Federal Court of Australia

Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 3

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| File number: |  |
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| Judgment of: | **ALLSOP CJ, BESANKO AND O’CALLAGHAN JJ** |
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| Date of judgment: | 16 January 2022 |
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| Date of publication of reasons: | 20 January 2022 |
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| Catchwords: | **MIGRATION** – application for review of decision of the Minister to cancel visa under personal power under s 133C(3) of the *Migration Act 1958* (Cth) – where Minister satisfied that a ground for cancelling the visa under s 116 of the *Migration Act* existed – where Minister satisfied that the presence of the applicant in Australia may be a risk to the health, safety or good order of the Australian community under s 116(1)(e)(i) of the Migration Act – where Minister satisfied under s 133C(3)(b) of the Migration Act that it would be in the public interest to cancel the visa – application dismissed |
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| Legislation: | *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 153, 153(1)  *Federal Court of Australia Act 1976* (Cth) ss 20(1A), 32AD, 32AD(3)  *Migration Act 1958* (Cth) ss 116, 116(1)(e)(i), 133C, 133C(3), 133C(3)(a), 133C(3)(b), 133C(4), 476, 476A  *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) |
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| Cases cited: | *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195; 395 ALR 57  *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; 78 CLR 353  *Boucaut Bay Company Ltd (in Liq) v Commonwealth* [1927] HCA 59; 40 CLR 98  *Buck v Bavone* [1976] HCA 24; 135 CLR 110  *Council of the Municipality of Bankstown v Fripp* [1919] HCA 41; 26 CLR 385  *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; 253 FCR 496  *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FedCFamC2G 7  *Federal Commissioner of Taxation v Brian Hatch Timber Co. (Sales) Pty Ltd* [1972] HCA 73; 128 CLR 28  *Leota v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1120  *Lewis v Australian Capital Territory* [2020] HCA 26; 381 ALR 375  *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40;162 CLR 24  *Minister for Home Affairs v DUA16* [2020] HCA 46; 385 ALR 212  *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; 240 FCR 158  *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437  *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1  *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541  *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332  *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611  *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611  *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 207 ALR 12  *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19* [2021] FCAFC 133  *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; 395 ALR 403  *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17;390 ALR 590  *Newall v Minister for Immigration and Multicultural Affairs* [1999] FCA 1624  *R v Connell; Ex Parte Hetton Bellbird Collieries Ltd (No 2)* [1944] HCA 42; 69 CLR 407  *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* [2003] HCA 30; 198 ALR 59  *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22; 254 CLR 28  *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2015] HCA 3;255 CLR 231  *Tien v Minister for Immigration and Multicultural Affairs* [1998] FCA 1552; 89 FCR 80  *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; 257 CLR 22  Aronson M, Groves M and Weeks G, *Judicial Review of Administrative Action and Government Liability* (7th ed, Thomson Reuters, 2021) |
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| National Practice Area: |  |
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| Number of paragraphs: | 106 |
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| Date of hearing: | 16 January 2022 |
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| Counsel for the Applicant: | Mr P Holdenson QC and Mr N Wood SC with Mr N Dragojlovic and Mr J Hartley |
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| Solicitor for the Applicant: | Hall & Wilcox |
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| Counsel for the Respondent: | Mr S Lloyd SC with Mr C Tran, Ms N Wootton and Ms J Nikolic |
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| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

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|  | | VID 18 of 2022 |
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| BETWEEN: | NOVAK DJOKOVIC  Applicant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  Respondent | |

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| order made by: | ALLSOP CJ, BESANKO AND O’CALLAGHAN JJ |
| DATE OF ORDER: | 16 JANUARY 2022 |

THE COURT ORDERS THAT:

1. The amended application be dismissed with costs, such costs to be agreed or failing agreement assessed.
2. Reasons to be published at a later date.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

# Introduction and background

1. The applicant, Mr Djokovic, is a citizen of Serbia. He is currently the world’s number 1 ranked men’s tennis player. Mr Djokovic was issued a Class GG subclass 408 Temporary Activity visa on 18 November 2021 for the purpose of competing in the Australian Open Tennis Championship.
2. He arrived in Australia on 5 January 2022. Upon his arrival, he was taken to immigration clearance and questioned by officers of the Department of Home Affairs until the early hours of 6 January 2022.
3. On the same day, his visa was purportedly cancelled by a delegate of the Minister for Home Affairs under s 116(1)(e)(i) of the *Migration Act 1958* (Cth) (the **Act**). That provision is at the centre of the proceeding and is in the following terms:

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

…

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

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

Subsections (2) and (3) are not relevant.

