Ground one alleges that the Minister's satisfaction that Mr Djokovic's presence in Australia may be a risk to health or good order of the Australian community was illogical, irrational or unreasonable because, it is said, the Minister did not consider the effect that **cancelling Mr Djokovic's visa may have in fostering sentiment against vaccination for COVID-19**. This ground should be rejected because the better inference from the material is that the Minister did take it into account. In any event, Mr Djokovic cannot show that the Minister did not do so, and Mr Djokovic has the onus of proof. Further, any failure to consider it (which is denied) would not amount to jurisdictional error in the circumstances of this case.

6. There are two annexures to these written submissions. **Annexure A** sets out where the Minister has considered what we refer to below as the Counterargument and is relevant

to ground one. **Annexure B** sets out the evidence about Mr Djokovic's views on vaccination against COVID-19 and is relevant to ground two.

B. BACKGROUND

B.1 The Minister's reasons

B.1.1 Health of the Australian community

7. The Minister concluded that Mr Djokovic's presence in Australia may be a risk to the health of the Australian community, being one limb of s 116(1)(e)(i): Reasons at [25].

8. That conclusion was not based on a concern about Mr Djokovic infecting others; the Minister was content not to seek to resolve a possible divergence in the material between Mr Djokovic's assertion that he presented a "negligible" risk to others and advice from the Department of Health that he presented a "low" or "very low" risk depending on the settings.

9. Rather, the Minister reasoned in this way.

10. *First*, the Minister reasoned that Mr Djokovic was unvaccinated (Reasons at [18]), had "indicated publicly that he is opposed to becoming vaccinated against COVID-19" (Reasons at [18], [41]) and acted inconsistently with certain COVID-19 restrictions in the past (Reasons at [23], [42]).

11. *Secondly*, the Minister reasoned that Mr Djokovic's conduct and position against vaccination against COVID-19 may encourage others to emulate him by reason of his high profile and status (Reasons at [18], [24], [33]). Indeed, the Minister noted that "there are some media reports that some groups opposed to vaccination have supported Mr DJOKOVIC's presence in Australia, by reference to his unvaccinated status" (Reasons at [22(ii)]).

12. *Thirdly*, the Minister reasoned that, if others were encouraged to take up or maintain resistance to vaccination or to COVID-19 restrictions, then that would present a problem for the health of individuals and the operation of Australia's hospital system (Reasons at [20]-[22], [24], [33], [40]).

B.1.2 Good order of the Australian community

13. The Minister also concluded that Mr Djokovic's presence in Australia may be a risk to the good order of the Australian community, being a separate limb of s 116(1)(e)(i): Reasons at [37].

14. The Minister reasoned in this way.

15. *First*, the Minister reasoned that orderly management of the COVID-19 pandemic is an aspect of the good order of the Australian community: Reasons at [30]-[32].

16. *Secondly*, the Minister reasoned that Mr Djokovic's presence in Australia, by reason of his status and by reason of his publicly expressed views and conduct, may influence others not to be vaccinated or boosted or otherwise act inconsistently with public health advice and policies: Reasons at [33] and see also paragraphs 10 and 11 above. Inhibiting the orderly management of the COVID-19 pandemic by his presence is something that may pose a risk to good order.

17. In addition the Minister reasoned that his presence may lead to rallies and protests that may themselves be a source of community transmission: Reasons at [34]. And in addition, the Minister reasoned that his presence may provoke opposing reactions, discord and public disruption at a sensitive time of the pandemic: Reasons at [35]-[36].

18. These circumstances fall comfortably within the concept of "good order" endorsed by decisions of this Court. The Minister quoted from two of them. In *Tien v Minister for Immigration and Multicultural Affairs*, Goldberg J described "good order" as follows (emphasis added):[1]

> [I]t has, in my opinion, a **public order element**, that is to say it requires there to be **an element of a risk that the person's presence in Australia might be disruptive to the proper administration or observance of the law in Australia or might create difficulties or public disruption in relation to the values, balance and equilibrium of Australian society. It involves something in the nature of unsettling public actions or activities**. For example, a person who came to Australia and was found to be committing in Australia serious breaches of the law or criminal acts or was inciting people in the community to violence could properly be said to be a person whose presence in Australia is a risk to the good order of the Australian community. …
>
> [T]he expression "good order of the Australian community" requires a consideration of issues similar to those which arise on a consideration of the expression "public order". That is to say one is **concerned with activities**

[1] (1998) 89 FCR 80 at 93-94.

which have an impact on public activities or which manifest themselves in a public way.

19. In *Newall v Minister for Immigration and Multicultural Affairs*, Branson J added that "satisfaction might be based on **the risk of an adverse reaction by certain members of the Australian society to his presence in this country** … rather than on concern about the likely or possible conduct of the applicant in Australia".[2] In that case, Branson J rejected a challenge to a Tribunal decision that concluded that the presence in Australia of a convicted criminal might be a risk to good order on the basis of a "risk of an adverse reaction by certain members of the Australian society to his presence in this country" having regard to the nature of the offences and the fact he was still on parole.[3]

20. Parliament can be taken to have endorsed the interpretation adopted in these cases. They were decided before s 116(1)(e)(i) was repealed and replaced in 2014. There is a "re-enactment presumption",[4] applicable here, that "where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]'."[5] (We return to this legislative history below. The amendment served only to lower "the threshold for satisfaction as to risk".[6])

B.2 The background section of Mr Djokovic's submissions

21. Mr Djokovic says that **AS [8]-[14]** are "important by way of context", but how that is so is not at all apparent (save in the trite sense that the Minister's reasons should undoubtedly be read as a whole and not cherry picked). But because the submissions have been made, in some respects they call for a response.

22. The Minister takes no issue with **AS [1]-[5]**. As to **AS [8]-[9]**, the Court should note that it is not clear whether what the Department of Health said about the infection risk presented by Mr Djokovic did mean that he was a "negligible" risk. The Department used the language of "low" risk and "very low" risk; this gradation in risk implies that

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2 [1999] FCA 1624 at [30] (emphasis added).
3 [1999] FCA 1624 at [30].
4 *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 502 [15].
5 *Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106.
6 ***Leota*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1120 at [15]; ***Cai*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 90 at [20].

"low" is something more than "negligible". As it was open to the Minister to do, he gave Mr Djokovic the benefit of the doubt on this because the Minister considered that he was satisfied of the statutory criteria for other reasons.

23. The asides in **AS [9]** and **[11]** about the Minister not reading the medical material submitted by Mr Djokovic are just that: irrelevant to the issues in dispute. As the Minister noted, he is not a doctor. And rather than reading that material, the Minister made various assumptions in Mr Djokovic's favour so that the evidence upon which Mr Djokovic relied did not matter, once the assertions based on them were assumed in his favour. No challenge is made to this process of reasoning, which was entirely favourable to Mr Djokovic.

24. As to **AS [14(3)]**, Mr Djokovic misreads the reasons. The Minister regarded the falsity of Mr Djokovic's Australia Travel Document as weighing **in favour of** cancellation. And **AS [14]** is wrong in any event. The health and good order matters considered by the Minister also weighed in favour of cancellation. It was not all one way.

C. GROUND ONE

25. Ground one alleges that the Minister's satisfaction that it was in the public interest to cancel Mr Djokovic's visa and the decision that it should be cancelled in the exercise of the Minister's discretion were affected by jurisdictional error.

