FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FedCFamC2G 7

File number(s):	MLG116/2022
Judgment of:	**JUDGE A KELLY**
Date of judgment:	15 January 2022
Catchwords:	**MIGRATION** – cancellation of temporary activity (subclass 408) visa – where, before entry into Australia, applicant has been issued visa – where, before entry into Australia, applicant has furnished Australian Travel Declaration and medical exemption provided to him by Independent Expert Medical Review Panel (such exemption having been considered and endorsed by separate Independent Expert Medical Review Panel) – where, before entry into Australia, Department of Home Affairs had assessed and approved travel declaration – where applicant interviewed by delegate of Minister for Home Affairs upon arrival at immigration clearance in Australia – where delegate decides to cancel applicant's visa – where decision tainted by jurisdictional error – where applicant brings proceeding for urgent relief – where parties to that proceeding agree in orders being made to set aside delegate's decision – where Minister for Home Affairs foreshadows cancellation of visa is also under consideration of respondent Minister for Immigration pursuant to personal powers conferred by s 133C(3) of *Migration Act 1958* (Cth).
	MIGRATION – respondent Minister for Immigration receives submissions from applicant for consideration against the exercise of power conferred by s 133C(3) of *Migration Act* – where Minister for Immigration makes decision to cancel applicant's visa – criteria imposed which operate as preconditions to availability of discretion to exercise a power conferred by s 133C(3) of *Migration Act* to cancel visa – whether circumstances exist upon which Minister could be satisfied a ground for cancelling visa under s 116 of *Migration Act* exists – whether circumstances exist upon which Minister could be satisfied it is in the public interest to do so – scope and nature of power to cancel visa

in the public interest.

MIGRATION – where further proceeding instituted by applicant seeking to impugn second decision to cancel visa on ground such decision is also tainted by jurisdictional error – where court may grant interim relief as necessary entirely on the basis that the authority of the court may be maintained and that it, and the parties, are afforded an adequate opportunity to consider the merit of the grounds to be advanced in this further proceeding upon whether the second decision is susceptible to being set aside and whether relief should go in the exercise of discretion upon judicial review.

PRACTICE AND PROCEDURE – Federal Courts – where objects of the Federal Circuit and Family Court of Australia are to ensure that justice is delivered by federal courts effectively and efficiently – where jurisdiction of that court is to be exercised by a single judge – where court is to completely and finally determine all matters in controversy between parties with the object of securing that all multiplicity of proceedings may be avoided – where power conferred to transfer a proceeding to Federal Court of Australia – where transfer of proceeding would assist to minimise dedication of resources and incurring of significant costs, including avoidance of appeals – where power conferred on Federal Court of Australia to confirm transfer – amplitude of other powers conferred by *Federal Court of Australia Act 1976* (Cth) – where Federal Circuit court may make such orders as it considers necessary pending the order transferring the proceeding to the Federal Court being confirmed by Court – injunctions granted to preserve authority of Federal Court to hear and determine substantive application for relief.

Legislation:

Acts Interpretation Act 1901 (Cth), ss 18A, 23.
Evidence Act 1995 (Cth), s 144.
Federal Court of Australia Act 1976 (Cth), ss 26, 32AD.
Federal Circuit and Family Court of Australia Act 2021 (Cth), ss 5, 137, 139, 153, 190, 192, 202, 203.
Migration Act 1958 (Cth), ss 4, 14, 40, 41, 65, 66, 67, 68, 77, 82, 116, 118A, 119, 127, 133C, 138, 189, 198, 199, 256, 474,476, 499.

Cases cited:

Attorney-General (NSW) v Quin (1990) 170 CLR 1

AZAFX v Federal Circuit Court of Australia (2016) 244 FCR 401

Plaintiff M64/2015 (2015) 258 CLR 173

Craig v South Australia (1995) 184 CLR 163

Hong v Minister for Immigration and Border Protection [2019] HCATrans 167

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Minister for Border Protection v SZVFW (2018) 357 ALR 408

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611

NAAV v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 228, 123 FCR 298

Plaintiff M64/2015 v Minister for Immigration and Border Protection (2015) 258 CLR 173

Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 1] (1998) 72 ALJR 868

Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476

Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu (2000) 171 ALR 341

Shrestha v Minister for Immigration and Border Protection [2017] FCAFC 69

Shrestha v Minister for Immigration and Border Protection [2018] HCA 35

Tait v R (1962) 108 CLR 620

Wei v Minister for Immigration and Border Protection (2015) 257 CLR 22

Division:	Division 2
Number of paragraphs:	75
Counsel for the applicant	Mr P Holdenson QC, Mr N Wood SC, Mr J Hartley and Mr N Dragojlovic of counsel
Solicitors for the applicant	Hall & Wilcox
Counsel for the first respondent	Mr S Lloyd SC, Mr C. Tran, Ms N. Wootton and Ms J. Nikolic of counsel
Solicitors for the first respondent	Australian Government Solicitor
Date of hearing:	14 January 2022

ORDERS

MLG 116/2022

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: **NOVAK DJOKOVIC**
Applicant

AND: **MINISTER FOR IMMIGRATION CITIZENSHIP MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**
Respondent

ORDER MADE BY: **JUDGE A KELLY**

DATE OF ORDER: **14 JANUARY 2022**

UPON THE APPLICANT, THROUGH HIS COUNSEL, UNDERTAKING:

1. To file and serve as soon as is reasonably practicable:

   (a) an originating application respecting the interlocutory and final relief to be sought in this proceeding;

   (b) an affidavit to which is exhibited a copy of the respondent's statement of reasons for the decision made, purportedly pursuant to s 133C(3) of the *Migration Act 1958* (Cth) together with the submission for decision by the respondent;

2. To submit to such order (if any) as the Court may consider just for the payment of compensation (to be assessed by the Court or as it may direct), to any person, (whether or not that person is a party), affected by the operation of this Order or Undertaking or any continuation (with or without variation) of the Order or Undertaking; and

3. To pay the compensation referred to in paragraph (2) above of his Undertaking to the person affected by the operation of the Order or Undertaking,

AND UPON THE RESPONDENT, THROUGH HIS COUNSEL, UNDERTAKING THAT:

1. Pending the final hearing and determination of this proceeding (or unless the applicant makes a written request of the respondent for his removal from Australia), he will not, whether by himself, his servants, his agents, the Department of Immigration, Citizenship, Migrant Services and Multicultural Affairs, the Australian Border Force, or howsoever otherwise, take or attempt to take any step to remove or purport to remove the applicant from Australia, whether pursuant to ss 198 or 199 of the *Migration Act 1958* (Cth) or otherwise;