1. Mr Djokovic immediately commenced a proceeding in the Federal Circuit and Family Court of Australia (Division 2) seeking to quash the decision to cancel his visa on the ground that the process adopted by the delegate of the Minister for Home Affairs in cancelling the visa was legally unreasonable.
2. A Judge of the FCFC granted Mr Djokovic interim relief late on 6 January 2022. The matter was set down for final hearing to commence on Monday 10 January 2022. At the hearing on that day, counsel for the Minister for Home Affairs conceded that the process adopted by her delegate was, as Mr Djokovic alleged, legally unreasonable by reason of a denial of procedural fairness, or to use a synonymous phrase and one used in the Act, “natural justice”. As a result, the Court made an order quashing the purported cancellation decision.
3. Immediately thereafter at the hearing, counsel for the Minister for Home Affairs said that the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the **Minister**), the respondent in this proceeding, would be considering whether to exercise the personal power of cancellation (that is a power not capable of being exercised by a delegate of the Minister, but one only for the Minister’s consideration and exercise personally) pursuant to s 133C(3) of the Act.
4. Sections 133C(3) and (4) are in the following terms:

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

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

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

Note: The Minister’s power to cancel a visa under this subsection is subject to section 117 (see subsection (9) of this section).

(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).

1. As s 133C(4) makes clear, there was no requirement upon the Minister in exercising his powers under s 133C(3) to afford Mr Djokovic natural justice (that is procedural fairness).
2. Mr Djokovic and those who advised him, having been made aware of the Minister’s intentions, provided material and submissions to the Minister as to why the power in s 133C(3) should not be exercised. Late in the day on Friday 14 January 2022, the Minister exercised his power to cancel the visa relying on s 133C(3). By letter dated that day, the Minister advised Mr Djokovic of that decision, and provided a ten page statement of reasons.
3. Under the Act, the FCFC and not the Federal Court of Australia had original jurisdiction to hear what is referred to in the Act as a “privative clause decision”: see generally ss 476 and 476A of the Act.
4. That evening, Mr Djokovic approached the FCFC seeking urgent interim relief in relation to the Minister’s decision to cancel the visa. Because of the urgency of the matter (Mr Djokovic was scheduled to play in the Australian Open Tennis Championship the following Monday), there was insufficient time for Mr Djokovic’s lawyers to prepare a formal written application for judicial review of the Minister’s decision, but senior counsel for Mr Djokovic undertook to file and serve such a document. On that basis, the FCFC granted Mr Djokovic leave to make an oral application and proceeded to hear an oral application for urgent interim relief.
5. Upon Mr Djokovic through his counsel giving the usual form of undertaking as to damages, the Minister undertook not to remove Mr Djokovic from Australia pending the hearing and determination of the application for judicial review: *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FedCFamC2G 7.
6. The FCFC then transferred the proceeding to this Court, pursuant to s 153(1) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth). That decision was confirmed by a judge of this Court on the following day, as a result of which the Federal Court has jurisdiction in relation to this proceeding pursuant to s 32AD(3) of the *Federal Court of Australia Act 1976* (Cth).
7. In the meantime, Mr Djokovic had filed in the FCFC an originating application for review of the decision, together with supporting materials. Subsequently, an amended application dated 15 January 2022 was filed in this Court pursuant to leave granted on that day by the Court.
8. On the same day, pursuant to s 20(1A) of the *Federal Court of Australia Act*, the Chief Justice directed that the original jurisdiction of the Court in this proceeding be exercised by a Full Court. The Chief Justice explained the reasons for making the direction at the commencement of the hearing on the following day, 16 January.
9. The application was heard on Sunday, 16 January. At the conclusion of the hearing, the Court made orders dismissing the amended application, with costs, to be agreed or failing agreement to be assessed. The Court said that it would provide written reasons for the making of those orders. These are those reasons.
10. As will be explained in the reasons below, an application for judicial review is one in which the judicial branch of government reviews, by reference to legality or lawfulness, the decision or decisions of the Executive branch of government, here in the form of a decision of the Minister. The Court does not consider the merits or wisdom of the decision; nor does it remake the decision. The task of the Court is to rule upon the lawfulness or legality of the decision by reference to the complaints made about it.

