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Details of Filing

Document Lodged:	Outline of Submissions
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File Title:	NOVAK DJOKOVIC v MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
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No. VID 18 of 2022

Federal Court of Australia

District Registry: Victoria

Division: General

NOVAK DJOKOVIC

Applicant

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Respondents

APPLICANT'S OUTLINE OF SUBMISSIONS

A. Introduction and background

1. The Applicant ("**Mr Djokovic**") arrived in Australia on 05 January 2022. On 06 January 2022 his subclass 488 visa ("**Visa**") was purportedly cancelled, relying on section 116(1)(e)(i) of the *Migration Act 1958* (Cth) ("**Act**").[1]

2. The purported cancellation was invalid because (as the respondent eventually conceded on 10 January 2022) the process that her delegate adopted was legally unreasonable. Judge A Kelly of the Federal Circuit and Family Court of Australia (Division 2) ("**FCFCOA**") quashed the purported cancellation decision on the same day (**D [4]**).

3. Directly following the respondent's counsel announcing her concession to the FCFCOA (at about 5:15 pm on Monday, 10 January 2022), her counsel said that the present respondent, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ("**Minister**"), would be considering whether to exercise a personal power of cancellation pursuant to section 133C(3) of Act (**D [4]**).

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[1] Minister's reasons for decision, [4]. Subsequent references to these reasons will take the form, "**D [X]**."

Filed on behalf of (name & role of party) NOVAK DJOKOVIC, the Applicant

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4. On Friday, 14 January 2022 at about 17:45, the Minister purported to exercise that power to cancel the Visa, relying on section 133C(3). That section provides as follows:

> "*Action by Minister—natural justice does not apply*
>
> (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."

5. The "*ground under section 116*" of which the Minister purported to be satisfied was section 116(1)(e)(i) of the Act. Accordingly, in order for the Minister's decision to have been lawful, he must lawfully have been satisfied of two matters:

(1) *first*: that the presence of Mr Djokovic in Australia is or may be, or would or might be, a risk to (relevantly) the health or good order of the Australian community or a segment thereof; and

(2) *second*: that it was in the public interest to cancel the Visa.

6. The balance of these submissions take the following form: *first*, something is said about the content of the Minister's reasons; *second*, something is said about the law in regard to section 116(1)(e)(i); *third*, there is argument on the three grounds of review.

B. The Minister's reasons

B.1 Reasoning relevant as context

7. There are five matters which Mr Djokovic says are important by way of context to the Minister's dispositive reasoning.

8. *First*, on 11 January 2022, the Minister received advice from the Commonwealth Department of Health, which had been cleared by the Chief Medical Officer ("**Health Advice**"). The Health Advice proceeded on the assumptions that Mr Djokovic tested positive for COVID-19 on 16 December 2021, negative on 22 December 2021, was asymptomatic from 27 December 2021, and was not vaccinated against COVID-19. On these assumptions, the Health Advice (**D [12]**) was that:

(1) "*Mr Djokovic was unlikely to be infectious with SARS-COV-2 and therefore was a LOW risk of transmitting SARS-COV-2 to others*" (capitalisation in original);

(2) having regard to specific additional control measures applicable at the Australian Open, it was assessed that "*the risk of a transmission event [presumably involving Mr Djokovic] related to the Australian Open is VERY LOW*" (capitalisation in original).

9. Accordingly, and consistently with Mr Djokovic's submission (though the Minister did not read the material Mr Djokovic submitted in support of his proposed finding (**D [13]**)), the Minister proceeded on the assumption that Mr Djokovic posed a "*negligible*" individual risk of transmitting COVID-19 to other persons (**D [13], [17]**).

10. Or, as the same finding is put in the "*public interest*" section, the Minister accepted that "*Mr DJOKOVIC's recent infection with COVID-19 means that he is at a negligible risk of infection and therefore presents a negligible risk to those around him*" (**D [39]**).