2. The applicant will not be taken into detention before attending for interview at the offices of the respondent in Lonsdale Street, Melbourne (or such other address as may be agreed by the parties in writing), at 8:00 a.m. on Saturday, 15 January 2022;

3. The applicant may continue in detention from 10:00 a.m. until 2:00 p.m. on Saturday, 15 January 2022, such detention to be effected by his being delivered by the respondent to the offices of the applicant’s solicitors where he shall remain, subject to the supervision of two officers of the Australian Border Force; and,

4. The applicant may continue in detention from 9:00 a.m. on Sunday, 16 January 2022, until the conclusion of any hearing of the proceeding, such detention to be effected by his being delivered by the respondent to the offices of the applicant’s solicitors where he shall remain subject to the supervision of two officers of the Australian Border Force,

THE COURT ORDERS AND DIRECTS:

1. Pursuant to ss 202-203 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth), the parties have leave to appear and to make submissions before the Court by video and audio link.
2. The applicant have leave, now for then, to make oral application for judicial review of the decision of the respondent made purportedly pursuant to s 133C(3) of the *Migration Act 1958* (Cth) to cancel his Temporary Activity (Subclass 408) visa.

3. Subject to paragraph 4 of this Order, pursuant to s 153(1) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth), the proceeding be transferred to the Federal Court of Australia.

4. The parties and each of them forthwith do all things and take all steps as may be reasonably necessary to make application seeking confirmation of the transfer of the proceeding to the Federal Court of Australia pursuant to s 32AD(1) of the Federal Court of Australia Act 1976 (Cth).

5. The costs of and incidental to this application be reserved.

THE COURT NOTES THAT:

A. The respondent did not oppose the grant of leave to make the oral application to seek judicial review of the respondent's decision to cancel his visa aforesaid.

B. While the applicant sought for the proceeding to remain in this Court, the respondent does not oppose the transfer of the proceeding to the Federal Court of Australia, doing so in circumstances where: (1) the applicant proposes, by midday on Saturday, 15 January 2022, to file and serve his submissions for the purposes of a final hearing of this proceeding; (2) the parties are agreed the respondent would file his response, submissions and any answering affidavit by 10:00 p.m. on Saturday, 15 January 2022; (3) the applicant contends the scope of the issues to be raised in this proceeding are of narrow compass such that he would agree to be limited in making oral submissions for a period of no more than one hour; (4) the respondent necessarily reserves his position as to the likely duration of any final hearing but notes the applicant's estimate of the likely duration of his oral submissions; (5) the parties seek a final hearing of the proceeding on Sunday, 16 January 2022; (6) competition in the Australian Open is scheduled to commence on Monday, 17 January 2022; (7) it is presently uncertain whether, should he be able to do so, the applicant will commence in such competition on Monday, 17 January 2022 or Tuesday, 18 January 2022.

C. Prior to his arriving in Australia on 5 January 2022, the applicant had been granted a Temporary Activity (Subclass 408) visa. Further, an Australian Travel Declaration made by him had been assessed by the Department of Home Affairs which Department had been supplied by Tennis Australia a copy of his medical exemption for vaccination against the Covid-19 virus.

D. The applicant's medical exemption had been provided to him by two medical specialists comprising an Independent Expert Medical Review Panel commissioned

by Tennis Australia for the purposes of assessing such applications. The medical exemption provided to the applicant by that panel had also been assessed and endorsed by an Independent Expert Medical Review Panel commissioned by the State of Victoria.

E. The applicant contends that he was accordingly entitled to quarantine-free entry into and travel in Australia for the duration of the permission granted by the visa and that otherwise, he would not have done so.

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

G. In proceeding No MLG35/2022 wherein Novak Djokavic was applicant and the Minister for Home Affairs was respondent, orders were made on Monday, 10 January 2022 quashing the purported first decision to cancel the visa and that the applicant be released from detention forthwith. The parties were agreed in the making of those orders. The applicant's visa took effect upon that Order becoming operative and the applicant was released from detention thereafter.

H. When that Order was made on 10 January 2022, counsel for the respondent informed the Court of his instructions that the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs may consider whether to exercise a personal power of cancellation pursuant to sub-section 133C(3) of the *Migration Act*.

I. The applicant has furnished submissions and supporting documentation to the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs against the exercise of the personal power to cancel his visa.

J. At about 5:45 p.m., on Friday, 14 January 2022, the respondent, made a decision, purportedly pursuant to s 133C(3) of the *Migration Act*, to cancel the applicant's visa, doing so on the stated ground that the power conferred by par 116(1) of the *Migration Act* was engaged "*on health and good order grounds, on the basis that it was in the public interest to do so*" (***second decision***). The applicant contends that the reasons assigned by the respondent for the making of the second decision are substantively different from those of the delegate who made the first decision.

K. In a proceeding commenced this day, the applicant seeks to contend that the second decision, purportedly made under s 133C(3) of the Migration Act, is also tainted by material jurisdictional error and should be quashed. The respondent to this proceeding also disputes those contentions.

L. Had the respondent not proffered the Undertakings given above, the Court would have been satisfied a serious question to be tried existed such as to support the making of interim orders and that the balance of convenience favoured the grant of such relief, doing so upon the substantive basis that:

(1) such relief would be available and warranted upon established principles including those stated in *Tait v R* (1962) 108 CLR 620, 624-625; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 1]* (1998) 72 ALJR 868, [1]-[2]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu* (2000) 171 ALR 341, [7];

(2) the applicant contends that a person who has been granted a medical exemption from vaccination for Covid-19, whose Australian Travel Declaration has been assessed and approved by the Australian Government and who holds a visa granted pursuant to s 65 of the *Migration Act 1958* (Cth), may travel to, enter and remain in Australia as provided by s 29 of that Act;

(3) the applicant also contends that before arriving in Australia on 5 January 2022, he satisfied each of the criteria necessary to entitle him to the grant of a visa;

(4) the objects and requirements stated in ss 5(a), 139(d) and 190 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth), are to ensure that justice is delivered by federal courts effectively and efficiently, to ensure all matters in controversy between the parties may be completely and finally determined (and, in particular, that all multiplicity of proceedings concerning such matters may be avoided). Overarching purposes of civil practice and procedure provisions of that Act are to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible, including by the efficient use of available judicial and administrative resources and in a timely manner;