# The relevant statutory provisions

1. We have set out ss 116(1)(e)(i) and 133C(3) above. The elements of s 133C(3) should be noted: a power or a discretion to cancel a visa (“*may* cancel a visa”) held by a person; if the Minister *is satisfied* that a ground for cancellation under s 116 exists; and (separately and in addition) the Minister *is satisfied* that it would be in the public interest to cancel the visa.
2. The elements of s 116(1)(e)(i) should be noted. As with ss 133C(3)(a) and (b), the power in s 116 is engaged by or conditioned upon the Minister being *satisfied* of certain matters, here satisfied of the matters in para (e)(i). Those matters are, relevantly for present purposes, that the *presence* of the visa holder in Australia is or *may be*, or *might be*, a *risk* to the *health, safety or good order* of the Australian community or a segment of it.

## The state of “satisfaction”

1. Thus it is not the *fact* of Mr Djokovic being a risk to the health, safety or good order of the Australian community; rather it is whether the Minister was *satisfied* that his presence is or may be or would or might be such a risk for the purposes of s 116(1)(e)(i), through s 133C(3).
2. The satisfaction of the Minister is not an unreviewable personal state of mind. The law is clear as to what is required. If, upon review by a court, the satisfaction is found to have been reached unreasonably or was not capable of having been reached on proper material or lawful grounds, it will be taken not to be a lawful satisfaction for the purpose of the statute. In such a case the precondition for the exercise of the power will not exist and the decision will be unlawful and will be set aside. That is, the lawful satisfaction is a jurisdictional precondition, a form of jurisdictional fact, for the exercise of the power or discretion: *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 at 651 [131] and the cases cited at footnote 109.
3. The expression of the requirements of lawful satisfaction have been set out in a number of High Court cases beyond which it is unnecessary to go: *Council of the Municipality of Bankstown v Fripp* [1919] HCA 41; 26 CLR 385 at 403; *Boucaut Bay Company Ltd (in Liq) v Commonwealth* [1927] HCA 59; 40 CLR 98 at 101; *R v Connell; Ex Parte Hetton Bellbird Collieries Ltd (No 2)* [1944] HCA 42; 69 CLR 407 at 430; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; 78 CLR 353 at 360; *Federal Commissioner of Taxation v Brian Hatch Timber Co. (Sales) Pty Ltd* [1972] HCA 73; 128 CLR 28 at 57; *Buck v Bavone* [1976] HCA 24; 135 CLR 110 at 118–119; *Eshetu* 197 CLR at 651–654 [130]–[136]; and *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; 257 CLR 22 at 35 [33].
4. Relevantly, where the satisfaction depends upon satisfaction of a factual state of affairs in particular one involving an opinion, the approach of Latham CJ in *R v Connell*, of Gibbs J in *Buck v Bavone*, of Starke J in *Boucaut Bay* (approved by Windeyer J in *Brian Hatch Timber*) and of Gummow J in *Eshetu* should be noted.
5. Chief Justice Latham in *R v Connell* approached the matter as presenting the question: “whether or not there was evidence upon which [the decision-maker] could be satisfied that [the] rates were anomalous”.
6. Justice Gibbs in *Buck v Bavone* said (amongst other things) the decision-maker must “act in good faith; [he or she] cannot act merely arbitrarily or capriciously” and “where the matter of which the [decision-maker] is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that … [the] decision could not reasonably have been reached”.
7. Justice Starke in *Boucaut Bay* said, amongst other things, that the decision-maker “must not act dishonestly, capriciously or arbitrarily … So long, however, as the Minister acts upon circumstances … giving him a rational ground for the belief entertained, then … the Courts of law cannot and ought not interfere”.
8. Justice Gummow in *Eshetu*, after referring to Gibbs J in *Buck v Bavone*, said the following at at 654 [137]:

…. where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question.

