

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 15/01/2022 2:41:00 PM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating Application for Review of a Migration Decision - Form 70 - Rule 31.22(1)
File Number:	VID18/2022
File Title:	NOVAK DJOKOVIC v MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



A handwritten signature in blue ink that reads "Sia Lagos".

Dated: 15/01/2022 2:43:44 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



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

Amended Application – Migration Act

(Amendments made pursuant to leave of the Court granted 15 January 2022)

The applicant applies for a remedy to be granted in exercise of the Court's jurisdiction under section 476 of the *Migration Act 1958* (Cth) in respect of the migration decision specified on page 2.

First court date

This application is listed for hearing at (court location): 305 William St., Melbourne, Vic., 3000

Court date and time (registry staff to insert): _____ at _____ am/pm.

All parties or their legal representatives should attend this hearing. Default orders may be made if any party fails to attend. The Court may hear and determine all interlocutory or final issues, or may give directions for the future conduct of the proceeding.

Applicant/s address (place of residence or business, if different from the address for service)

c/- Hall & Wilcox Lawyers, Level 11, 525 Collins St.,
Melbourne, Vic., 3000

(for) Registrar

Date:/...../.....

Applicant/s details

Is the applicant or are any of the applicants to this proceeding currently in immigration detention?

☒ Yes

☐ No

Name and address of the detention centre: Lonsdale Street, Melbourne, or otherwise a location to be agreed between the parties.

.....

Filed on behalf of Novak Djokovic

Prepared by Hall & Wilcox

Lawyer's code

Name of law firm Hall & Wilcox Lawyers

Address for service in Australia Level 11, 525 Collins Street, Melbourne

State VIC

Postcode 3000

Email Natalie.Bannister@hallandwilcox.com.au

DX

Tel 03 9603 3155

Fax 03 9670 9632

Attention Natalie Bannister



Expedited hearing (specify why the applicant believes their hearing should be expedited)

The hearing should be expedited because the Subclass 408 visa that was cancelled was granted in order to allow the applicant to compete in the Australian Open 2022, which starts on 17 January 2022. The applicant contends that a purported decision made by the Respondent on 14 January 2022 under section 133C(3) read together with section 116(1)(e)(i) of the *Migration Act 1958* (Cth) to cancel his visa is invalid. The applicant respectfully requests that the application be heard urgently such that, if the application is successful, the applicant may be able to compete at the Australian Open.

.....
.....

Migration decision details (select box and insert details of the migration decision)

- ☐ Decision made by a tribunal

Name of the tribunal:

Date of the decision:/...../.....

Have you applied for a protection visa?

☐ Yes

☐ No

- ☐ Immigration Assessment Authority

Date of the decision:/...../.....

- ☒ Decision made by the Minister or another person under the Migration Act.

Name of decision-maker: Alex Hawke.....

Office held: Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.....

Date of the decision: 14/01/2022.....

- ☒ A future decision or other action by the Minister or an officer under the Migration Act, being removal of the applicant from Australia under section 198 of the Act.

Application for extension of time

(an extension is required if the application is not made within 35 days of the date of the migration decision)

Does the applicant apply for an order that the time for making the application be extended under section 477 of the *Migration Act 1958*?

☐ Yes ☒ No

Grounds of application for extension of time

(specify why the applicant considers that it is necessary in the interests of the administration of justice to extend time)

1. Not applicable

Other Interlocutory, interim or procedural orders sought by applicant/s

(complete only if other interlocutory, interim or procedural orders are sought)

1. Not applicable.

Final orders sought by applicant/s (select boxes and add additional or alternative order/s)

- ☒ An order that the decision of the Minister be quashed.
- ☐ A writ of mandamus directed to the tribunal, Immigration Assessment Authority or Minister, requiring them to determine the applicant's application according to law.
- ☒ An injunction or alternatively a writ of prohibition restraining the Minister, by himself or by his Department, officers, delegates or agents, from making the future decision or taking the other action the subject of the proceedings.
- ☒ An order that the respondent is to take appropriate steps to ensure that the applicant is released immediately and forthwith from immigration detention.
- ☒ Such further or other orders as the Court thinks fit.
- ☒ Costs.

Grounds of application

Background

1. On or about 05 January 2022, the Applicant arrived at Melbourne Tullamarine Airport.
2. At that time, the Applicant held a subclass GG408 (Temporary Activity) visa ("**Visa**").
3. At or about 4.11am on 06 January 2022 an officer of the Australian Border Force purported to give to the Applicant a "Notice of intention to consider cancellation under section 116 of the *Migration Act 1958* (Cth)."
4. At or about 07:42 am on 06 January 2022, a delegate of the Minister for Home Affairs purported to cancel the Visa, pursuant to section 116(1)(e)(i) of the *Migration Act 1958* (Cth) ("**Act**") ("**First Unlawful Decision**").