26. The precise jurisdictional error alleged is that the state of satisfaction was illogically, irrationally or unreasonably formed, and the discretion unreasonably exercised, because, it is alleged, the Minister did not consider whether cancelling Mr Djokovic's visa may itself foster anti-vaccination sentiment in Australia (**AS [27]**). We will refer to this as the **Counterargument**.

27. This ground fails for any of three reasons.

28. The ***first reason*** is that it depends on a factual finding, upon which the applicant carries the onus of proof, that the Minister did not consider the Counterargument. The problem for Mr Djokovic is that there is insufficient basis for the Court to make this finding. We address this at paragraphs 34 to 53 below. The ***second reason*** is that even if the Minister did not consider the Counterargument (which the Court cannot find), the Minister's state of satisfaction was not illogical, irrational or unreasonable. We address this at paragraphs 64 to 68 below. The ***third reason*** is that even if we are wrong on both one

and two, any failure to consider was not material. Mr Djokovic has not met his onus to show otherwise. We address this at paragraphs 69 to 70 below.

C.1 Mr Djokovic's finding of fact should not be made

C.1.1 Foundational principles

29. We start with some well-established propositions.

30. The ***first proposition*** is that whether the Minister considered an argument is a question of fact.[7]

31. The ***second proposition*** is that a finding against the Minister that he did not consider something that he should have considered is not lightly to be made and "must be supported by clear evidence, bearing in mind that the judicial review applicants carry the onus of proof".[8]

32. The next propositions are about how the Court can permissibly go about its fact finding task.

33. The ***third proposition*** is that a failure to consider something — be it evidence or argument — cannot be inferred simply from an omission to refer to it in the reasons for decision.[9]

34. The ***fourth proposition*** builds upon and reinforces the previous proposition. Where a decision-maker has no duty to provide reasons, it is even more difficult to infer that the decision-maker did not consider something — be it evidence or argument — precisely because there was no duty upon the decision-maker to provide reasons. The fact that he or she did so is a testament to good administration. But because there was no duty, the Court cannot proceed on the basis that the decision-maker would have been especially astute to record everything he or she considered.

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7 See generally ***Carrascalao*** *v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [48] (Griffiths, White and Bromwich JJ); *GBV18 v Minister for Home Affairs* (2020) 274 FCR 202 at [32] (Flick, Griffiths and Moshinsky JJ).

8 *Carrascalao* (2017) 252 FCR 352 at [48] (Griffiths, White and Bromwich JJ). See also, eg, *CAR15 v Minister for Immigration and Border Protection* (2019) 272 FCR 131 at [76] (Allsop CJ, Kenny and Snaden JJ); *Minister for Home Affairs v Omar* (2019) 272 FCR 589 at [35] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ); *Singh v Minister for Home Affairs* (2019) 267 FCR 200 at [37(2)(c)] (Reeves, O'Callaghan and Thawley JJ).

9 *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2013) 236 FCR 593 at [46] (French, Sackville and Hely JJ); *Carrascalao* (2017) 252 FCR 352 at [45] (Griffiths, White and Bromwich JJ); *Mundele v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 221 at [45] (Middleton, Farrell and White JJ).

35. The leading authority is ***Plaintiff M64**/2015 v Minister for Immigration and Border Protection*, in which French CJ, Bell, Keane and Gordon JJ said:[10]

> it must be borne in mind that the Delegate was not duty-bound to give reasons for his decision, and so it is difficult to draw an inference that the decision has been attended by an error of law from what has *not* been said by the Delegate. Further, "jurisdictional error may include ignoring relevant material in a way that affects the exercise of a power"; but here the plaintiff does not show that relevant material was ignored simply by pointing out that it was not mentioned by the Delegate, who was not obliged to give comprehensive reasons for his decision.

Their Honours later said "[t]he plaintiff cannot invite the inference that an erroneous view has been taken of some material aspect of the matter **simply because** that aspect has not been expressly addressed and made the subject of findings".[11]

36. What was said in *Plaintiff M64* has been applied in this Court on several occasions.[12] In *AAL19 v Minister for Home Affairs*, the Full Court said:[13]

> Where, as here with the Authority, an administrator chooses to give reasons, in the absence of any obligation to give reasons at all, let alone to give detailed reasons, a court conducting judicial review (or one hearing an appeal from such a court) must be astute not to infer jurisdictional error from what that administrator has not said in the reasons given: *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173, at [25], (the "not" being there emphasised by the High Court). …

37. The only case that might be thought to suggest something to the contrary is ***Taulahi** v Minister for Immigration and Border Protection*.[14] But *Taulahi* is not at odds with these other authorities. The point is not that the Court can **never** — never ever — find that something was not considered by its omission from voluntarily prepared reasons. Given it is a question of fact, it would seem difficult to reach such an extreme position applicable to every case. The point of all these authorities is to emphasise what experience shows: where there is no duty to provide reasons, voluntarily provided

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10 (2015) 258 CLR 173 at 185 [25].

11 (2015) 258 CLR 173 at [36].

12 See *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 213 at [105] (Griffiths J); *CAQ17 v Minister for Immigration and Border Protection* (2019) 274 FCR 477 at [119]-[120] (Derrington and Steward JJ); *Yaacoub v Minister for Immigration and Border Protection* [2018] FCAFC 39 at [34] (Rares, Rangiah and Charlesworth JJ); *XA v Minister for Home Affairs* (2019) 274 FCR 289 at [174]-[177] (Thawley J; Lee J agreeing).

13 (2020) 277 FCR 393 at [48] (Logan, Markovic and Anastassiou JJ).

14 (2016) 246 FCR 146.

reasons are unlikely to be fulsomely expressed. This in turn undermines reliance upon omission to infer lack of consideration.[15]

38. This fourth proposition applies because the Minister was under no legal duty to provide reasons for a decision under s 133C(3). The only obligation is, under s 133F, to give a written notice that set outs the original decision and certain particulars. This stands in stark contrast with s 133E(1), which imposes an obligation to give reasons in respect of a decision under s 133C(1). The Parliament's choice to require reasons to be given for a decision under s 133C(1), but not s 133C(3), must be respected and, in accordance with authority, bears powerfully upon the fact finding exercise.

39. The ***fifth proposition*** is that, in seeking to draw any inferences from reasons for decision, the Court must recall the usual instruction that they should not be scrutinised "minutely and finely with an eye keenly attuned to the perception of error".[16] The Court should be slow to infer a failure to consider merely from how the reasons are worded. The Full Court recently explained in *Chetcuti v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (citations omitted):[17]

> Where such reasons are provided, either in fulfilment of a statutory obligation or voluntarily, it is only natural that the person affected by the decision, particularly if it is adverse, will closely scrutinise them to see if the decision admits of challenge. If, however, it comes to be alleged that the decision is attended with jurisdictional error, it is always a mistake for a court to succumb to the temptation of over-analysis of an administrator's reasons to the end of discerning error. The familiarity of encounter with the emphatic endorsement by the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*, of the observation made by the Full Court in *Collector of Customs v Pozzolanic Enterprises Pty Ltd*, that a reviewing court must not scrutinise such reasons narrowly and with an eye for error, must translate into a principled restraint on the part of the judiciary in relation to the proof of jurisdictional error by reference to an administrator's reasons. If it were otherwise, the informative purpose of reasons would be apt to be subverted by the prolixity of an endeavour on the part of an administrator to anticipate and explicitly negate suggestions that a consideration was or was not taken into account or understanding was or was not held, no matter whether raised on the facts of a given case or not. Further, for the judiciary to expect such an endeavour would make the task of public administration impossible. Thus, a reviewing court must be astute not to

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15 See generally *AGK17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 668 at [41] (Anderson J).