11. *Second*, and again though he did not read the material Mr Djokovic submitted in support of this finding (**D [14]**), the Minister assumed that Mr Djokovic had a medical reason for not being vaccinated (**D [14]**).

12. *Third*, the Minister assumed that Mr Djokovic entered Australia consistently with ATAGI documents (**D [15]**). There had been dispute about this in the FCFCOA, which the Minister did not find necessary to resolve in order to make the impugned decision (**D [15]**).

13. *Fourth*, and relevantly to public interest, the Minister acknowledged (not assumed) that Mr Djokovic had made no attempt to contravene any Australian law, that he is a person of good standing, and that he is known for his philanthropic efforts (**D [45]**).

14. *Fifth*, and relevantly to discretion, every matter that the Minister considered either militated against cancellation or was neutral. So:

(1) Mr Djokovic's purpose of travel to and stay in Australia remained the purpose for which the Visa was granted (participating in the Australian Tennis Open) (**D [50]**), which weighed against cancelling the Visa (**D [51]**);

(2) Mr Djokovic had an extensive compliant travel history (**D [52])**, which weighed against cancelling the Visa (**D [54**]).

(3) The Minister was prepared to assume, consistently with the statutory declaration of Mr Djokovic's agent, that she had wrongly filled in Mr Djokovic's Australian Travel Declaration form and did not check the answer with Mr Djokovic. The Minister found that this circumstance "*[did] not weigh against cancellation*" (**D [55]**), and rather was "*at most neutral*" (**D [55]**).

(4) Cancellation of Mr Djokovic's Visa would cause "*him and his family significant inconvenience and emotional hardship and distress, and is likely to result in significant reputational, financial and professional implications for him*," which weighed against cancellation of the Visa (**D [56]–[57]**).

(5) Mr Djokovic had been cooperative in his dealings with the Department, which weighed against cancellation (**D [58]**).

(6) The "*issue about whether Mr Djokovic entered Australia consistently with ATAGI* documents," and Mr Djokovic's belief that he had a valid medical exemption (which the Minister assumed to be correct), weighed against cancellation (**D [59]**).

(7) The legal consequences of a cancellation decision were that, for three years and subject to Ministerial discretion, Mr Djokovic would not be granted any class of visa (**D [63]**). This weighed against cancellation.

(8) Diplomatic considerations were given some weight against cancelling the Visa (**D [67]–[68]**).

B.2 Dispositive reasoning—health

15. Why, then, was the Visa cancelled? The dispositive reasoning commences at **D [18]**, which is as follows:

> "[18] 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**).
>
> [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 antivaccination 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. Attachment H, being the only evidence upon which the Minister relied in support of his findings concerning Mr Djokovic's views, is a BBC article (evidently downloaded on the morning of the hearing before the FCFCOA and dated three days prior to that) which says as follows:[2]

    (1) "*In April 2020, well before Covid vaccines were available, [Mr Djokovic] was 'opposed to vaccination'*," the underlined passage being the part selectively and somewhat misleadingly extracted in the Minister's reasons;

    (2) "*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*'," which important qualifying passage was not extracted by the Minister in his reasons;

    (3) he "*wouldn't want to be forced by someone to take a vaccine*" to travel or compete in tournaments—this part being relied upon by the Minister.

17. The Minister then identified the benefits of vaccination, and the protection that they provide against COVID-19 (including booster doses in regard to the Omicron variant) (**D [20]–[21]**).

18. At **D [22]**, the Minister finds that, "*[B]ecause of this*"—though is not clear what "*this*" refers to—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 (in effect) to an undermining of the vaccination program. This finding is effectively repeated at **D [22(i)]** and **D [22(ii)]**.[3]

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[2] Affidavit of Natalie Bannister dated 15 December 2022, Ann NB-1, pp 114-120.