5. On or about 06 January 2022, the Applicant commenced proceeding MLG35/2022, the Respondent being the Minister for Home Affairs.
6. On or about 10 January 2022, Judge A Kelly made Orders:
 - (a) quashing the First Unlawful Decision and requiring the release of the Applicant from immigration detention;
 - (b) noting that the Minister for Home Affairs notified the Court that the Respondent ("**Minister**") may consider whether to exercise a personal power of cancellation pursuant to sub-section 133C(3) of the Act.
7. At or about 17:46 on 14 January 2021, the Minister purported to cancel the Applicant's Visa under section 133C(3) of the Act ("**Second Purported Decision**").
8. Section 133C(3) required the Minister to be lawfully satisfied, in order to have power to cancel the Applicant's visa under that sub-section, that:
 - (a) a ground for cancelling the Visa under section 116 of the Act existed ("**section 116 precondition**"); and
 - (b) it would be in the public interest to cancel the Visa.

Reasons

9. The Minister produced reasons for his purported decision (hereafter, **D [X]**).
10. In his reasons, the Minister:
 - (a) recorded that he had received advice from the Commonwealth Department of Health that, on the assumptions that Mr Djokovic had tested positive for COVID-19 on 16 December 2021, negative on 22 December 2021, and was asymptomatic on 27 December 2021, he was a "*low*" risk of transmitting SARS-CoV-2 to others (**D [12]**), and that the risk of a transmission event (presumably involving Mr Djokovic) related to the Australian Open is "*very low*" (**D [12]**);
 - (b) assumed that Mr Djokovic posed a "*negligible risk*" of infection to others (**D [13]**);
 - (c) assumed that Mr Djokovic had a medical reason for not being vaccinated (**D [14]**);
 - (d) assumed that Mr Djokovic entered Australia consistently with ATAGI documents (**D [15]**);
 - (e) found that Mr Djokovic had made no attempt to contravene any Australian law, was of good standing, and was known for his philanthropic efforts (**D [45]**).
11. Despite these findings, the Minister nevertheless found that Mr Djokovic's presence in Australia:
 - (a) may be a risk to the health of the Australian community (**D [17]**); and
 - (b) may be a risk to the good order of the Australian community (**D [27]**).

12. In each case, the Minister's reasons were founded (in at least substantial or material part) on propositions that:
 - (a) *"in April 2020, well before Covid vaccines were available, [Mr] Djokovic said he was 'opposed to vaccination',"* (this quote from **Attachment H**, selectively extracted in **D [18]**); and
 - (b) Mr Djokovic had *"previously stated he wouldn't want to be forced by someone to take a vaccine"* to travel or compete in tournaments (again from **Attachment H**, extracted in **D [18]**);
 - (c) this material *"makes it clear that he has publicly expressed anti-vaccination sentiment,"* or in any event (inferentially) his sentiments would be perceived in that way (**D [19]**);
 - (d) accordingly, *"his presence in Australia may foster anti-vaccination sentiment"* (**D [22]**) which (if it were to occur) would have deleterious effects identified at **D [22]**.
13. These findings form part of the basis for the finding, at **D [25]**, that Mr Djokovic's presence in Australia *"may be counterproductive to efforts at vaccination by others in Australia."*
14. In the same way, the Minister found in relation to good order that having regard to, *inter alia*, his *"publicly stated views as well as his unvaccinated status,"* his presence in Australia may pose a risk to the good order of the Australian community (**D [33]**) in that:
 - (a) it might encourage people to act inconsistently with public health advice and policies in Australia, including but not limited to, becoming vaccinated against COVID-19 or receiving a booster vaccine (**D [33]**);
 - (b) it may lead to *"an increase in anti-vaccination sentiment generated in the Australian community,"* potentially leading to unrest (**D [34]**).
15. The same or similar reasoning appears in regard to the Minister's approach to public interest in that the Minister:
 - (a) reasoned as follows: *"Despite my acceptance above 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, 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."* (**D [39]**); and
 - (b) stated that *"the health and good order points discussed above are each separately relevant to whether it is in the public interest to cancel Mr Djokovic's visa"* (**D [43]**).
16. In a sentence, the Minister's reasoning in regard to all of risk to health, risk to good order, and public interest involved the proposition that Mr Djokovic's presence in Australia may cause an

increase in anti-vaccination sentiment, in effect because he may be perceived by some as a talisman of a community of anti-vaccine sentiment, leading to various negative consequences.

Ground 1: illogical / irrational / unreasonable approach to one or more of: (1) the section 116 precondition; (2) the question of public interest; (3) the exercise of discretion