16 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; *Plaintiff M64* (2015) 258 CLR 173 at 185-186 [25]; *Carrascalao* (2017) 252 FCR 352 at [45] (Griffiths, White and Bromwich JJ).

17 [2021] FCAFC 98 at [30] (Logan, Charlesworth and Wheelahan JJ).

> infer jurisdictional error from what that administrator has not said in the reasons given.

40. There is no inconsistency between propositions three to five. It is not inconsistent to say, on the one hand, that little can be drawn from silence as to a matter (propositions three and four) and to accept, on the other, that what is said can be considered by the Court.[18]

41. The ***sixth proposition*** is that, in the fact finding process, the Court should not overlook the broader context. That context includes the departmental submission to the Minister.[19] It includes what the Minister can be reasonably supposed to be aware of.[20] And it includes the statutory framework of a decision of this nature. Two features of the statutory context bear on the fact finding process.

42. The first bit of statutory context is this. Section 133C(3) is a personal non-compellable power, which the High Court has explained traditionally proceeds in two steps.[21] The first step is to consider whether to exercise it, and the second step is to decide whether or not to cancel. The Minister took the first step some time on Monday 10 January 2022 when, through the Minister for Home Affairs' counsel, Judge Kelly was advised that the present Minister was considering whether to cancel Mr Djokovic's visa under that power. The Minister then cancelled it four days later. In those four days, the Minister had been engaged in considering whether to exercise power under s 133C(3).

43. The second bit of statutory context is this. Mr Djokovic's challenge is, at least in part, to the formation of a state of satisfaction as to the public interest. As to the public interest, the breadth of the expression "public interest" as a statutory criterion is beyond question.[22] In *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*, six members of the High Court explained:[23]

> It is well established that, when used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined

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18 See ***Taulahi*** *v Minister for Immigration and Border Protection* (2016) 246 FCR 146 at [72] (Kenny, Flick and Griffiths JJ); *AGK17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 668 at [41] (Anderson J).

19 *Taulahi* (2016) 246 FCR 146 at [70] (Kenny, Flick and Griffiths JJ); *Cunliffe v Minister for immigration and Citizenship* (2012) 129 ALD 233 at [116]-[119].

20 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***Viane*** [2021] HCA 41 at [19]-[20] (Keane, Gordon, Edelman, Steward and Gleeson JJ).

21 See generally *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [43] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

22 See, eg, *ENT19 v Minister for Home Affairs* [2021] FCAFC 217 at [91] (Collier, Katzmann and Wheelahan JJ).

23 (2012) 246 CLR 379 at 400-401 [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

> factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*, when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view".

44. Their Honours went on to explain that, especially when a power conditioned on the public interest is vested in a Minister of the Crown:[24]

> It follows that the range of matters to which the NCC [the National Competition Council, a different statutory body in that case] and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would *not* be contrary to the public interest is very wide indeed. And conferring the power to *decide* on the Minister (as distinct from giving to the NCC a power to *recommend*) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office.

45. Quite properly, there is no allegation that the Minister misunderstood the breadth of the statutory criterion and discretion that he was considering. That being so, it is even more difficult to find, as a fact, that something was overlooked.

C.1.2 The factual finding sought should not be made

46. Mr Djokovic has not discharged his onus of establishing that the Minister did not consider the Counterargument.

47. We begin with a number of points that follow from the foundational principles set out above. *First*, Mr Djokovic cannot rely on the mere omission to refer in terms to the Counterargument as a sufficient basis to support the inference that it had not been considered. *Secondly*, the Minister had ample time to cogitate on matters. *Thirdly*, given that the Minister understood the statutory criteria he was to apply, there is every reason to think that the Minister did consider the Counterargument.

48. Those points are enough to dispose of Mr Djokovic's argument, because Mr Djokovic has not discharged his onus. But to these points we add this critical point: the Decision, read as a whole and in the context of the departmental submission and its attachments, gives rise to a strong inference that the Minister **did** consider the Counterargument.

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[24] (2012) 246 CLR 379 at 401 [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

The decision record

49. To begin: the record of decision does not purport to be exhaustive. Importantly, the Minister states that he has "done his best to consider matters alive to the fact that Mr DJOKOVIC's view may not have been sought on everything" (Decision at [7]). The Minister was alive to countervailing considerations to those raised in the record of decision.

50. Next: it is evident from the record of decision that the Minister was plainly aware that there were people supportive of what they perceived to be Mr Djokovic's stance against vaccination. That was, indeed, part of the Minister's expressed concern at paragraphs [19] and [22] of the reasons for decision. The Minister even referred to "[t]he opposing reactions" (being those for and against vaccination and concerned or not concerned about his presence or removal) as "a source of discord" and as a flashpoint for "public disruption" at paragraph 36 of the reasons for decision. The Minister noted that Mr Djokovic had "attracted a high level of press coverage and public interest at a critical juncture in the government's management of a rapidly evolving public health emergency" at paragraph 36.

51. Now the Minister did not, in express terms, address the Counterargument. But given what the Minister did say, it is plain that he was cognisant of the possible consequences of the cancellation decision and that it might provoke the reactions that the Minister was, on health and good order grounds, concerned with.

52. In particular, the Minister acknowledged that "Mr DJOKOVIC is now in the community, and that some unrest has already occurred, such that it is too late to avoid it": see at paragraph 46 of the reasons for decision. While not expressly noted, the Minister must be taken to be aware of protests that occurred in Melbourne on 11 January 2022 involving persons supportive of Mr Djokovic, being some of the context surrounding discussions in the Court below about detention arrangements and security.[25] It is reasonable to infer this was the unrest there being referred to. The Minister took this into account as a factor **against** the public interest in cancellation, which is to say in Mr Djokovic's favour: see at paragraph 46 of the reasons for decision.

53. To this can be added the fact that the Minister recorded Mr Djokovic's contentions that "[t]here is support in Australia and abroad for Mr DJOKOVIC to remain in Australia

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[25] See generally ***Viane*** [2021] HCA 41 at [19]-[20] (Keane, Gordon, Edelman, Steward and Gleeson JJ).

and play in the Australian Open in 2022" and that "[c]ancelling Mr DJOKOVIC's visa would be likely to adversely affect Australia's global reputation and call into question its border security principles and policies" at paragraph 44 of the reasons for decision. The Minister also recorded Mr Djokovic's contentions that "[c]ancelling Mr DJOKOVIC's visa would prejudice Australia's economic interests, and jeopardise the viability of Australia continuing to host the Australian Open" and that "[c]ancelling Mr DJOKOVIC's visa would create the appearance of politically motivated decision-making" at paragraph 44. The Minister considered these at paragraph 45 of the record of decision and, in respect of the first contention, acknowledged that "there is some support in Australia and abroad for Mr DJOKOVIC to remain in Australia to compete in the Australian Open". The contentions of Mr Djokovic did not raise the Counterargument in terms, and so considering these contentions does not directly show that the Minister considered or did not consider the Counterargument. But what these contentions do is focus attention on the consequences of cancellation. That the Minister considered them explicitly demonstrates that he turned his mind to consequences generally. This makes it altogether more dubious that he did not then consider that the minority in the community opposed to vaccination might be spurred on by cancellation.