(5) notwithstanding the jurisdiction conferred by s 476 the Migration Act upon this Court to hear and determine proceedings by way of judicial review, additional power is conferred on the Federal Court of Australia, including by s 26(1) of

the Federal Court of Australia Act 1976 (Cth), that allows for the referral to a Full Court of questions that may be reserved for its consideration. Powers of that kind are not conferred on this Court;

(6) it is consistent with the furtherance of those objects, including to minimise the use of further resources and to contain significant costs to each of the parties (including on appeal), for the matter to be transferred without delay;

(7) further, the court has been satisfied it is in the interests of the administration of justice for the proceeding to be transferred to the Federal Court of Australia and that pending the order for the transfer of the proceeding being confirmed by that Court, it is necessary, within the meaning of s 153(5) of the *Federal Circuit and Family Court of Australia Act* for this Order to be made, including upon the Undertakings that have been proffered to the Court and accepted by it;

(8) the facts and circumstances recorded in this notation will be more fully explained in *ex tempore* reasons for judgment to be delivered.

Note: The form of the order is subject to the entry in the Court's records.

Note: This copy of the Court's Reasons for judgment may be subject to review to remedy minor typographical or grammatical errors (r 10.14(b) *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 10.13 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT
(*Ex tempore* and subject to revision)

JUDGE A KELLY

Introduction

1 These reasons for judgment explain why interim orders have been made on an urgent basis granting relief that will preserve the *status quo* pending the confirmation of a decision that the proceeding should be transferred to the Federal Court of Australia and for the hearing and determination of the substantive issues in contention between the parties in this proceeding.

2 In summary, the court is satisfied such interim relief should be granted as to do so is necessary to maintain the court's authority to hear and determine the proceeding and to afford the parties an adequate opportunity to address the suggested merit of the grounds upon which the applicant seeks to challenge a decision by the respondent, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, to cancel his Temporary Activity (Subclass 408) visa that was granted to him on 18 November 2021. In this, the second, application for judicial review, the applicant seeks to establish that the cancellation of his visa, purportedly made in the exercise of a personal, non-delegable, power conferred on the respondent pursuant to s 133C(3) of the *Migration Act 1958* (Cth) (including, perhaps, both the decision itself in the process by which that decision was made), are tainted by jurisdictional error of a material kind sufficient so as to attract the exercise of the discretionary power conferred by s 476(1) of the *Migration Act* to quash the decision and remitted to the Minister for reconsideration.

Background

3 The applicant, a Serbian citizen, is a professional tennis player of international renown.

4 On 18 November 2021, the applicant was issued his temporary activity visa.

5 It does not appear that any provisions or conditions (of the kind which are not uncommonly located, for example, in the *Migration Regulations 1994* (Cth) or ministerial directions as may be authorised and made pursuant to s 499 of the *Migration Act*), expressly proscribed the applicant from travelling to, entering or remaining temporarily in Australia where he had not been vaccinated against Covid-19. The search for any such express proscription lay elsewhere.

6 Any general express requirement for such vaccination may be located in various documents promulgated by the Australian Technical Advisory Group on Immunisation (***ATAGI***), a body

established by the Commonwealth Department of Health. The first is entitled "*ATAGI expanded guidance on acute major medical conditions that warrant a temporary medical exemption relevant for Covid-19 vaccines*" that was updated on 26 November 2021. This guidance was augmented by further advice furnished by ATAGI on 14 December 2021 in relation to the definition of the expression "*fully vaccinated*" as applied, it seems, to "*people returning from overseas travel*". While the status of this 'guidance' remains to be determined, the court takes judicial notice of the significant impact which the outbreak of this pandemic has had worldwide and in particular, on the Australian economy, its peoples, their livelihoods, their physical and mental health and that these are matters for government policy. So much was accepted by the parties: *Evidence Act 1995* (Cth), ss 144(1)(a)-(b), 144(4).

7 ATAGI's expanded guidance was stated as applying generally (i.e., across the board), but was framed in an orthodox manner such that the *general* requirement necessarily admitted of exceptions. Relevantly, an exception that may be available in relation to what is contended to be a general requirement for vaccination is that which arises where a person has been granted a medical exemption. It is unnecessary for the purposes of the present application to examine in particular detail the facts and circumstances giving rise to the application for, and the grant of, the applicant's visa. Suffice it to say, the applicant contends that he completed an Australian Travel Declaration and furnished a medical exemption from vaccination against Covid-19 that was assessed by the Department of Home Affairs of the Australian Government.

8 Following the applicant's arrival in Australia late on Wednesday, 5 January 2022, he was taken to immigration clearance where he was questioned during a series of interviews conducted over several hours until the morning of Thursday, 6 January 2022. Before ordinary business hours on that day, a decision was purportedly made by a delegate of the Minister for Home Affairs to cancel the applicant's visa. When the making of the decision was communicated to the applicant, he immediately commenced a proceeding in this court seeking to quash the decision.

9 Interim relief was granted to the applicant late on 6 January 2022 and the matter was set down for final hearing to commence on Monday, 10 January 2022 (with a number of interim hearings being conducted on 8-9 January 2022). Ultimately, the parties to that proceeding were agreed in orders quashing the cancellation decision made on 6 January 2022 and for the applicant's immediate release from detention. However, at the time when those orders were pronounced, counsel for the Minister for Home Affairs quite candidly and properly disclosed to the court his instructions that the Minister for Immigration, Citizenship, Migrant Services and

Multicultural Affairs had under active consideration whether the personal power conferred by s 133C(3) of the *Migration Act* to cancel the applicant's visa would be exercised.

10 At a time that is presently not disclosed by the evidence, the parties to this proceeding engaged in further communications, including that the applicant made detailed submissions (and supplied supporting documentation) to the respondent in relation to the exercise of power pursuant to s 133C(3) of the *Migration Act*. The respondent took some time to consider those submissions. At about 5:45 p.m. on Friday, 14 January 2022, the respondent made a decision to cancel the applicant's visa, purportedly doing so in the exercise of power under s 133C(3).