17. The Minister's decision (to cancel or not cancel) had binary legal outcomes:
 - (a) if the Minister did not cancel Mr Djokovic's visa, then Mr Djokovic would be entitled to remain present in Australia in accordance with the conditions of his visa; or
 - (b) if the Minister did cancel Mr Djokovic's visa, then Mr Djokovic would not be entitled to remain present in Australia, and instead he would be liable to detention and forcible removal from Australia, as well as subsequent inability to apply for certain visas and precluding him from obtaining certain visas for a period of three years (except in certain circumstances including the Minister being satisfied that there are compelling circumstances affecting the interests of Australia).
18. Accordingly if, which is the underpinning of the Minister's reasoning, Mr Djokovic is perceived by some as a talisman of a community of anti-vaccination sentiment, then:
 - (a) the question of whether Mr Djokovic's presence in Australia may foster anti-vaccination sentiment, and if so the significance of that to the assessment of public interest and the exercise of discretion could not logically, rationally and reasonably be assessed in isolation from and without also considering
 - (b) the question of whether the cancellation and consequent detention and forcible removal of Mr Djokovic—being a person who the Minister recognised had the characteristics at [10] above—on the basis of a few lines of text he said about two years ago may also foster anti-vaccination sentiment, and if so the significance of that to the assessment of public interest and the exercise of discretion,
 - (c) especially in circumstances where the only evidence before the Minister as to the behaviour of "*anti-vaccination activists*" in relation to Mr Djokovic was evidence (Attachment H to the Department's submission to the Minister) that the First Unlawful Decision (being a decision with the same consequence as the Second Purported Decision) was to "*really galvanise anti-vaccination activists*"
19. The Minister did not consider the question identified at [18(b)] above.
20. In the circumstances, the Second Purported Decision is affected by jurisdictional error.

Ground 2: not open to find that the presence of Mr Djokovic in Australia is or may be a risk to the health or good order of the Australian community

21. The Minister cited no evidence that supported his finding that Mr Djokovic's presence in Australia may "*foster anti-vaccination sentiment*", and it was not open to the Minister to make that finding, which finding was material to the Minister's purported states of satisfaction that:
- (a) the presence of Mr Djokovic in Australia may be a risk to the health of the Australian community;
 - (b) the presence of Mr Djokovic in Australia may be a risk to the good order of the Australian community; and
 - (c) it would be in the public interest to cancel Mr Djokovic's visa.
22. In the circumstances, the Second Purported Decision is affected by jurisdictional error.

Ground 3: not open to make a finding concerning Mr Djokovic's "*well-known stance on vaccination*," and similarly-expressed findings

23. It was not open to the Respondent to make a finding regarding Mr Djokovic's:
- (a) 'stance on vaccination' (D[42]);
 - (b) 'well-known stance on vaccination' (D[39]);
 - (c) 'publicly stated views' (D[33]);
- or a finding that Mr Djokovic had '*expressed anti-vaccination sentiment*' (D[19]), in circumstances where:
- (d) the Respondent had not sought Mr Djokovic's views on vaccinations (D[19]); and
 - (e) the material upon which the Respondent relied was confined to a reference to a media article which refers to a selective extract of comments attributed to Mr Djokovic (Attachment H) in April 2020, being almost two years ago and '*well before Covid vaccines were available*' and which Mr Djokovic had positively sought to qualify and explain by clearly stating (also referred to in Attachment H) that:
 - (i) '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'; and
 - (ii) 'I am not against vaccination of any kind'.
 - (f) there was no evidence before the Respondent that Mr Djokovic had made any comments about his vaccination status or expressed any '*views*' regarding vaccination at any time during which he has been in Australia (on this occasion or previous occasions) or at any other time in any other location (post April 2020).

Other Court Proceedings

(This section must be completed if the applicant has made a previous application or applications to a court to review the decision – see section 486D of the Migration Act 1958.)

Person or persons who made each previous application: Not applicable

Court or courts to which each application was made:

Commencement date of each previous application:

File number of each application:

Outcome of each application:

Related Court Proceedings*

(This section must be completed if a separate application has been made arising out of the same circumstances, for example, by the applicant's employer or by a family member of the applicant)

Person who has made the related application: Not applicable.....

Court to which the application has been made:

Commencement date of the related application:

File number of the related application:

Language spoken

Does the applicant require an interpreter?

☐ Yes

☒ No

If Yes, what language:



Service of Application

The application must be served on each respondent within 7 days by delivering it to the Department of Home Affairs at the address below.

[The address will be inserted by the Registry]

Signature of applicant/s or lawyer

A handwritten signature in black ink, appearing to read "Natalie Bannister", is written over a dotted line.

Signed by (print name/s)

The name "Natalie Bannister" is handwritten in black ink over a dotted line.

☐ the applicant/s or ☒ lawyer for the applicant/s

Date: 15 January 2022

Lawyer's Certification (see section 486I of the Migration Act 1958)

I, Natalie Louise Bannister, the lawyer filing this document commencing migration litigation, certify that there are reasonable grounds for believing that this migration litigation has a reasonable prospect of success.

A handwritten signature in black ink, appearing to read "Natalie Bannister", is written over a dotted line.

Signature of the lawyer filing application

Date: 15 January 2022



IMPORTANT NOTICE TO RESPONDENT/S

To the respondent(s): Department of Home Affairs
of (the address will be inserted by the Registry):

.....

A respondent who intends to contest the application must file a response within eight weeks of service of the application: see rule 29.06(2) of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021*. A response must specify each ground of opposition with particulars, including grounds of objection to competency, previous court proceedings, delay, etc. Any evidence relied upon must be detailed in or attached to an affidavit.

A respondent who does not intend to contest the application may file a notice of appearance which submits to the orders of the Court save as to costs.

Form approved by the Chief Judge pursuant to subrule 2.04(1) for the purpose of rule 29.05(1)

MIG_Application_0921V1