[3] A secondary but obviously cumulative basis (**D [23]** commences "*I have also*," **D [24]** speaks of the matters there described as an "*additional factor*," and **D [25]** commences "*accordingly*" (*i.e.*, as incorporating all previous findings). Mr Djokovic makes no challenge to the findings in **D [23]–[25]**. But, having regard to the way that the Minister's reasons are framed, they do not stand as an "*independent and sufficient*" basis for the ultimate decision: *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109 at 128–129 [72]–[74] (Griffiths, Perry and Bromwich JJ), approving and applying *SZOOR v Minister for Immigration and Citizenship* (2012) 202 FCR 1 at 26 [102] (McKerracher J, Reeves J relevantly agreeing).

19. **D [22(ii)]** is the only sub-paragraph that purports to cite evidence for the proposition that Mr Djokovic's presence in Australia may "*foster anti-vaccination sentiment*". It says that "*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)*." But the articles in Attachments K and L all pre-date Mr Djokovic's arrival in Australia, some by months. None refer to Mr Djokovic. None provide any support whatsoever for the Minister's finding. This, alone, evinces error.

20. There was otherwise no evidence in or attached to the Department's submission to the Minister that supported the finding that a non-cancellation decision (thereby resulting in Mr Djokovic's continuing presence in Australia) "*may foster anti-vaccination sentiment*". For example, there was no evidence that any such "*sentiment*" has been fostered or fomented in the communities of the many countries in which Mr Djokovic has been present, as a result of his presence, since the development of vaccines.

B.3 Dispositive reasoning—good order

21. It is the same in regard to good order. At **D [33]**, the Minister says that because of (*inter alia*) Mr Djokovic's "*conduct after receiving a positive COVID-19 result, his publicly stated views, as well as his unvaccinated status*," his conduct in Australia may pose a risk to good order, in particular by "*encouraging other persons to disregard or act inconsistently with public health advice or policies in Australia, including but not limited to, becoming vaccinated against COVID-19 or receiving a booster vaccine*."

22. Additionally, at **D [34]**, the Minister says that Mr Djokovic's ongoing presence in Australia, "*may lead to an increase in anti-vaccination sentiment generated in the Australian community*," and possibly discord and public disruption in regard to interactions with persons opposed to Mr Djokovic's presence (**D [35]–[36]**).

23. In short, then, the supposed capacity of Mr Djokovic's presence in Australia to cause an "*increase in anti-vaccine sentiment*" feeds into the "*good order*" ground in both aspects of the dispositive reasoning for that ground.

B.4 Dispositive reasoning—public interest

24. Finally, and in the same way, it is said in regard to consideration of public interest that Mr Djokovic's presence in Australia "*creates a risk of strengthening the*

anti-vaccination sentiment of a minority of the Australian community." This matter is again an inseparable part of the Minister's reasoning in regard to why it is in the public interest to cancel the Visa (**D [39], [43]**).[4]

C. Argument

C.1 Ground 1—failure to consider the consequences of cancellation

25. The Minister's consideration of the exercise of his power under section 133C(3) of the Act read with section 116(1)(e)(i) would result in one of two binary, and mutually-exclusive, outcomes. If Mr Djokovic's Visa were not cancelled, he would be entitled to be present in Australia for a temporary period in accordance with the conditions of his Visa, and would presumably stay and play in the Australian Tennis Open 2022. Whereas, if his Visa were cancelled, sections 189, 196, and 198 of the Act would require his detention and expulsion from Australia as soon as reasonably practicable, thereby thwarting his participation in the tournament and, consequentially, attracting the operation of other provisions of the Act[5] and the *Migration Regulations 1994* (Cth)[6] that would impose substantial barriers on his capacity to re-enter Australia.

26. The central premise of the Minister's reasoning in regard to each of the health, good order, and public interest limbs of his analysis is essentially that Mr Djokovic is an influential figure, talismanic in some way to the anti-vaccination movement. Let it be assumed, for the sake of argument, that this premise was soundly based in the material.