11 In a media statement made by the respondent, the Minister advised that the exercise of his power under s 133C(3) "*on health and good order grounds, on the basis that it was in the public interest to do so*." The Minister further advised that his decision followed orders made by this court on 10 January 2022, quashing the first decision on procedural fairness grounds alone (and as to which it may be noted the parties were agreed in the making of those orders). The Minister further stated that in making his decision he had "*carefully considered information provided to me by the Department of Home Affairs, the Australian Border Force and Mr Djokovic*." The Minister expressed the government's firm commitment "*to protecting Australia's borders, particularly in relation to the Covid-19 pandemic*." The applicant has now been invited to attend upon immigration authorities for interview on Saturday, 15 January 2022. Upon the principles considered below he is liable to be placed in detention immediately. In that connexion the applicant would be being treated no differently from any other person who, for the purposes of the *Migration Act*, answers the description of an unlawful non-citizen.

12 The respondent provided a statement of reasons for the decision made, purportedly pursuant to s 133C(3) of the *Migration Act* together with a 'submission for decision' made to the respondent by the Minister for Home Affairs. From those documents it appears the respondent has accepted a great many of the applicant's submissions.

13 Included in those documents was reference to the array of materials before the respondent. The list of such materials confirms that the respondent had been provided certain of the documents that had been filed in an earlier proceeding as referred to below.

14 In the urgent circumstances of this application, resort was made to those materials as providing a proper basis upon which these reasons for judgment would be prepared.

Procedural history

15 Conformably with their obligations to act consistently with the overarching purpose to facilitate the just resolution of their dispute according to law and as quickly, inexpensively and efficiently as possible, the parties communicated with the court in relation to the possibility that an urgent application may be made if a decision was made by the respondent to cancel the applicant's visa pursuant to s 133C(3) of the *Migration Act*. As a consequence of those communications it seems the parties were able to avert the necessity for any such application at least until after the respondent had considered the applicant's submissions, made a decision and communicated it to the applicant and his lawyers.

16 Later on Friday, 14 January 2022, the applicant approached the court seeking urgent interim relief in relation to the respondent's cancellation decision. For the purposes of his application, the applicant relied upon an affidavit to which he exhibited certain documents together with a minute of proposed orders which detailed the scope of relief being sought at this point.

17 Having regard to the urgency of the matter, no formal application was filed and upon the undertaking of his senior counsel to file and serve such a document, the court was amenable to the application proceeding on the basis of an oral application.

18 The application was heard in open court and able to be observed via a form of live streaming platform that was established for that purpose. The parties appeared by video link.

Judicial review

19 Part 8 of the *Migration Act* is entitled *Judicial review*, and comprises ss 474-484. Within Div. 1 of Pt. 8, s 474(1) provides that a "*privative clause decision*" is final and conclusive, must not be challenged, appealed against, reviewed, quashed or called into question in any court, and is not subject to prohibition, *mandamus*, injunction, declaration or *certiorari* in any court on any account. In s 474, the expression "*privative clause decision*" has the meaning given to it by s 474(2) and includes a decision, relevantly cancelling a consent or permission (including a visa): *Migration Act*, par 474(3)(c). Further, sub-ss 474(4)-(5) of the *Migration Act*, identify, by a process of exclusion, certain kinds of decisions made pursuant to specified provisions of the Act and regulations which are not privative clause decisions.

20 A decision, or a purported decision, made under s 133C(3) to cancel a visa is not excluded and so falls within the definition of a privative clause decision under Pt 8 of the *Migration Act*.

21 Subject to s 476 of the *Migration Act*, this court has the same original jurisdiction in relation to migration decisions as the High Court has under par 75(v) of the *Constitution*. However, it has no jurisdiction in relation to a primary decision or a privative clause decision.

22 Being a privative clause decision, the respondent's decision is not amenable to judicial review unless it is shown to be vitiated by jurisdictional error: *Migration Act*, ss 474(1)(c), 476(2)(b); *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). Absent jurisdictional error, the court has no jurisdiction to grant relief in respect of the Tribunal's decision: *Migration Act*, s 476(2).

23 The judicial review of an administrative decision is confined to an examination of the legality of the decision under review. It is not a procedure in the nature of an appeal which permits a general review of the decision or a substitution of the decision which the court considers ought to have been made: *Craig v South Australia* (1995) 184 CLR 163, 175; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41-42; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-36; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173, [23] (French CJ, Bell, Keane and Gordon JJ).

24 The applicant bears the onus of demonstrating that the approach taken by the decision-maker manifested a legally erroneous view as to what the application for merits review was about such that the decision-maker thereby lacked authority to make the decision that was made: *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173, [24] (French CJ, Bell, Keane and Gordon JJ) citing *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, [55] (Gleeson CJ and McHugh J).

25 The jurisdiction, being supervisory, is to quash a decision on established grounds, the most important of which is jurisdictional error, and, where appropriate, to order that the matter be remitted and reconsidered according to law: *Craig v South Australia* (1995) 184 CLR 163, 175 (Brennan, Deane, Toohey, Gaudron and McHugh JJ). The court's role on judicial review is supervisory and confined: "*The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power*." *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, [36] (Brennan J); see also, *Minister for Border Protection v SZVFW* (2018) 357 ALR 408, [51] (Gageler J).

Applicable principles – visas to travel to, enter and remain in Australia

26 The object of the *Migration Act* is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. In the advancement of that object, the Act provides for visas permitting non-citizens to enter or remain in Australia, it being intended that the Act be the only source of a non-citizen's right to so enter or remain in this country and that the Act should provide for the removal or deportation from Australia of non-citizens whose presence in Australia is not, or is no longer, permitted: *Migration Act*, s 4.

27 Subject to the Act, the Minister may grant a non-citizen permission, to be known as a visa, to travel to, enter and remain in Australia: Act, s 29(1). Subject to the Act and regulations, a non-citizen who wants a visa, must apply for a visa of a particular class: *Migration Act*, 45(1). The regulations may provide that visas may only be granted in specified circumstances and are subject to specified conditions: *Migration Act*, 40-41.

28 Subject to presently immaterial provisions, upon considering a valid visa application, if satisfied that the criteria applicable to a visa application have been satisfied, the Minister must grant the visa; alternatively, if not so satisfied, the Minister must refuse it: *Migration Act*, s 65(1). The Minister is required to notify an applicant whether the visa application has been granted or refused and, relatedly, the decision to do so is taken to have been made on the day and at the time that a record of the decision to do so is made: *Migration Act*, ss 66(1), 67(4).

29 Upon its grant, and subject to an immaterial proviso, "*a visa has effect as soon as it is granted*". For the avoidance of doubt, for the purposes of the Act, a non-citizen who holds a visa does so *at all times* during the visa period for which it is granted.