54. The same point can be made by reference to paragraph 67 of the record of decision where the Minister notes possible adverse reaction from the Serbian government. Again, this does not show consideration of the Counterargument in terms. What it does show is attention to the consequences of the decision. The circumstantial case which Mr Djokovic must advance to support the finding of fact which he needs for ground one to succeed is even more difficult to advance as a result.

The material before the Minister

55. Mr Djokovic seeks to confine attention to Annexure H (see paragraph 18(c) of the amended application), but attention should not be so confined. Paragraph 23 of the departmental submission to the Minister states that Mr Djokovic's "presence in Australia, given his well-known stance on vaccination, may create a risk of strengthening the anti-vaccination sentiment of a minority of the Australian community", and there were materials in the departmental submission supporting this.

56. Page 5 of Attachment A is a letter from Hall and Wilcox to the Minister dated 11 January 2022. The letter states (at [33]):

> There is vocal support in Australia and abroad for Mr Djokovic to remain in Australia and play in the Australian Open 2022. For example:
>
> a) an online poll from the Age shows support for Mr Djokovic remaining in Australia at 60% (screenshot attached); and
>
> b) an online petition for Mr Djokovic to be freed to play in the Australian Open has gathered over 83,000 signatures (at the time of this letter).

57. Page 19 of Attachment A, and pages 145 and 172 of Attachment R comprise a screenshot of an online poll that was originally submitted by Mr Djokovic to the Minister with the letter dated 11 January 2022 referred to above. The poll question is "*Should Novak Djokovic be allowed to stay and play in the Australian Open*". The results show as Yes – 60%; No: 37%; Not sure; 3%.

58. The Minister was aware that the majority of respondents to that online poll of The Age wished for Mr Djokovic to remain in Australia, and may react negatively if the decision were to be made to cancel Mr Djokovic's visa and remove him from Australia.

59. Page 85 Attachment H, page 85 – The BBC article entitled "What has Novak Djokovic actually said about vaccines" includes further statements that Mr Djokovic points to only selectively:

> While he's been defended by fans and Serbian politicians, the visa dispute has really galvanised anti-vaccination activists, although Djokovic has never explicitly come out in support of their more extreme positions.
>
> Getty Images: Anti-vaccine activists have rallied in support of the tennis star
>
> In Telegram groups promoting anti-vax theories, he's been portrayed as a hero and an icon of freedom of choice. Twitter users have gathered under hashtags in support of Djokovic and to call for a boycott of the Australian Open.
>
> One influential conspiracy-laced account claimed the star was a "political prisoner" and asked: "If this is what they can do to a multimillionaire superstar, what can they do to you?"

60. The Minister must have understood, based on the references to "anti-vaccination activists" having "rallied" around Mr Djokovic, the fact that anti-vaccination groups had portrayed Mr Djokovic as a "hero" and an "icon of freedom of choice", and the fact that users of Twitter had called for a "boycott" of the Australian Open, that members of the community may react negatively if the decision were to be made to cancel Mr Djokovic's visa and remove him from Australia.

Mr Djokovic's submissions to this Court

61. Mr Djokovic's submissions do not even attempt to explain **how** this Court is to make a finding of fact that the Minister did not consider the Counterargument. Those submissions do not grapple with the fact finding exercise at all. They proceed on the assumption that the Minister did not consider it rather than demonstrating that fact, or else proceed as if that finding of fact can be made based only on an omission to deal with the Counterargument explicitly in its terms in the Minister's reasons for decision. For the reasons already explained, that is impermissible.

62. In the circumstances, ground one must be rejected.

C.2 No jurisdictional error even if Counterargument not considered

63. Our submissions here now proceed on the alternative footing that the Court finds, contrary to the above, that the Minister did not consider the Counterargument in forming a state of satisfaction as to the public interest and in the exercise of his discretion.

64. Any failure to consider the Counterargument does not reveal jurisdictional error, even before turning to materiality.

C.2.1 Foundational principles

65. In so far as s 133C(3)(a) and (b) are concerned, what is being judicially reviewed is the Minister's formation of a state of satisfaction. That state of satisfaction is a subjective rather than an objective jurisdictional fact. The state of satisfaction is not unreviewable, but the scope for judicial review is limited.[26] "It should be emphasized that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question".[27] As Gummow J noted in *Minister for Immigration and Multicultural Affairs v Eshetu*, "where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult

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[26] *Leota* [2020] FCA 1120 at [17] (Banks-Smith J); *Cai* [2021] FCA 90 at [20] (Wheelahan J). See also *EHF17 v Minister for Immigration and Border Protection* (2019) 272 FCR 409 at [61] (Derrington J).

[27] *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432 (Latham CJ).

to show that no reasonable decision-maker could have arrived at the decision in question".[28]

66. In ***Ali*** *v Minister for Home Affairs*, Collier, Reeves and Derrington JJ explained (citations omitted):[29]

> The shielding of jurisdictional facts from curial review by interposing a subjective deliberation on a matter is a long established legislative drafting technique. Although the existence of a subjective state of mind is not beyond review by the Court, the grounds upon which it may be "reviewed" are limited. An early identification of those grounds was undertaken by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*. Those grounds have been added to and refined over the years. Despite that elaboration in the later cases, the principles on which subjective jurisdictional facts may be reviewed are nevertheless generally referred to as "*Avon Downs* principles". That being said, where the state of mind on which the operation or exercise of a provision or power is conditioned is vitiated by an Avon Downs error, any subsequent purported exercise of power will necessarily be affected by jurisdictional error.

67. In *Avon Downs Pty Ltd v Federal Commissioner of Taxation*, Dixon J said:[30]

> But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, or if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review.

68. In addition to the Minister's state of satisfaction under s 133C(3)(a) and (b), Mr Djokovic also challenges the exercise of the Minister's discretion to cancel. "The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind".[31] The Court does not "substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator" but instead "set[s] limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned".[32]

69. One boundary is set by legal unreasonableness. Generally speaking the "test for unreasonableness is necessarily stringent" and "the courts will not lightly interfere with

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28 (1999) 197 CLR 611 at [137]. See also *Egan v Minister for Home Affairs* [2021] FCAFC 85 at [99] (Nicholas, Stewart and Abraham JJ).

29 (2020) 278 FCR 627 at 642 [42]. See also *Guclukol v Minister for Home Affairs* (2020) 279 FCR 611 at [16] (Katzmann, O'Callaghan and Derrington JJ).

30 (1949) 78 CLR 353 at 360.

31 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.