27. The vice with the Minister's reasoning, on this central premise, is that it involves an irrational, illogical or unreasonable approach to the purported formation of either or both of the requisite states of satisfaction in section 133C(3)(a) and (b), or the exercise of discretion:

    (1) to address the prospect of Mr Djokovic's presence in the Australia (consequent to a non-cancellation decision) "*foster[ing] anti-vaccination sentiment*"; but

    (2) not to address the prospect of the binary alternative outcome (consequent to a cancellation decision that the Minister ultimately selected), being

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4 See again cases cited in ft 3 above.
5 See section 48.
6 See clause 4013 of Schedule 4.

Mr Djokovic's detention and expulsion from Australia and the attraction of consequential bars to re-entry "*foster[ing] anti-vaccination sentiment*", including at least potentially of an equal of not more deep or widespread kind.

28. On the identified premise, it is obvious that a decision to detain and expel Mr Djokovic (thereby not only preventing his participation in the Australian Tennis Open but also at a minimum prejudicing his participation in future Australian tournaments), based on the fact that he made the two statements about two years ago about vaccination, would be apt to "*foster anti-vaccination sentiment*". That is because such a decision would be apt to be regarded by those who the BBC described as "*anti-vaccination activists*" as (to put it neutrally) government over-reach with respect to private choices (to that end, see also Attachments K, L, evincing the focus of protest activity).

29. It is even more obvious that a decision to detain and expel Mr Djokovic based on two historic statements about vaccination would be apt to "*foster anti-vaccination sentiment*", given that in the particular circumstances of this decision-making process, the Minister was inclined to assume or found that:

(1) Mr Djokovic posed a negligible COVID-19 risk to others;

(2) he had a medical reason for not being vaccinated;

(3) he entered Australia lawfully and consistently with ATAGI documents;

(4) he had made no attempt to contravene any Australian law;

(5) he is a person of good standing, known for his philanthropic efforts; and

(6) every non-neutral discretionary factor weighed against cancellation, including (relevantly) that cancellation would cause him and his family significant inconvenience and emotional hardship and distress, and would likely have significant reputation, financial, and professional implications for him.

30. But, in any event, the argument does not depend on these observations of the obvious.

31. That is because there <u>was</u> evidence before the Minister, in the form of the BBC report (at Attachment H) that the First Unlawful Decision had "*really galvanised anti-vaccination activists*". "*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?'"

32. Indeed, the BBC report is the only evidence that was before the Minister as to the behaviour of anti-vaccination activists or sympathisers to Mr Djokovic.[7] And it unequivocally supported the risk of "*anti-vaccination sentiment*" being "*fostered*" by a cancellation decision, rather than a non-cancellation decision (which would simply allow Mr Djokovic to stay in Australia temporarily to compete in the tournament).

33. The purpose of the cancellation power in section 133C(3) read with section 116(1)(e)(i) is (self-evidently) to enable the Minister to make a decision that minimises risks to the health and/or good order of the Australian community.

34. Where the specifically identified concern of the Minister in considering the exercise of power under section 113C(3) read with section 116(1)(e)(i) is reducing the risk of the fostering of "*anti-vaccination sentiment*", the Minister cannot logically, rationally and reasonably only consider (whether in forming the requisite states of satisfaction are formed, and/or whether it should in exercise of discretion be used) whether that purpose is served or best served only by considering one possible outcome (cancellation with the attendant consequences) without considering the alternative outcome (non-cancellation with the attendant consequences). That is at least the case where, as here, there was specific evidence before the Minister of the consequences of cancellation (and *a fortiori* there was no specific evidence before the Minister of the consequences of non-cancellation).

35. For these reasons, if the Minister was to consider:

    (1) the risk to health of Mr Djokovic's presence in Australia (via his effect on the anti-vaccination community), it was irrational for him not also to consider the risk to health of Mr Djokovic's removal from Australia because of cancellation

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[7] As outlined above at [19] above, Attachments K and L were said, quite wrongly, to provide evidence that anti-vaccination sentiment had increased as a result of Mr Djokovic's presence in Australia. There was also no evidence for any finding by the Minister that "unrest" that had occurred was attributable to the presence of Mr Djokovic in Australia, rather than his detention following the First Unlawful Decision (**D [46]**).