30 The *Migration Act* makes extensive provision for the discrete circumstances in which a visa may be cancelled. Within Pt. 2 of the *Migration Act*, each of subdivisions C, D, E, F, FA, FB, G, GB, GC and H (comprising ss 97-140) address the circumstances in which a visa may be cancelled (and the respective procedures to each form of cancellation). It should be recognised each cancellation power lies within a particular statutory framework. Relevantly, a visa may be cancelled where, upon certain pre-conditions being made out, the Minister may be satisfied that a personal power to do so is engaged and the discretion to do so may be exercised.

31 A visa that is cancelled ceases to be in effect upon cancellation: ss 68(1), 77, 82(1).

32 Within Pt. 2 of the Act, *Arrival, presence and departure of persons*, Sub-div D of Div. 3, *Visas for non-citizens*, provides that *Visas may be cancelled on certain grounds* and comprises

ss 116-118. A visa may be cancelled when a non-citizen is in immigration clearance: Act, par 117(1)(b). Section 116, which is of particular import to the present application confers power on the Minister to cancel a visa in certain circumstances and relevantly provides:

> *(1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:*
>
> *(a)-(c)* . . .
>
> *(d) if its holder has not entered Australia or has so entered but has not been immigration cleared – it would be liable to be cancelled under Subdivision C (information given by holder) if its holder had so entered and been immigration cleared; or*
>
> *(e) the presence of its holder in Australia is or may be, or would or might be, a risk to:*
>
> *(i) the health, safety or good order of the Australian community or a segment of the Australian community; or*
>
> *(ii) the health or safety of an individual or individuals; or*
>
> *(f)-(g)* . . . .
>
> *(1AA)-(2)* . . .
>
> *(3) If the Minister may cancel a visa under subsection (1), (1AA), (1AB) or (1AC), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.*

It is convenient to observe s 116 is structured so as to provide, disjunctively, for a series nine broad categories of circumstance in which the statutory power conferred by that section may be engaged. For the purposes of the Act, the term '*prescribed*' means prescribed by the regulations: Act, s 4. It does not appear that any other provisions in s 116 are relevant.

33 Within Div. 3 of Pt. 2, Sub-div E, which comprises ss 118A-127, addresses the subject, *Procedure for cancelling visas under Subdivision D in or outside Australia*, and are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters with which they deal: *Migration Act*, s 118A(1)-(2).

34 Where it applies, s 119 imposes an obligation upon the Minister to notify a visa holder if he or she is considering cancelling a visa including by providing particulars of the grounds and further, by inviting the visa holder to show within a specified period that those grounds do not exist or why there is reason for not cancelling the visa. Depending on the particular case, such a notice may, or may not, need to be given in a prescribed way: 119(2)-4).

35 When the Minister decides to cancel a visa, the visa holder must be notified of the decision in a prescribed way including by specifying the ground for cancellation: s 127.

36 Other provisions within Sub-div E of Div. 3 do not appear relevant.

Ministerial cancellation of visas

37 Within Div. 3 of Pt. 2, Sub-div. FA, which comprises ss 133A-133F, addresses the subject, *Additional personal powers for Minister to cancel visas on section 109 or 116 grounds*.

38 By way of overview, amongst the several personal powers conferred on the Minister under this subdivision of the *Migration Act*, the provisions are structured in a manner which distinguish between those actions by the Minister to which the rules of natural justice will apply, and to those other actions to which any natural justice requirements are expressly excluded. Repeated features of the provisions of this Sub-div FA include that: (a) the powers to cancel a visa are conferred in imperative terms which require the Minister to exercise the power personally (i.e. such powers are non-delegable); (b) the provisions are expressed in terms making it clear that the power of cancellation is not coupled with a duty to consider whether to exercise certain other powers; (c) in some cases, the scope of the cancellation power is not limited by s 138(4) (and which, although immaterial, removes power in the Minister to vary or revoke a decision to cancel a visa after a record of such decision has been made).

39 Section 133C is entitled *Minister's personal powers to cancel visas on section 116 grounds* and is structured under three subheadings: *Action by Minister – natural justice applies*; *Action by Minister – natural justice does not apply*, and; *Ministers exercise of power*.

40 Relevantly, ss 133C(3)-(6), each of which fall within the second category above (*Action by Minister – natural justice does not apply*), read:

> *(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 exist; and*
> >
> > *(b) the Minister is satisfied that it would be in the public interest to cancel the visa.*
>
> *(4) The rules of natural justice, and the procedures set out in Subdivisions E and F do not apply to a decision under subsection (3).*
>
> *(5) The Minister may cancel a visa under subsection (3) whether or not:*
>
> > *(a) the visa holder was given a notification under section 119 in relation to the ground for cancelling the visa; or*
> >
> > *(b) the visa holder responded to any such notification; or*

> *(c) the Administrative Appeals Tribunal . . .*
>
> *(i) . . .*
>
> *(ii) . . .*
>
> *(d) a delegate of the Minister decided to revoke, under subsection 131(1), a cancellation of the visa in accordance with section 128 in relation to the ground.*
>
> *(6) If a decision was made as mentioned in paragraph 5(c), the power under subsection (3) to cancel a visa is a power to set aside that decision and cancel the visa.*
>
> ***Note**: The Minister's power to cancel a visa under this subsection is subject to section 117 (see subsection (9) of this section)*

41 In the result, the personal power conferred on the Minister to cancel the visa under s 133C(3) is a power: (a) to which the rules of natural justice do not apply; (b) to which the procedures set out in Sub-div E (notice of cancellation and provision of particulars coupled with invitation to comment within prescribed period *et cetera*), do not apply; (c) to which the procedures set out in Sub-div F (cancellation for visa holders outside of Australia, provision of particulars coupled with invitation to comment within prescribed period *et cetera*), do not apply. Where the power is engaged, it may be exercised whether or not the visa holder was: (i) notified pursuant to s 119 that cancellation of the visa was under consideration; (ii) given particulars of the grounds under s 116 upon which it appeared to exist that the Minister may be satisfied the visa might be cancelled, or; (iii) invited to show, within a specified time that such ground did not exist or there was good reason why the visa should not be cancelled.

42 Above the heading to ss 133C(7)-(10), *Minister's exercise of power*, provision is made that the power of cancellation is non-delegable and is not coupled, relevantly, with a duty to consider whether to do so. Further, s 117 which makes provision for the circumstances "*When visa may be cancelled*" applies, so far as is material to the conferral of power under s 133C(3) and so applies "*in the same way as it applies to the cancellation of a visa under section 116*."