32 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.

the exercise of a statutory power involving an area of discretion".[33] The threshold "is usually high".[34] There is "an area within which the decision-maker has a genuinely free discretion which resides within the bounds of legal reasonableness",[35] and the court does not determine for itself how the power should have been exercised,[36] or interfere "just because the court would have exercised the discretion in a different way".[37] A standard of legal reasonableness does not involve substituting a court's view as to how discretion should be exercised for that of the decision maker.[38]

70. Another boundary is set by illogicality review. But "it must be accepted that the threshold for establishing illogicality is very high and requires extreme illogicality such that the decision was one that no rational or logical decision-maker could arrive at on the same evidence".[39]

C.2.2 No jurisdictional error in this case

71. On the (wrong) premise that the Minister did not consider the Counterargument, Mr Djokovic's submissions rise no higher than this assertion: that it is **extremely illogical**, or **seriously irrational**, for the Minister not to have considered that a cancellation decision would foster anti-vaccination sentiment (**AS [34], [37]**). This must be considered against the fact that there are **no** specific statutory criteria which the Minister is obliged to consider in ascertaining the public interest. And the Minister simply has a discretion to cancel a visa if the Minister considers that a ground in s 116 exists and it is in the public interest to do so. The Act does not expressly oblige the Minister to consider any particular thing or matter before deciding to exercise his powers under s 133C(3).[40]

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33 *Minister for Immigration and Border Protection v **SZVFW*** (2018) 264 CLR 541 at 551 [11], 564 [52], 570 [70], 586 [135].

34 *Minister for Home Affairs v DUA16* (2020) 385 ALR 212 at [26] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ) citing *SZVFW* (2018) 264 CLR 541 at 551 [11], 564 [52], 575 [89], 586 [135].

35 *SZVFW* (2018) 264 CLR 541at 577 [97].

36 *SZVFW* (2018) 264 CLR 541at 567 [58].

37 *SZVFW* (2018) 264 CLR 541 at 574 [86].

38 See generally *DCP16 v Minister for Immigration and Border Protection* [2019] FCAFC 91 at [83]-[88] (Beach, O'Callaghan and Anastassiou JJ).

39 *Zyambo v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 545 at [25], citing *Gill v Minister for Immigration & Border Protection* (2017) 250 FCR 309 at [62] (Griffiths and Moshinsky JJ); *CQG15 v Minister for Immigration & Border Protection* (2016) 253 FCR 496 at [60] (McKerracher, Griffiths and Rangiah JJ); *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [130]-[135] (Crennan and Bell JJ); *EHF17 v Minister for Immigration and Border Protection* (2019) 272 FCR 409 at [73]-[85] (Derrington J); *Ali* (2020) 278 FCR 627 at [42]-[44] (Collier, Reeves and Derrington JJ).

40 See, by analogy, *Carrascalao* (2017) 252 FCR 352 at [46] (Griffiths, White and Bromwich JJ).

72. It is within this sparse statutory framework that Mr Djokovic asks this Court to find that not only was the Minister **required** to consider his Counterargument but that any failure to consider it renders the Minister's decision beyond the power conferred by s 133C(3).

73. This argument sits uncomfortably with the statutory text itself. The chapeaux to s 116(1)(e)(i) requires the Minister to direct attention to whether the **presence** of the visa holder **in Australia** would create the relevant risk.[41] It directs the Minister's attention to what will happen **because Mr Djokovic is here**, not if Mr Djokovic is removed.

74. We do not go so far as to say that what will happen if Mr Djokovic is not in Australia is an irrelevant consideration in the *Peko-Wallsend* sense. But, not considering it does not give rise to jurisdictional error in the particular circumstances of this case. There is nothing in the text and context of ss 116(1)(e)(i) and 133C to suggest that it is irrational or unreasonable for a decision-maker (particularly here, the Minister personally under s 133C(3)) not to engage in a comparison exercise between the visa holder here and the visa holder there. There are entirely explicable reasons of context why that need not be done in order to have a valid rather than an invalid exercise of power.

75. The power to cancel under s 116(1)(e)(i) and s 133C(3) are part of the suite of powers that reflect the power and responsibility of the Commonwealth to determine who is entitled to be in Australia. That power and responsibility are fundamental attributes of Australia's sovereignty.[42] The Commonwealth ought not, in the public interest, be obliged to suffer the presence of an alien merely for fear that their non-presence would incite some adverse reaction. Consistently with this, the Act does not direct the Minister's attention to the effect of Mr Djokovic's removal from, or non-presence in, Australia, but directs attention instead to his presence in Australia.

76. This ground is, upon analysis, simply an invitation to engage in impermissible merits review.

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41 See *Tien* (1998) 89 FCR 80 at 94.

42 *Robtelmes v Brenan* (1906) 4 CLR 395 at 400; *Pochi v Macphee* (1982) 151 CLR 101 at 106; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at [21]; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [402]; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [479]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [92]; *Commonwealth v AJL20* (2021) 95 ALJR 467 at [21].

C.3 Materiality

77. The final hurdle on which Mr Djokovic fails is materiality. **AS [37]** merely asserts without elaboration that, if the Counterargument were considered, "there is also obviously a real prospect that may have also influenced his approach". This is not the kind of error which necessarily satisfies materiality.[43] Mr Djokovic bears the onus of proof[44] to demonstrate that there is "realistic possibility that the decision in fact made could have been different"[45] had the alleged error not occurred.

78. It might seem striking to suggest that not considering an argument could fail materiality when that argument goes to matters as broad as the "public interest" and the discretion. But this is by no means unusual.[46] The Minister said what he said and had before him what we have summarised in paragraphs 48 to 59 above. Having considered those matters, whatever room is left for the Counterargument could not realistically have tipped the balance.

D. GROUND TWO

79. The second ground of review is that it was not open to find that Mr Djokovic's presence in Australia "may foster anti-vaccination sentiment". This ground, in truth, contains two sub-grounds. The first sub-ground is a "no evidence" ground; it asserts that the Minister did not have evidence to be satisfied of the statutory risk in s 116(1)(e)(i) (**AS [46]**). The second sub-ground is an unreasonableness/illogicality ground; it asserts that it was extremely illogical or seriously irrational for the Minister to be satisfied of the statutory risk (**AS [41]**).

80. Evaluation of both sub-grounds is assisted by paying close attention to the statutory test and the factual finding actually made. Only then do we turn to the sub-grounds.

D.1 The nature of the finding

81. The impugned finding was not a finding that Mr Djokovic's presence **has** fostered anti-vaccination sentiment or that his presence necessarily **will** foster it. It is a finding that

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43 See *PQSM v Minister for Home Affairs* (2020) 279 FCR 175 at [142] (Banks-Smith and Jackson JJ).

44 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at [3] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

45 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at [2]-[3] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

46 See, eg, *Mackie v Minister for Home Affairs* [2021] FCA 1326 at [55], [82].

his presence **may** foster it. Two features of the finding are important: it imports a low threshold of likelihood, and it has a forward-looking aspect.

82. That this is how the finding should be read flows very naturally from the wording of the reasons, and is reinforced by consideration of the statutory provision under application. It is important to appreciate the low threshold that s 116(1)(e)(i) imposes.

83. *First*, the word "'risk' has an element of futurity to it".[47] It is well established that "the word 'risk' imputes notions of possibility",[48] and that it does so "in quite the same way as by the use of the word 'might'".[49] Consideration of what may happen in the future by reason of a person's current presence in Australia is an open pathway of reasoning on the text of the provision.