## Findings of fact without relevant evidence or material

1. Related to the above body of principle is a ground of review, invoked in this proceeding in relation to two of the three grounds of review mounted, that a finding of fact, here connected to the formation of a state of satisfaction, was made in the absence of any evidence or supporting material. The High Court (Keane, Gordon, Edelman, Steward and Gleeson JJ) recently put the matter as follows in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; 395 ALR 403 at [17]:

If the Minister exercises the power conferred by s 501CA(4) [a provision in the Act concerning the Minister’s power to revoke the cancellation of a visa] and in giving reasons makes a finding of fact, the Minister must do so based on some evidence or other supporting material, rather than no evidence or no material, unless the finding is made in accordance with the Minister’s personal or specialised knowledge or by reference to that which is commonly known. By “no evidence” this has traditionally meant “not a skerrick of evidence”.

See also Aronson M, Groves M and Weeks G, *Judicial Review of Administrative Action and Government Liability* (7th ed, Thomson Reuters, 2021) at 235–239 [5.8].

## Illogicality, irrationality and legal unreasonableness

1. As a statutory jurisdictional condition or jurisdictional fact (cf Aronson et al *op cit* at 258–260 [5.500]), the satisfaction that the presence of a visa holder may for the purposes of s 116(1)(e) be a relevant risk must be reached on a legally reasonable basis and the discretionary power exercised in accordance with legal reasonableness: *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at 350–351 [26]–[29], 362 [63] and 370 [88]. At one level such is to take the matter, for the lawfulness of a jurisdictional state of satisfaction, no further than the cases to which we have referred above. The state of satisfaction is a jurisdictional precondition or jurisdictional fact and should be distinguished from the exercise of discretion for which the state of satisfaction is a precondition: *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at 624–625 [39]–[40].
2. As Allsop CJ said in *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 at 3–4 [3], [5] and [6], the above statements of principle in *Li* drew upon and drew together a number of well-known expressions and bodies of principle in giving explanatory (not definitional) content to the concept of legal unreasonableness. Further, as the Court (Allsop CJ, Robertson and Mortimer JJ) said in *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437 at 445–446 [44], the Court in *Li* identified two different contexts in which the concept of legal unreasonableness has developed: a conclusion after the identification of jurisdictional error of a recognised specie and an “outcome focused” conclusion without any specific jurisdictional error being identified.
3. That taxonomy should not, however, be taken to mask the interrelationship of result and specific error. Nevertheless here, as shall be seen, the complaints made were directed to identifiable errors: a lack of evidence or material upon which to found central conclusions of fact within the process of reaching a relevant state of satisfaction, illogical or irrational reasoning central to the reaching of the relevant state of satisfaction, and such matters also affecting the exercise of discretion. It was not the applicant’s case that aside from the identified errors the outcome was so overwhelmingly wrong that it must be characterised as unlawful.
4. The nature of jurisdictional error and legal unreasonableness was described by Allsop CJ in *Stretton* at 3–6 [2]–[13]. See also *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; 240 FCR 158 at 170–172 [54]–[65].
5. The characterisation of a decision (or a state of satisfaction) as legally unreasonable because of illogicality or irrationality is not easily made: *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at 551 [11], 564 [52], and 586 [135]; *Minister for Home Affairs v DUA16* [2020] HCA 46; 385 ALR 212 at 220 [26]; *SZMDS* 240 CLR at 647–650 [130]–[135]; *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; 253 FCR 496 at 517–518 [60]; and *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195; 395 ALR 57 at 88 [142].
6. The task in assessing illogicality is not an exercise in logical dialectic. “Not every lapse of logic will give rise to jurisdictional error. A Court should be slow, although not unwilling, to interfere in an appropriate case”: *SZDMS* 240 CLR at 648 [130]. It is the ascertainment, through understanding the approach of the decision-maker and characterising the reasoning process, of whether the decision (or state of satisfaction) is so lacking a rational or logical foundation that the decision (or relevant state of satisfaction) was one that no rational or logical decision-maker could reach, such that it was not a decision (or state of satisfaction) contemplated by the provision in question. Some lack of logic present in reasoning may only explain why a mistake of fact had been made which can be seen to be an error made within jurisdiction. As the Chief Justice said in *Stretton* at [11], the evaluation of whether a decision was made within lawful boundaries is not definitional, but one of characterisation and whether the decision was sufficiently lacking in rational foundation, having regard to the terms, scope and purpose of the statutory source of power, that it cannot be said to be within the range of possible lawful outcomes.
7. Ultimately, the question is whether the satisfaction of the relevant state of affairs or matter was irrational, illogical or not based on findings or inferences of fact supported by logical grounds: *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 207 ALR 12 at 20–21 [38]; *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* [2003] HCA 30; 198 ALR 59 at 71 [52] and 98 [173], such that it cannot be said to be possible for the conclusion to be made or the satisfaction reached logically or rationally on the available material. It will then satisfy the characterisation of unjust, arbitrary or capricious.