43 Section 133F confers power on the Minister to revoke certain cancellation decisions, including those made under s 133C(3).

44 As the text of s 133C(3) makes clear, and as is confirmed by its context within the broad range of other cancellation powers conferred by Div. 3 of Pt 2 and the other cancellation powers conferred by the *Migration Act* more broadly (including, for example, s 500), the personal discretionary power of cancellation is confined by its express terms.

45 It is beyond the scope of the present application to determine whether or not the limitations on the power conferred by s 133C(3) serve to magnify or diminish the importance of demonstrating the existence of facts and circumstances upon which the Minister could properly determine that he or she should or should not be satisfied that: (a) a ground for cancelling the visa under s 116 exists, *and*; (b) it would be in the public interest to cancel the visa. For immediate purposes the self-evidently significant and immediate consequences of cancellation to the visa holder should be observed. But it is in the context of those significant and immediate consequences that demonstration of the existence of facts and circumstances capable of supporting a conclusion that each of the criterion in s 133C(3)(a) and (b) (namely, the existence of a valid ground under s 116 for cancellation together with a conclusion it would be in the public interest to cancel the visa fall for examination) are of such importance.

46 Upon cancellation, a person who held a valid visa becomes an unlawful non-citizen. Persons who are unlawful non-citizens are to be detained and removed from Australia as soon as is reasonably practicable, including where the non-citizen asks the Minister, in writing, to be so removed: Migration Act, ss 14, 189, 198.

Consideration

47 The respondent's cancellation decision is a privative clause decision for the purposes of s 476 of the *Migration Act* and accordingly this court's jurisdiction is confined by that section.

48 Unless the applicant, who bears the onus of proof, is able to demonstrate that the respondent's cancellation decision is tainted by jurisdictional error, the court has no jurisdiction to quash it, or to grant relief in relation to it, and the decision is thus final and conclusive. However, and despite the very wide terms in which it is expressed, a statutory, non-delegable, discretion to cancel a visa pursuant to s 133C(3) is by nature, neither unfettered nor at large.

49 In *NAAV v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 228, 123 FCR 298, French J (as his Honour then was), stated at [451]-[453]:

> *451 In determining whether a decision made in purported exercise of a statutory power is invalid for exceeding that power, it is necessary to consider the provision conferring the power and its constitutional and statutory setting. There is no such thing as an absolute or unlimited statutory power. Every Commonwealth statute and every power it confers is confined by constitutional limits. It must be a law with respect to one of the subjects on which the Commonwealth Parliament may make laws under the Constitution. It cannot confer upon an administrative body the judicial power of the Commonwealth. It cannot transgress constitutional prohibitions. Nor, can it reduce the jurisdiction conferred directly on the High Court by the Constitution although it may, by the width of the powers conferred or duties imposed, affect the range of actions in respect of which that jurisdiction may be invoked. A*

statute conferring a power which apparently exceeds any of these limits must be read down, if that be possible, so that its operation will be confined within the boundaries of validity - s 15A of the Acts Interpretation Act. In the case of the Migration Act there is additional provision in s 3A for the severance of valid from invalid applications, if any, of an offending provision.

452 Every statutory power, whether subject to an express condition or not, is confined by the subject matter, scope and purpose of the legislation under which it is conferred - Water Conservation and Irrigation Commission (NSW) v Browning [1947] HCA 21; (1947) 74 CLR 492 at 505 (Dixon J), see also 496 (Latham CJ); R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd [1979] HCA 62; (1979) 144 CLR 45 at 49-50; FAI Insurances Ltd v Winneke [1982] HCA 26; (1982) 151 CLR 342 at 368 (Mason J); Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24 at 40 (Mason J); O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); and Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 at 84 (Gaudron and Gummow JJ). A privative clause, however widely expressed, cannot affect those defining attributes of the statute in which it appears, a fortiori where there is, as in the Migration Act, an express statement of its objects. In addition to these general parameters there may be particular conditions on powers expressly imposed by the terms of the statute.

453 The Migration Act and the Regulations made under it are replete with powers conferred on the Minister and his officers, as well as upon the Tribunals which the Act establishes. Those powers are variously subject to different kinds of conditions which may be classified as follows:

1. A condition precedent requiring the existence of a fact before the power can be exercised.

2. A condition precedent which requires the decision-maker's reasonable belief or suspicion that a fact exists before the power can be exercised.

3. A condition precedent that requires the decision-maker's state of satisfaction as to the existence of a fact before the power can be exercised.

4. A condition which defines the content of the power by reference to its subject matter.

5. A condition which prescribes procedures incidental to or governing the manner of exercise of the power.

50 Later at [455], his Honour addressed the nature of a condition which turned upon the formation of ministerial satisfaction stating:

An example of the third kind of condition is the Minister's state of satisfaction that the various criteria for the grant of a visa have been satisfied (s 65). So too is the requirement for ministerial satisfaction of certain matters before a visa can be cancelled (s 116). Indeed the formation of the relevant opinion or state of satisfaction will be a jurisdictional fact (discussed below) so that the power is not validly exercised if it does not exist - Minister for Immigration & Multicultural Affairs v Eshetu (1999) 197 CLR 611 ("Eshetu") at 653-657 (Gummow J):

> *"A determination that the decision-maker is not `satisfied' that an applicant answers a statutory criterion which must be met before the decision-maker is empowered or obliged to confer a statutory privilege or immunity goes to the jurisdiction of the decision-maker and is reviewable under s 75(v) of the Constitution." (651)*

Where a condition on a statutory power requires formation of an opinion or a state of satisfaction as to a matter it is necessary that the opinion or state of satisfaction be based upon a correct interpretation of the relevant statute. In R v Connell; Ex parte Hetton Bellbird Collieries Ltd [1944] HCA 42; (1944) 69 CLR 407, Latham CJ said at 430:

> *"Thus, where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist. A person acting under a statutory power cannot confer power upon himself by misconstruing the statute which is the source of his power."*

And at p 432:

> *"If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of the power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide."*

See also Buck v Bavone [1976] HCA 24; (1976) 135 CLR 110, at 118-119 for a similar statement by Gibbs J and Foley v Padley [1984] HCA 50; (1984) 154 CLR 349, for approval of Latham CJ's opinion by Gibbs CJ at 353 and Brennan J at 370. These and related authorities were cited by Gummow J in Eshetu at 652. Where an official or ministerial opinion or state of satisfaction as to a fact is not expressly required to be reasonably based in fact the Court would not ordinarily review it on the ground of the non-existence of the fact that is its subject. But where it can be shown that the opinion or state of satisfaction rests upon error of law such as misconstruction of the statute then it is not the opinion or state of satisfaction required for the exercise of the power. In Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 194, at 208-209 Gleeson CJ, Gaudron and Hayne JJ also referred with approval to what Latham CJ said in Hetton Bellbird Collieries when they observed that the Full Bench of the Commission would have committed jurisdictional error if, inter alia, it "misunderstood the nature of the opinion it was to form". See also Minister for Immigration & Multicultural Affairs v Jia (2001) 178 ALR 421, at 438-439 per Gleeson CJ and Gummow J and Re Patterson; Ex parte Taylor [2001] HCA 51; (2001) 182 ALR 657, at 676 (Gaudron J), 698 (Gummow and Hayne JJ) and 742 (Kirby J).