84. *Secondly*, s 116(1)(e)(i) only requires the Minister to be satisfied that the presence of the applicant **may be** a risk to health, safety or good order. It is not necessary for the Minister to be satisfied that the presence of the applicant **is** a risk to health, safety or good order. So much is immediately apparent from reading the statutory language, but it is amply reinforced by consideration of legislative history.

85. The words "or may be" and "or might be" which are now found in s 116(1)(e)(i) were not there when s 116(1)(e)(i) was first enacted. These were introduced (by way of a repeal and replacement of the previous provision) by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth). Prior to 2014, s 116(1)(e)(i) read: "the presence of its holder in Australia is, or would be, a risk to the health, safety or good order of the Australian community". This was repealed and replaced with s 116(1)(e)(i) in its current form.

86. According to the Explanatory Memorandum:[50]

> The purpose of this amendment is firstly to clarify that this ground for cancellation applies where the risk of harm is to an individual, or a segment of the Australian community, as well as to the broader Australian public. Secondly, the amendment seeks to lower the threshold of this cancellation ground, so that it exists where there is a possibility that the person may (or might upon their arrival in Australia) be a risk to the health, safety or good order of an individual

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47 *Leota* [2020] FCA 1120 at [63] (Banks-Smith J).

48 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19* [2021] FCAFC 133 at [81] (Lee and Wheelahan JJ).

49 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19* [2021] FCAFC 133 at [82] (Lee and Wheelahan JJ).

50 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) at 24 [13].

or community in Australia, as well as where there is demonstrated to be an actual risk of harm.

87. As a matter of statutory construction, this Court must acknowledge what the Parliament evidently intended by this amendment. Even before the amendment when s 116(1)(e)(i) had only the words "is, or would be, a risk", those words had imported a "might" standard of risk.[51] That threshold can only be understood to have been still further reduced by the Parliament's amendment. So much has been recognised by this Court, which has acknowledged that the amendment "clearly lowers the threshold for satisfaction as to risk" even further from the threshold that existed when s 116(1)(e)(i) was in its previous form.[52]

88. The forward-looking and low-probability features of the finding of fact that has been challenged are important. "Facts" about future conduct are not the same as facts about the past or the present and cannot be "proved" in precisely the same ways or to the same degree of confidence. Proof of "future possibilities" is very similar to proof of "past hypothetical situations", which is made clear by the High Court's treatment of them together in *Malec v J.C. Hutton Pty Ltd*[53] and *Sellars v Adelaide Petroleum NL*.[54] As to the consideration of hypotheticals, and thus as to the proof of future possibilities, it has been recognised that "the inquiry necessarily proceeds by drawing inferences from known facts"[55] and based on "reasonable conjecture within the parameters set by the historical facts".[56] "[S]ome future facts are more certain than others", and past occurrences may provide a reliable basis to draw reasonable inferences about the future.[57]

89. The above principles have been articulated in the context of judicial proceedings, whereas the Minister is an administrative decision-maker. Not only that, but the Minister is a Minister of the Crown charged with the administration of an Act which is all about giving effect to the Commonwealth executive's control over which aliens may

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51 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19* [2021] FCAFC 133 at [81]-[82], quoting *Tien v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80 at 94.

52 *Leota* [2020] FCA 1120 at [15]; *Cai* [2021] FCA 90 at [20].

53 (1990) 169 CLR 638 at 643 (Deane, Gaudron and McHugh JJ).

54 (1994) 179 CLR 332 at 350 (Mason CJ, Dawson, Toohey and Gaudron JJ).

55 *Lewis v Australian Capital Territory* (2020) 94 ALJR 740 at [35] (Gageler J).

56 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at [38] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

57 *Australian Competition and Consumer Commission v Pacific National Pty Ltd* (2020) 277 FCR 49 at 110 [218] (Middleton and O'Bryan JJ).

remain in Australia. It follows that there is more, not less, scope for the Minister to engage in drawing inferences and reasonable conjecture.

D.2 First sub-ground: no evidence

90. Mr Djokovic's "no evidence" challenge to the finding of risk must be rejected. This ground only bites when there is a "not a skerrick of evidence" to support a critical finding of fact.[58] Further, the evidence does not need to be directly on point: the ground cuts out when the finding is supported by rational inferences from the evidence.

91. The highest the challenge goes, it seems, is to complain that the Minister did not have evidence of Mr Djokovic having said "anything concerning vaccines during the period of time between April 2020 and the present day" (**AS [54]**). But to state the complaint is to see its flaw: there was not "no" evidence. There was evidence of Mr Djokovic's statements in April 2020, from which reasonable inferences could be drawn.

92. But in any event, the Minister went further in grounding his finding of risk not **only** on what Mr Djokovic has said, but on how those in Australia perceive his views on vaccinations: see at paragraph 19 of the reasons for decision. The Minister had ample evidence of this before him,[59] and in any event it was within the Minister's capacity to make reasonable assumptions about how people in Australia perceive Mr Djokovic's views on vaccination. The fact, amply supported by the materials, that Mr Djokovic is not vaccinated against COVID-19,[60] and has previously stated he is opposed to vaccination,[61] gives rise to an immediately available inference that people will perceive him as being opposed to COVID-19 vaccination.

D.3 Second sub-ground: illogicality

93. Mr Djokovic's challenge to the finding on the basis of illogicality must also be rejected.

94. It is worth stating clearly what Mr Djokovic is in fact contending. He is in fact contending that no reasonable decision-maker could have formed the view that he is opposed to COVID-19 vaccination. Put another way, he is contending that it was

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58 *Viane* [2021] HCA 41 at [17] (Keane, Gordon, Edelman, Steward and Gleeson JJ).

59 Affidavit of Natalie Bannister dated 15 January 2022, 115-116 (Attachment H).

60 Affidavit of Natalie Bannister dated 15 January 2022, 23 at [3], 24 at [11], 26 at [25], 40-41 (Attachment A), 54 at Ts 3.23 (Annexure B); 62 at Ts 11.10 (Annexure B); 76 (Attachment C).

61 Affidavit of Natalie Bannister dated 15 January 2022, 26 at [23] and [25], 114-116 (Attachment H), 142-152 (Attachment P).

seriously irrational for the Minister to have formed the view that he was opposed to COVID-19 vaccination.

95. That contention is advanced notwithstanding two facts which are not disputed. *First,* Mr Djokovic is not vaccinated against COVID-19. *Secondly,* Mr Djokovic stated **prior** to the life-saving invention of the COVID-19 vaccination, but **during the world-wide pandemic**, that he was "opposed to vaccination".

96. Mr Djokovic has chosen not to go into evidence in this proceeding. He plainly could. And he could set the record straight, if it needed correcting. But he has not and that has important consequences for materiality in respect of the "no evidence" ground.

97. **AS [47(2)]** claims that the Minister could not "reasonably" be "satisfied" that either Mr Djokovic's views in fact, or how his views may be perceived, could foster anti-vaccination so as to pose the relevant statutory risk. When one looks to the reasons the Minister gave, it is plain that this cannot be accepted. We summarised those reasons relevantly at paragraph 11, 12 and 16 above. Those reasons are self-evidently logical. They are more substantial than the reasoning of the Tribunal upheld by Branson J in *Newall* before the amendment of s 116(1)(e) to lower the threshold of risk.