## The content of s 116(1)(e)(i)

1. Prior to the *Migration Amendment (Character and General Visa Cancellation) Act* *2014* (Cth) s 116(1)(e) read “The presence of the visa holder in Australia is, or would be, a risk to” the matters as presently set out in paras (i) and (ii). The introduction by the above *Amendment Act* of the words “or may be” and “or might be” clearly lowered the requisite level or threshold of satisfaction to that of a possibility. The word “may” and the word “might” do not contain different levels of possibility; they relate to different contexts: “may” if the visa holder is presently in the migration zone (relevantly Australia); “might” if he or she were to come into the migration zone in the future.
2. The relevant Explanatory Memorandum stated:

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

1. The notion of “risk” involves possibility in the future: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19* [2021] FCAFC 133 at [81] and [82]; *Leota v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1120 at [63]. Thus, consideration of what may or might happen in the future by reference to the presence of the visa holder in Australia is what is called for. The satisfaction is that the presence of Mr Djokovic in Australia may be a risk to health, safety or good order.
2. The task is the consideration of future possibilities which “proceeds by drawing inferences from known facts”: *Lewis v Australian Capital Territory* [2020] HCA 26; 381 ALR 375 at 384 [35] (Gageler J) and is based on “reasonable conjecture within the parameters set by the historical facts”: *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17;390 ALR 590 at 599 [38] (Kiefel CJ, Gageler, Keane and Gleeson JJ). To these considerations should be added as legitimate bases for the assessment process: common sense, a reasonable appreciation of human experience, and personal knowledge or specialised knowledge of the Minister or his or her Department: see generally *Viane* 395 ALR at 408–409 [17]–[21].
3. The notions of “health” and “safety” need no elaboration. The phrase “good order” was described by Goldberg J in *Tien v Minister for Immigration and Multicultural Affairs* [1998] FCA 1552; 89 FCR 80 at 93–94 as follows:

… The expression “good order of the Australian community” is not defined in the Act. I was not referred to any judicial consideration of this particular expression. It must be construed in the context in which it appears, that is, juxtaposed to the words “the health, safety” of the Australian community. In that context it has, in my opinion, a public order element, that is to say it requires there to be an element of a risk that the person’s presence in Australia might be disruptive to the proper administration or observance of the law in Australia or might create difficulties or public disruption in relation to the values, balance and equilibrium of Australian society. It involves something in the nature of unsettling public actions or activities. For example, a person who came to Australia and was found to be committing in Australia serious breaches of the law or criminal acts or was inciting people in the community to violence could properly be said to be a person whose presence in Australia is a risk to the good order of the Australian community. It should be emphasised that it must be the presence of the visa holder “in Australia” which constitutes or would constitute the risk to the good order of the Australian community.

1. It is not necessary that the visa holder himself or herself take action to create the risk. It is the presence of the person in Australia that must found the risk: *Newall v Minister for Immigration and Multicultural Affairs* [1999] FCA 1624 at [30] (Branson J).

## The “public interest” for s 133C(3)(b)

1. The phrase “public interest” is a broad one and especially so when an aspect of the power vested in a Minister responsible to Parliament: *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22; 254 CLR 28 at 46–48 [39]–[46]; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2015] HCA 3;255 CLR 231. Further, it is to be recalled that the relevant inquiry is as to the lawfulness of the Minister’s *satisfaction* that it was in the public interest to cancel the visa, the Minister being satisfied of the ground for cancellation under s 116 (see s 133C(3)(a)), here satisfied of the matters in s 116(1)(e)(i).
2. The above sufficiently explains the operative sections and tasks of the Minister by reference to legal principle.