Those principles were applied in *AZAFX v Federal Circuit Court of Australia* (2016) 244 FCR 401, [77]-[78] (Charlesworth J).

51 More recently, the High Court has confirmed it to be well-settled that the "*satisfaction of the Minister or delegate required to meet that precondition is a state of mind formed reasonably and on a correct understanding and application of the applicable law*": *Shrestha v Minister for Immigration and Border Protection* [2018] HCA 35, [2] (Kiefel CJ, Gageler and Keane JJ) (citing *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 35 [33]), [33] (Nettle and Edelman JJ); see also *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69.

52 These principles are applicable whether one is concerned with the question of ministerial "*satisfaction*" for the purposes of ss 116, 133C(3) or cognate provisions of the *Migration Act*.

53 For obvious and good reason, satisfaction of health criteria may be made essential to the grant or refusal, respectively, of a visa: see, e.g., *Migration Act*, 65(1)(a)(i). For the purposes of statutory interpretation, words in the singular include the plural. Further, where in any Act a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings: *Acts Interpretation Act 1901* (Cth), ss 18A, 23. In the *Migration Act*, the expression "*health criterion*" is given a particular meaning and for the purposes of statutory interpretation of that Act, the expression "*health criterion*" bears the meaning which provided by s 5. Although it has not been the subject of argument, it is unclear whether the combined effect of the requirement for ministerial satisfaction as expressed in par 65(1)(a)(i), coupled with the definitions of "*health criterion*" and "*prescribed*" in s 5, confine the issue of '*health criteria*' as including only those criteria prescribed by regulation.

54 For present purposes, it is unnecessary to determine whether there in fact exists in Australia (or the state of Victoria), any legally enforceable obligation to be vaccinated against Covid-19. The existence of such an obligation had been the subject of contest between the applicant and the Minister for Home Affairs in the earlier proceeding and may or may not be the subject of contest between the applicant and the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs in this proceeding. Whether any such legal obligation exists requires that it be identified in some valid legislation, regulations or subordinate regulations. Relatedly, where a person has been granted a visa together with a medical exemption for vaccination and his or her Australian Travel Declaration has been assessed and approved by the Department for Home Affairs, the existence of those facts may inform consideration of whether the criteria essential to engagement of the power conferred by s 133C(3) are made out.

55 As stated, the parties were in contest upon the existence of such a legal obligation, but in any event, the applicant has only ever advanced his entitlement to a visa permitting him to travel to, enter and remain in Australia temporarily on the basis that any such general requirement did not apply as he had sought and been granted a medical exemption for such vaccination and that such medical exemption had been provided by an Independent Expert Medical Review Panel comprising two highly qualified medical practitioners, such panel being commissioned by Tennis Australia and in circumstances where the exemption provided by that panel had been assessed and approved by a further Independent Expert Medical Review Panel which had been commissioned by the government of the state of Victoria.

56 By 116(1) of the *Migration Act*, no less than nine alternative generic grounds are provided the satisfaction of which engages a discretionary statutory power in the Minister to cancel a visa. However, in each case, the discretionary power to do so is not enlivened unless the Minister is satisfied of the existence of such a ground.

57 Upon the basis of the decision announced at about 5:45 p.m. on Friday, 14 January 2022, for the purposes of engaging s 133C(3), the head of power relied upon under s 116 was the ground specified in par (1)(e) of that provision, being the health of the Australian community. Further, as I understood it, the respondent also considered it to be in the public interest to cancel his visa, by reason of a perceived need to quell the risk, as it seemed to be said, of so-called 'anti-vaxers', deploying the applicant's presence in Australia as some sort of vehicle upon which to rally in support of their cause. Without the benefit of argument it was more difficult to locate the source of this discrete head of power in s 116.

58 It is not necessary to examine in detail the nature of ministerial satisfaction or to finally determine the relative merits of the parties' competing contentions whether a ground exists under s 116 of the *Migration Act* for the respondent to cancel the applicant's visa, or whether the criterion for ministerial satisfaction whether it would be in the public interest for the respondent to cancel the applicant's visa pursuant to s 133C(3). That is because in my view, it is sufficient to record my conclusion I am satisfied that the applicant has demonstrated there is a reasonably arguable case; that is, there is a serious question to be tried whether a ground for cancellation existed under s 116 to do so. Stated in other terms, if no such ground existed, the primary and essential criterion for engagement of the personal power to cancel a visa as expressed in par 133C(3)(a) might not exist. In that event, the discretionary power conferred by s 133C to cancel the visa would not be enlivened. That is because ministerial satisfaction respecting the matters in each limb of s 133C(3)(a) and (b) is essential to the existence of the Minister's statutory discretionary personal power to consider cancellation. Further, if facts and circumstances capable of supporting the precondition to par 133C(3)(a) were not demonstrated, no occasion would arise to address whether the secondary, and equally, essential, criterion expressed in par 133C(3)(b) was satisfied. In each case, the nature of the satisfaction of the Minister that is necessary and sufficient to engage the power in s 133C(3) "*is a state of mind formed reasonably and on a correct understanding and application of the applicable law.*"

Resolution

59 The urgency of the present application brings to the fore, the importance to the rule of law in this society that parties may resort to the court to determine their disputes. Maintenance of the rule of law is the source or foundation of the court's power to make such orders as it considers proper or necessary to enable the parties' substantive dispute to be determined.