98. Moreover, the Minister's satisfaction of risk was not based only on Mr Djokovic's anti-vaccination views. The Minister noted that Mr Djokovic had publicly admitted to disregarding the need to isolate following the receipt of a positive COVID-19 test (**D [23]**) and considered that this also might encourage a failure to comply with appropriate public health measures (**D [24]**). Again, that is self-evidently logical. The second sub-ground must also fail.

E. GROUND THREE

E.1 Failure to make an obvious inquiry

99. **AS [51]-[52]** allege that the Minister failed to make an obvious inquiry about Mr Djokovic's stance on vaccination, relying upon *Minister for Immigration and Citizenship v* ***SZIAI***.[62]

100. This ground is a difficult one to establish. As authorities in this Court establish, a failure to inquire will only amount to jurisdictional error in "rare or exceptional

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62 (2009) 83 ALJR 1123 at 1129 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *MZABA v Minister for Immigration and Border Protection* (2015) 234 FCR 425 at 442–443 [61] (Bromberg J).

circumstances",[63] and "[t]he fact that it may have been reasonable for [a decision maker] to make a certain inquiry does not elevate the lack of such an inquiry into a jurisdictional error".[64]

101. This sub-ground or ground fails for several reasons.

102. *First*, what Mr Djokovic could have said to the Minister in response to a question about his stance on vaccination would not have altered the fact of his previous public statements and the views of those in the Australian community as to what his views on vaccination were.

103. *Secondly*, there is no evidence before the Court to suggest that Mr Djokovic could have put forward any useful material to the Minister had his views been sought.[65] It is for Mr Djokovic to establish jurisdictional error. He has not put on any evidence of what he could have said had his views been sought.[66]

104. *Third*, a failure to inquire is not a jurisdictional error in and of itself but a step towards a finding of unreasonableness or a constructive failure to exercise jurisdiction.[67] Neither unreasonableness nor constructive failure can be found here when it is recalled that s 133C(3) excludes the operation of the natural justice hearing rule and when it is recalled that the Minister was alive to the fact that Mr Djokovic's views had not been sought. It is not something the Minister overlooked; he expressly adverted to the fact that Mr Djokovic's views had not been sought, and gave reasons for proceeding under s 133C(3).

E.2 Finding not open

105. Mr Djokovic then contends that it was "not open" on the material before the Minister to find that he was opposed to vaccination.

106. This sub-ground or ground must be rejected.

107. The materials before the Minister read as a whole (rather than as cherry picked by Mr Djokovic at **AS [53]**) clearly permit a reasonable inference that Mr Djokovic is

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63 *Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151 at 172 [60].

64 *SZMJM v Minister for Immigration and Citizenship* [2010] FCA 309 at [30]. See also *Kaur v Minister for Immigration and Border Protection* (2017) 256 FCR 235 at 245-246 [33]; *MZZGB v Minister for Immigration and Border Protection* [2014] FCA 1052 at [63].

65 See *SZIAI* (2009) 83 ALJR 1123 at 1129 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)

66 *ERE18 v Minister for Home Affairs [No 2]* [2021] FCA 1346 at [49]-[50] (Stewart J).

67 *SZMJM v Minister for Immigration and Citizenship* [2010] FCA 309 at [30].

personally opposed to vaccination against COVID-19. One could not read Attachment H and Attachment P as if the only rational inference was that Mr Djokovic was neutral to or in favour of vaccination against COVID-19.

108. To this should be added some very obvious context. The Minister was aware that Mr Djokovic, even after all this time, is still unvaccinated. Material supporting this was specifically before the Minister.[68] A reasonable and rational inference from this is that he is opposed to being vaccinated.

109. To that then may be added some additional context. Mr Djokovic had released a press release (Attachment O) about some of the events that have occurred. He said nothing in it in support of vaccination. And there was material before the Minister which the Minister assessed as showing apparent disregard for other restrictions designed to protect against the spread of COVID-19 to others. Such material includes Attachment N and Attachment Q.

110. We anticipate Mr Djokovic may say (as he has done to a degree in **AS [54]**): well, the Minister said none of this explicitly in his reasons for decision. But we refer back to what we said above: the Minister was not obliged to step out every bit of his reasoning process. He did not need to do so on this point, which was amply supported by the material. As for the balance of **AS [54]**, the public attention to the previous proceeding and this proceeding do not show that it was not open to the Minister to make the findings he did. The paragraph does not go anywhere.

111. The ground should be rejected.

F. CONCLUSION

112. The amended application should be dismissed with costs.

Date: 15 January 2022

Stephen Lloyd
Christopher Tran
Naomi Wootton
Julia Nikolic
Counsel for the respondent

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68 See Annexure B (transcript of interview by delegate) at page 3, lines 23-29.

ANNEXURE A: CONSIDERATION BY MINISTER OF COUNTERARGUMENT (GROUND 1)

Reasons for decision		
Page	**Pinpoint**	**Extract**
13[69]	Paragraph [10]	By way of background, I note that: … Mr DJOKOVIC arrived in Australia on 5 January 2022 to compete in the 2022 Australian Open tennis tournament. He is present in Australia during a time in which the Australian community is experiencing a significant, and rising, number of COVID-19 cases and an active, vocal, minority of people in the community opposing vaccination (or compulsory vaccination) against COVID-19.
15	Paragraph [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.
16	Paragraph [22]	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 … Specifically this may lead to one or more of the following: … (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**) …
18	Paragraphs [35]-[36]	I also consider that there may be a risk of an adverse reaction by some members of the Australian community to Mr DJOKOVIC's presence in Australia on the basis of their concerns about his unvaccinated status and his apparent disregard for the need to isolate following the receipt of a positive COVID-19 test result. These opposing reactions may themselves be a source of discord and create public disruption. Mr DJOKOVIC has attracted a high level of press coverage and public interest at a critical juncture in the government's management of a rapidly evolving public health emergency.

[69] Page numbers in these Annexures refer to the pagination in the Affidavit of Natalie Bannister sworn 15 January 2022.

Reasons for decision		
Page	**Pinpoint**	**Extract**
18	Paragraph [39]	I am concerned that his presence in Australia, given his well-known stance on vaccination, creates a risk of strengthening the anti-vaccination sentiment of a minority of the Australian community.
19	Paragraph [45]	Without intending to be exhaustive, I make the following comments on the specific points raised above: … I acknowledge also that there is some support in Australia and abroad for Mr DJOKOVIC to remain in Australia to compete in the Australian Open
19	Paragraph [46]	I also acknowledge that Mr DJOKOVIC is now in the community, and that some unrest has already occurred, such that it is too late to avoid it. This weighs in my mind against the public interest in cancellation.