# The decision of the Minister

1. The Minister’s reasons, entitled “Statement of Reasons”, comprised ten pages and 71 paragraphs. The reasons began by reciting the history of the matter in paragraph 4 (or **D[4]**). In D[6] the Minister explained why he proceeded under s 133C(3) where natural justice was not required. He said:

Subsequently, Mr DJOKOVIC’s legal representatives have provided lengthy submissions and supporting documentation concerning the possible cancellation of his visa under section 133C(3) of the Act (Attachment A). In those submissions, Mr DJOKOVIC takes issue with the possible use of the section 133C(3) power, rather than proceeding under a process in which Mr DJOKOVIC would have a right to be heard before a decision is made. I chose to proceed under section 133C(3), having regard to the need to consider possible cancellation of the visa quickly, in light of the particular circumstances of the case and the public interest in resolving the matter expeditiously. That public interest includes: (a) the upcoming start of the Australian Open; (b) the prospect of litigation challenging my decision and the desirability, if possible, of affording the Court time to hear arguments and make its decision; and (c) a situation where Mr DJOKOVIC is in the community while he may be a risk to health and good order. Further, Mr DJOKOVIC had had opportunities to put forward his position in documents to the Court and in further submissions provided by his legal representatives to me.

1. No complaint was made about the course set out in D[6].
2. At D[7] the Minister recognised that Mr Djokovic may not have been able to comment on everything. He said:

In case there might have been anything else Mr DJOKOVIC wanted to say but has not said, I have done my best to consider matters alive to the fact that Mr DJOKOVIC’s view may not have been sought on everything.

1. By way of background, the Minister noted a number of things at D[10], as follows:

By way of background, I note that:

• Mr DJOKOVIC arrived in Australia on 5 January 2022 to compete in the 2022 Australian Open tennis tournament. He is present in Australia during a time in which the Australian community is experiencing a significant, and rising, number of COVID-19 cases and an active, vocal minority of people in the community opposing vaccination (or compulsory vaccination) against COVID-19.

• During an interview with an officer from the Department on 6 January 2022, Mr Djokovic stated he had not been vaccinated against COVID-19 (Attachment B).

• That Mr DJOKOVIC has not been vaccinated against COVID-19 is information that was also included in Mr DJOKOVIC’s Australia Travel Declaration (Attachment C).

• Mr DJOKOVIC also provided copies of his COVID-19 test results, being a positive polymerase chain reaction (PCR) test (the result dated 16 December 2021), a negative PCR test (the result dated 22 December 2021) and a positive SARS-COV-2 RBD IgG test, which seems to confirm that Mr DJOKOVIC was identified as having a recent or prior infection (the result dated 23 December 2021) (Attachments D and E).

• Mr DJOKOVIC also provided a ‘testimonial’ from Associate Professor Verica Jovanovic dated 12 January 2022, which states that Mr DJOKOVIC’s positive test result sampled on 16 December 2021 and subsequent negative test result sampled on 22 December 2021 are ‘legitimate’. Associate Professor Jovanovic also stated that ‘[o]ur test system is reliable, accurate and the test results of Mr Novak Djokovic are legitimate’ (Attachment F).

## The satisfaction as to risk to the health of the community

1. The Minister dealt with risk to the health of the community at D[11]–[26]. At D[11] the Minister referred to various medical journals, articles and studies provided to him by Mr Djokovic and his advisors. On the basis of these, Mr Djokovic submitted that he posed a negligible risk of infection to others. At D[12] the Minister referred to advice from the Commonwealth Department of Health which concluded on certain assumptions as follows:

• ‘Mr Djokovic is unlikely to be infectious with SARS-COV-2 and as such is likely to constitute a LOW risk of transmitting SARS-CoV-2 to others. This assessment applies to all other demographic groups.’

• Having regard to the specific additional control measures applicable to the Australian Open, ‘it is assessed that the risk of a transmission event related to the Australian Open is VERY LOW.’

1. At D[13] the Minister said that he was prepared to proceed on the assumption that Mr Djokovic posed a “negligible” risk of infection of others.
2. At D[14] the Minister said:

I have also not sought or read the extensive factual materials which Mr DJOKOVIC has provided on whether recent infection with COVID-19 is a medical contraindication against vaccination because I am willing to assume, in the time available, that Mr DJOKOVIC has a medical reason for not being vaccinated.

The last part of this sentence should not be misunderstood. The Minister was plainly referring to a medical reason for not being vaccinated now, given his recent infection. It is not a reference to a reason for not being vaccinated in the past since vaccines were developed.