60 Not uncommonly, parties confronted by such urgent circumstances may seek a stay of orders pending appeal. In other cases, an adjournment may be the appropriate relief: see, for example, *Tait v The Queen* (1962) 108 CLR 620. There, Dixon CJ, speaking for the Court, stated that appropriate relief should go "*without giving any consideration to or expressing any opinion as to the grounds upon which they are to be based, but entirely so that the authority of this Court may be maintained and we may have another opportunity of considering it*." The same principle was applied in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 1]* (1998) 72 ALJR 868, [1]-[2], (Hayne J)

61 The principle is equally applicable where the jurisdiction of a Federal Court is sought to be engaged in relation to decisions made under the *Migration Act*, including where prerogative relief is sought to quash an administrative decision: see, e.g., *Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu* (2000) 171 ALR 341, [7] (Gleeson CJ). As *Ex parte Fejzullahu* confirms, the grant of relief in circumstances of the present kind requires the court to be satisfied that it is appropriate to preserve the subject matter of a dispute pending its final resolution, or otherwise to maintain the *status quo* so as to enable a court to do justice between the parties. The Chief Justice stated as follows:

> *The proceedings presently before the Court, that is to say, the applications for urgent injunctions, invoke the Court's power, in an appropriate case, to make an interim order which will, in practical effect, preserve the subject matter of a dispute pending its final resolution, or otherwise maintain the status quo so as to enable a court to do justice between the parties. The principles according to which such a power will be exercised are well established. As Mason ACJ pointed out in Castlemaine Tooheys Ltd v South Australia, the principles which are to be applied in the exercise of the discretionary power to grant or refuse an interlocutory injunction in private law cases are also applied in public law cases, notwithstanding that different factors may arise for consideration in giving practical effect to those principles. The applicants must show that there is a serious question to be tried in the principal proceedings, and that the balance of convenience favours the granting of an injunction.* (Citation omitted)

62 More recently, in *Hong v Minister for Immigration and Border Protection* [2019] HCATrans 167, Bell J applied the principles stated in *Ex parte Fejzullahu* above that it may be necessary to demonstrate exceptional circumstances before such relief would be granted. Although that

application involved a cancellation decision made by a delegate pursuant to s 501(3A) of the *Migration Act*, her Honour was persuaded to grant relief on the basis that the applicant's prospects of success were not insubstantial and that the balance of convenience favoured the grant of relief, doing so in circumstances where no prejudice was identified by the Minister arising from deferral of the deportation until determination of the pending application.

Conclusion

63 It cannot be overlooked that the rights which inhere in a visa are of real and substantial value. The destruction of such rights, as by cancellation, are to be considered from that perspective. Upon the foregoing principles, it is appropriate to grant relief in this case. It is then necessary to address the relief that is appropriate to be granted in the case.

64 As raised in the course of argument, it was necessary for the applicant, through his counsel to proffer certain undertakings which condition the relief to be granted. Senior counsel have proffered, and the court has accepted, those undertakings.

65 Having regard to the Undertakings which were proffered on behalf of the respondent and accepted by the court, it became unnecessary to grant interim relief restraining the respondent from taking or attempting to take any steps to remove the applicant from the jurisdiction.

66 It is also desirable that the proceeding be transferred to the Federal Court of Australia. It is necessary to explain, however briefly, why this conclusion has been reached. As stated above, limited jurisdiction is conferred on this court to grant relief by way of judicial review where an administrative decision made under the *Migration Act* is shown to be tainted by jurisdictional error. It will not do so unless the error is shown to be material in the requisite sense.

67 By s 137(1) of the *Federal Circuit and Family Court of Australia Act 2021*, jurisdiction of Div. 2 of this court is to be exercised by the court constituted by a single Judge. When called upon to exercise jurisdiction, the Judge may give directions under s 192(1). Included in the directions that the court is empowered to give in a civil proceeding is a direction requiring things to be done: see par 192(2)(a). Relatedly, s 153(1) confers a discretionary and qualified power in the court to transfer a proceeding to the Federal Court of Australia.

68 While the court may transfer the proceeding of its own initiative, a non-exhaustive list of matters that the court must have regard to are detailed s 153(3). An order for transfer is qualified by s 153(3) inasmuch as the order is not operative and does not take effect until it has

been confirmed pursuant to s 32AD(1) of the *Federal Court of Australia Act 1976* (Cth). Section 32AD addresses matters relevant to the exercise of discretion to confirm a transfer.

69 An ancillary order was required directing that the parties forthwith do all things and take all steps were reasonably necessary to make application seeking confirmation of the transfer of the proceeding pursuant to s 32AD(1) of the *Federal Court of Australia Act*. Should the Federal Court of Australia determine not to confirm the transfer of the proceeding, it will be remitted immediately to this court for hearing and determination.

70 I have concluded that it is in the interests of the administration of justice to make an order for the transfer of the proceeding. The objects and requirements stated in ss 5(a), 139(d) and 190 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth), are: to ensure that justice is delivered by federal courts effectively and efficiently; to ensure all matters in controversy between the parties may be completely and finally determined (and, in particular, that all multiplicity of proceedings concerning such matters may be avoided). Overarching purposes of civil practice and procedure provisions of that Act are to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible including by the efficient use of the judicial and administrative resources available in a timely manner.

71 In my view it is consistent with the furtherance of those objects, including to minimise the application of further resources and incurring of significant costs to each of the parties (including appeals), for the matter to be transferred without delay.

72 Notwithstanding the jurisdiction conferred by s 476 the *Migration Act* upon this court to hear and determine proceedings by way of judicial review, an additional power conferred by s 26(1) of the *Federal Court of Australia Act 1976* (Cth), allows for the referral to a Full Court of questions that may be reserved for its consideration.

73 It does not appear, and having regard to the divisional nature of this court, I would not expect to locate, any correlative provision in the *Federal Circuit and Family Court of Australia Act 2021*. To say as much is only to underline the importance of achieving the object that justice is delivered by federal *courts* effectively and efficiently and this should occur in a manner that secures the just resolution of the parties' disputes according to law, as quickly, inexpensively and efficiently as possible and in a timely manner.

74 Further, the court was satisfied it was in the interests of the administration of justice that, pending the order for the transfer of the proceeding being confirmed, and necessary, within the

meaning of s 153(5) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth), for these orders to be made.

75 Having regard to the attention which this matter has attracted to date, I considered it appropriate to include a series of notations providing a narrative of salient points which might render the aspects of particular orders, and the reasons they were made, more readily understandable.

I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Judgment of Judge A Kelly.

Associate:

Dated: 15 January 2022