(such risk to health arising in the same way as outlined at **D [22]**—causing anti-vaccination types to entrench in their views, *etc.*); and

(2) the risk to good order of Mr Djokovic's presence in Australia (via the same effect considered above, and also because of unrest caused by heightened activity in the anti-vaccination community), it was irrational for him not also to consider the risk to good order of Mr Djokovic's removal because of cancellation (again, because of the matters outlined in **D [22]**, and also because of unrest caused by dissatisfaction in the anti-vaccination community at Mr Djokovic's treatment).

36. And, given that the Minister's consideration of the public interest materially turned on the same questions (*i.e.*, the supposed influence of Mr Djokovic's presence on anti-vaccination sentiment in Australia), then again it was irrational, illogical or unreasonable for the Minister to fail to consider the influence of Mr Djokovic's removal on anti-vaccination sentiment.

37. One sees, in this light, that the irrationality, illogicality or unreasonableness pervades every step of the decision-making process. It affects the formation of the purported state of satisfaction for the purpose of section 116(1)(e)(i) based on health, and the purported state of satisfaction for the purpose of section 116(1)(e)(i) based on good order. It affects the formation of the purported state of satisfaction in regard to public interest, for the purposes of section 133C(3)(b). And, had the Minister lawfully approached these questions, then there is also obviously a real prospect that may have also influenced his approach on the ultimate exercise of discretion as to whether public health or good order together with public interest considerations outweighed, or was outweighed by, all of the various discretionary factors that counted in Mr Djokovic's favour (consideration of which is at **D [69]**).[8]

38. Accordingly, the Minister fell into jurisdictional error.

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[8] See, *e.g.*, *Waraich v Minister for Home Affairs* [2021] FCAFC 155 at [56] (Full Court), approving *Fastbet Investments Pty Ltd v Deputy Commissioner of Taxation (No 5)* (2019) 167 ALD 492 at [71] (Derrington J), as to the relationship between a subjective jurisdictional fact and a residual discretion.

C.2 Ground 2—not open to the Minister to be satisfied the presence of Mr Djokovic "is or may be" a relevant risk

39. In order for the Minister to be satisfied for the purposes of section 133C(3)(a) that the ground in section 116(1)(e)(i) exists, the Minister needed to form a positive state of satisfaction that the presence of Mr Djokovic in Australia "*is or may be*"[9] a risk to the health *etc*., of the Australian community or a segment thereof. The requisite state of satisfaction is a "*real*" one that is reached "*on a consideration of the available material*."[10] "*A visa cannot be cancelled simply because the visa holder has failed to show cause why it should not*".[11]

40. The inclusion of the disjunctive conditional expression ("*or may be*") entails that the Minister need not be definitively satisfied that the presence of the visa-holder in Australia is a relevant risk. Nevertheless, construing section 116(1)(e)(i) purposively and contextually, the mere contemplation of a conceivable possibility is insufficient. Were it otherwise, the power in section 116(1)(e) would be extreme and would be apt to annihilate the various other carefully-delineated powers of cancellation in the Act. The scope of the power of cancellation under section 116(1)(e)(i) would be confined only by the limits of human imagination.

41. The requisite state of satisfaction must also be reasonably obtained. Thus, as Derrington J observed in *EHF17 v Minister for Immigration and Border Protection* [2019] FCA 1681 at [70], in analysis specifically endorsed in a section 116(1)(e)(i) context by Banks-Smith J in *Leota v Minister for Immigration, Migrant Services and Multicultural Affairs* [2020] FCA 1120 at [17]: "*The Parliament implicitly intends the requisite state of mind should be one which has been formed logically and rationally upon findings of fact which are logically formed by probative evidence*."