Submission		
Page	**Pinpoint**	**Extract**
26	Paragraph [23]	In considering whether it would be in the public interest to cancel Mr DJOKOVIC's visa, you may wish to give specific consideration to: • Although Mr DJOKOVIC's recent infection with COVID-19 means that he is at a low risk of infection and therefore presents a low risk to others in the Australian community and a very low risk at the Australian Open, his presence in Australia, given his well-known stance on vaccination, may create a risk of strengthening the anti-vaccination sentiment of a minority of the Australian community …

Attachments		
Page	**Attachment**	**Extract**
34-35	A	Letter from Hall and Wilcox to Minister Alex Hawke dated 11 January 2022 Paragraph [33]: There is vocal support in Australia and abroad for Mr Djokovic to remain in Australia and play in the Australian Open 2022. For example:

Attachments		
Page	**Attachment**	**Extract**
		a) an online poll from the Age shows support for Mr Djokovic remaining in Australia at 60% (screenshot attached); and b) an online petition for Mr Djokovic to be freed to play in the Australian Open has gathered over 83,000 signatures (at the time of this letter).
48 174	A R	Screenshot of Sydney Morning Herald poll This poll question is "Should Novak Djokovic be allowed to stay and play in the Australian Open" The poll has 69,417 votes with results shown as Yes = 60%, No = 37% and Not sure = 3%
115-116	H	"What has Novak Djokovic actually said about vaccines" (BBC) (7 January 2022) **Anti-vaccine activists** While he's been defended by fans and Serbian politicians, the visa dispute has really galvanised anti-vaccination activists, although Djokovic has never explicitly come out in support of their more extreme positions. GETTY IMAGES: Anti-vaccine activists have rallied in support of the tennis star In Telegram groups promoting anti-vax theories, he's been portrayed as a hero and an icon of freedom of choice. Twitter users have gathered under hashtags in support of Djokovic and to call for a boycott of the Australian Open. One influential conspiracy-laced account claimed the star was a "political prisoner" and asked: "If this is what they can do to a multimillionaire superstar, what can they do to you?"
126	K	Table of media reporting on anti-vaccination related unrest
127-130	L	"Old Parliament House fire protesters linked to anti-vaccine and conspiracy groups" (the Guardian) (31 December 2022) "Protests against COVID vaccine mandate and pandemic restrictions take place in Melbourne, Sydney, Gold Coast" (ABC News) (12 December 2021)

ANNEXURE B – EVIDENCE BEFORE THE MINISTER OF MR DJOKOVIC'S VIEWS ABOUT COVID-19 VACCINATION (GROUND 2 (FIRST SUB-GROUND) AND GROUND 3)

Submission		
Page	**Pinpoint**	**Extract**
23	Paragraph [3]	You may consider that 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 and that he has previously stated that he "wouldn't want to be forced by someone to take a vaccine" to travel or compete in tournaments may pose a risk to the health of the Australian community (**Attachment H**).
24	Paragraph [11]	Mr DJOKOVIC provided evidence in the Australia Travel Declaration, completed before his arrival (**Attachment C**), and to ABF officers on arrival (**Attachment B**), that he was not vaccinated against COVID-19.
26	Paragraph [23]	In considering whether it would be in the public interest to cancel Mr DJOKOVIC's visa, you may wish to give specific consideration to: • Although Mr DJOKOVIC's recent infection with COVID-19 means that he is at a low risk of infection and therefore presents a low risk to others in the Australian community and a very low risk at the Australian Open, his presence in Australia, given his well-known stance on vaccination, may create a risk of strengthening the anti-vaccination sentiment of a minority of the Australian community. • … • Mr DJOKOVIC has previously indicated publicly that he is opposed to becoming vaccinated against COVID-19. He has also acknowledged that he knowingly failed to isolate following the receipt of a positive COVID-19 test result (**Attachment O**).
26	Paragraph [25]	You may find that it would be in the public interest to cancel Mr DJOKOVIC's visa insofar that it is consistent with the expectations of the public that a person who has failed to obtain a COVID-19 vaccine and has repeatedly made public statements against vaccinations (**Attachment H**) should expect to forfeit the privilege of staying in Australia.

Attachments		
Page	**Attachment**	**Extract**
54 83	B D	Transcript of Interview prepared by AGS At Ts 3.23: INTERVIEWER: And question regarding your vaccination, are you vaccinated - - - DJOKOVIC: I'm not – INTERVIEWER: - - - for COVID-19? Not vaccinated? DJOKOVIC: I'm not vaccinated.
76	C	Australian Travel Declaration Have you ever received a COVID-19 vaccine? [**No** is selected] Please provide your vaccination status. I declare I am fully vaccinated with an Australian approved or recognised COVID-19 vaccine … I have evidence to support this. My last dose of the vaccine was at least 7 days before the day my flight is scheduled to commence. [**No** is selected]
114-116	H	"What has Novak Djokovic actually said about vaccines" (BBC) (7 January 2022) The Serbian star, 34, has not officially disclosed his COVID-19 vaccination status, but he's made his resistance to jabs clear in the past. In April 2020, well before Covid vaccines were available, Djokovic said he was "opposed to vaccination". He later clarified his position by adding that he was "no expert" and would keep an "open mind" but wanted to have "an option to choose what's best for my body". During a Facebook live, he explained that he "wouldn't want to be forced by someone to take a vaccine" to travel or compete in tournaments. He added that he was "curious about wellbeing and how we can empower our metabolism to be in the best shape to defend against imposters like Covid-19." In Djokovic's home country, where it is estimated that under half the population is fully vaccinated against Covid, his comments were criticised at the time by government epidemiologist Predrag Kon, who accused the athlete of "creating misconceptions". … **Anti-vaccine activists** While he's been defended by fans and Serbian politicians, the visa dispute has really galvanised anti-vaccination activists, although

Attachments		
Page	**Attachment**	**Extract**
		Djokovic has never explicitly come out in support of their more extreme positions. GETTY IMAGES: Anti-vaccine activists have rallied in support of the tennis star In Telegram groups promoting anti-vax theories, he's been portrayed as a hero and an icon of freedom of choice. Twitter users have gathered under hashtags in support of Djokovic and to call for a boycott of the Australian Open. One influential conspiracy-laced account claimed the star was a "political prisoner" and asked: "If this is what they can do to a multimillionaire superstar, what can they do to you?"
142-152	P	"Novak Djokovic on Coronavirus Vaccines and His Ill-Fated Adria Tour" Page 142: He's monitoring his health closely in the run up to the United States Open. He's not against all vaccines but wouldn't want to be forced to take one to play. And he says he had good intentions with his tour that became a coronavirus cluster. Page 144: But he was hardly a big winner during the forced off-season. He generated concern and controversy by questioning vaccination and claiming that water could be affected by human emotions … Page 148 – 149: He continued: "I want to play. I mean that's why I'm here. I am personally not afraid of a risky, dangerous health situation for myself. If I felt that way, I most likely would not be here. I am cautious of course, and I have to be responsible of and of course respect the regulations and rules and restrictions as anybody else. But things are unpredictable. Anything can happen in the tennis court or off the tennis court." … Djokovic said his own experience with the coronavirus had not altered his views on vaccines. He has said that he would have a difficult decision to make if receiving a coronavirus vaccine became mandatory to compete on the tennis circuit. "I see that the international media has taken that out of context a little bit, saying that I am completely against vaccines of any kind," he said. "My issue here with vaccines is if someone is forcing me to put something in my body. That I don't want. For me that's unacceptable. I am not against vaccinations of any kind, because who am I to speak

Attachments		
Page	**Attachment**	**Extract**
		about vaccines when there are people that have been in the field of medicine and saving lives around the world? I'm sure that there are vaccines that have little side effects that have helped people and helped stop the spread of some infections around the world." But Djokovic did express concern about potential issues with a coronavirus vaccine. "How are we expecting that to solve our problem when this coronavirus is mutating regularly from what I understand? he said.