42. The Minister's reasons evidence a failure to remain within these constraints.

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9 The expression "*would or might be*" in section 116(1)(e)(i) is irrelevant here. That expression is cast in the future tense: it is capable of applying only if a cancellation decision were to be made before the non-citizen arrives in Australia: see section 117(1)(a). See, *e.g.*, *Gong v Minister for Immigration* [2016] FCCA 561; 309 FLR 151 at 157 [39] (Smith J).

10 ***Zhao*** *v Minister for Immigration and Multicultural Affairs* [2000] FCA 1235 at [25] (French, Hill and Carr JJ)).

11 *Zhao* [2000] FCA 1235 at [25], see also [32] (French, Hill and Carr JJ)).

43. As the BBC report records, the only expression by Mr Djokovic in opposition to vaccination was made in April 2020—"*well before Covid vaccines were available*"—and (although the Minister's reasons selectively do not quote this text) Mr Djokovic "*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'.*"

44. Certainly, there was no evidence before the Minister that Mr Djokovic has ever urged any others not to be vaccinated. Indeed, if anything, Mr Djokovic's conduct over time reveals a zealous protection of his own privacy rather than any advocacy. Thus:

(1) it was not until a few days ago, when Mr Djokovic's evidence in the FCFCOA proceedings was made publicly available as a result of that proceeding, that Mr Djokovic's unvaccinated status was confirmed; and

(2) the Minister himself acknowledged in his reasons (**D [19]**) that he is not aware of Mr Djokovic's "*present attitude to vaccinations*" (which acknowledgement is notably difficult to reconcile with the Minister's reference at **D [39]** to Mr Djokovic's "*well-known stance on vaccination*").

45. The Minister said that, irrespective of Mr Djokovic's present attitudes to vaccinations, "*just as important is how those in Australia may perceive his views on vaccinations*". The Minister does not identify what those (supposed) perceived views are or may be.

46. In any event, as explained above, there was no evidence before the Minister, and the Minister's reasons identify none, that supported the finding that a <u>non</u>-cancellation decision (thereby resulting in Mr Djokovic's temporary presence in Australia to play tennis) "*may foster anti-vaccination sentiment*".

47. Further, interrogating the two statements on which the Minister purported to rely:

(1) As noted above, the only statement in which Mr Djokovic is recorded as having expressed "*opposition to vaccination*" was made in April 2020 "*well before Covid vaccines were available*", and therefore necessarily at a time when matters such as the efficacy and safety of vaccines had yet to be established. Moreover, as is emphasised above, but what the Minister's reasons inexplicably do not recite, is the subsequent "*clarifi[cation]*" issued by Mr Djokovic 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*".

(2) Especially in circumstances where, on the Minister's own express assumption, Mr Djokovic had a medical reason for not being vaccinated (**D [14]**), there was simply no basis for the Minister reasonably to be satisfied that the fact of that historic statement by Mr Djokovic (at least as subsequently clarified) entailed his presence in Australia in January 2022 may "*foster anti-vaccination sentiment*" such that the presence of Mr Djokovic in Australia in January 2022 may be a risk to the health or good order of the Australian community.

(3) Similar analysis applies to the second (and only other) statement attributed to Mr Djokovic, being that during a "Facebook live" session he explained that he "*wouldn't want to be forced by someone to take a vaccine*".

48. The Minister's purported state of satisfaction that Mr Djokovic's presence in Australia for a temporary period may be a risk to the "*health*" or "*good order*" of the Australian community was not reasonably open to him, on the evidence.

C.3 Ground 3—unreasonableness and/or irrationality in regard to finding concerning Mr Djokovic's "*stance on vaccination*" *etc*.

49. As outlined above (see in particular [16]), the only evidence upon which the Minister relied in support of a finding that he variously expressed as being the Applicant's "*stance on vaccination*" (**D [42]**), his "*well-known stance on vaccination*" (**D [39]**), his "*publicly stated views [about vaccination]*" (**D [33]**)—being, so said the Minister, in the nature of "*anti-vaccination sentiment*" (**D [19]**)—was a single newspaper article (the BBC report), selectively quoted, and devoid of context.

50. It was not open to the Minister to find that Mr Djokovic had a "*well known stance on vaccination*" (or howsoever else that finding might be expressed) which was in the nature of "*anti-vaccination sentiment*," for at least *two* reasons.

51. *First*, as the Minister himself acknowledge, he did not make the obvious, critical, and easy inquiry of Mr Djokovic as to what his sentiment in fact was, given that the only information that the Minister had was a selective extract of an interview that was nearly two years old, done (as the article records) before COVID-19 vaccines even existed.

52. The Minister had several days in which to make that inquiry. This is, of course, an error of the kind referred to in *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1129 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), applied in (*e.g.*) *MZABA v Minister for Immigration and Border Protection* (2015) 234 FCR 425 at 442–443 [61] (Bromberg J).

53. *Second*, the finding made by the Minister was not open even on the material before him. The evidence before the Minister established that:

    (1) Mr Djokovic's initial comments were made "*well before Covid vaccines were available*";[12]

    (2) Mr Djokovic "*clarified*" his position by saying that he was "*no expert*" on vaccination and would "*keep an open mind*";[13]

    (3) Mr Djokovic said that his comments on vaccination had been "*taken … out of context a little bit, saying that I am completely against vaccines of any kind*";[14]

    (4) Mr Djokovic was "*not against all vaccines*."[15]

54. And, beyond these matters (to which the Minister failed to refer), there was no evidence before the Minister of Mr Djokovic having said anything concerning vaccines during the period of time between April 2020 and the present day. Rather, if anything, he has been scrupulously private: as outlined above, it is only for the purpose of travel to Australia, and to satisfy requirements of a determination made under the *Biosecurity Act 2015* (Cth) that he disclosed his vaccination status. And, it is only because of the intrusion on his privacy that these visa cancellation proceedings have necessarily entailed that that personal medical information has become a matter of public record.

55. Of course, fact-finding is a matter for the decision-maker. But factual findings must be logically formed on the basis of probative evidence.[16] No logical or rational approach to the material before the Minister, including the material outlined above to which the

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12 Attachment H, p 115.
13 Attachment H, p 115.
14 Attachment P, p 148.
15 Attachment P, p 142.
16 See, again, *EHF17 v Minister for Immigration and Border Protection* (2019) 272 FCR 409 at [70] (Derrington J).

Minister did not refer, could have justified a finding that Mr Djokovic had a "*well-known stance on vaccination*," being in the nature of "*anti-vaccination sentiment*."

56. Since this finding, of course, fed into the remainder of the Minister's dispositive reasoning (that purported "*well-known stance*" forming at least a significant part of the basis on which the posited risk to health and good order was said to arise), the erroneous finding undermines each of the health, good order, and public interest aspects of the Minister's reasoning.

D. Conclusion

57. For the foregoing reasons, the Minister's purported decision was affected by jurisdictional error in that:

(1) the Minister was not lawfully satisfied of the ground in section 116(1)(e)(i) which (by operation of section 133C(3)(a) of the Act) was a precondition to the valid cancellation of the Visa;

(2) the Minister was not lawfully satisfied of the matter in section 133C(3)(b), which again was a precondition to the valid cancellation of the Visa; and

(3) the Minister's discretion miscarried, in that it incorporated the erroneous approach to health, good order, and the public interest.

58. Relief should issue quashing the purported cancellation, and ordering (again) Mr Djokovic's release from detention. The Minister should pay Mr Djokovic's costs, including reserved costs, as agreed or assessed.

O P HOLDENSON QC
N M WOOD SC
N DRAGOJLOVIC
J E HARTLEY
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15 January 2022