1. The Minister also assumed at D[15] that Mr Djokovic entered Australia consistently with documents of the Australian Technical Advisory Group on Immunisation (**ATAGI**) a matter about which there had been controversy in the FCFC.
2. At D[16], the Minister referred to a letter from Tennis Australia and said:

Further, I have had regard to the fact that he received a letter from Tennis Australia, which was signed by Dr Carolyn Broderick and reviewed by an Independent Expert Medical Review Panel comprised of [names redacted] (Attachment E). I have taken into account that upon receipt of this letter, Mr DJOKOVIC considered that he had a valid medical exemption to come to Australia, and that he would thereafter be entitled to remain in Australia (Attachment A). I give this factor some weight in the exercise of my discretion against cancellation.

1. At D[17]–[19], the Minister stated:

17. Although I make the assumptions above and accept that Mr DJOKOVIC poses a negligible individual risk of transmitting COVID-19 to other persons, I nonetheless consider that his presence may be a risk to the health of the Australian community.

18. In this respect, I have given consideration to the fact that Mr DJOKOVIC is a high profile unvaccinated individual who has indicated publicly that he is opposed to becoming vaccinated against COVID-19 (which for convenience I refer to as ‘anti-vaccination’). Mr DJOKOVIC has previously stated that he ‘wouldn’t want to be forced by someone to take a vaccine’ to travel or compete in tournaments (Attachment H).

19. I have not sought the views of Mr DJOKOVIC on his present attitude to vaccinations. Even acknowledging this, the material before me makes it clear that he has publicly expressed anti-vaccination sentiment. Further, just as important is how those in Australia may perceive his views on vaccinations, rather than his presently held opinion should it be different from what has been publicly identified.

Attachment H referred to in support of D[18] is of some significance to the proceeding. We will come to its contents in due course.

1. At D[20] the Minister referred to information from the Commonwealth Department of Health, cleared by the Chief Medical Officer, which stated as follows:

• Immunisation is one of the most successful public health interventions of the past 200 years. The Australian Government has supported immunisation and has strongly encouraged vaccination in the context of SARS-CoV-2. Vaccination was the fifth element of Australia’s COVID-19 Vaccine and Treatment Strategy released in August 2020. The Strategy supports early access to, and delivery of, safe and effective COVID-19 vaccines and treatments. It was developed to provide Australians with safe and effective vaccines under a targeted and responsive national COVID-19 vaccination policy and immunisation program based on up-to-date health advice.

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

1. At D[21] the Minister referred to a statement by ATAGI about booster doses of vaccine as follows:

The Australian Technical Advisory Group on Immunisation (ATAGI) has also stated on 24 December 2021 that ‘[s]trong evidence has accumulated over the past two weeks to indicate that booster doses of COVID-19 vaccines are likely to increase protection against infection with the Omicron variant. Although some early data suggest that the risk of hospitalisation due to disease caused by the Omicron variant is lower than that with the Delta variant, this difference would not be enough to offset the impact of high case numbers on the health system.’ (Attachment J).

1. At D[22] the Minister drew his conclusions about his state of satisfaction as to health as follows:

Because of this, I consider that Mr DJOKOVIC’s presence in Australia may pose a health risk to the Australian community, in that his presence in Australia may foster anti-vaccination sentiment leading to (a) other unvaccinated persons refusing to become vaccinated, (b) other unvaccinated persons being reinforced in their existing view not to become vaccinated, and/or (c) a reduction in the uptake of booster vaccines. Specifically this may lead to one or more of the following:

i. An increase in anti-vaccination sentiment being generated in the Australian community, leading to others refusing to become vaccinated or refusing to receive a booster vaccine; and/or

ii. A reinforcing of the views of a minority in the Australian community who remain unvaccinated against COVID-19 and who are at risk of contracting COVID-19 (as to which, there are media reports that some groups opposed to vaccination have supported Mr DJOKOVIC’s presence in Australia, by reference to his unvaccinated status) (Attachments K and L); and/or

iii. An increased number of people deciding to not receive a booster vaccine; and/or

iv. Unvaccinated persons becoming very unwell and/or transmitting it to others; and/or

v. Increased pressure placed on the Australian health system, a significant contributing factor being the number of unvaccinated persons contracting COVID-19 and requiring medical attention or assistance (Attachment M).

1. Significant reliance was placed by the applicant on D[22(ii)]. At this point it is sufficient to say that what appears in parentheses: “(as to which, there are media reports that some groups opposed to vaccination have supported Mr DJOKOVIC’s presence in Australia, by reference to his unvaccinated status)” is not supported by Attachments K and L; but is supported by some of the contents of Attachment H to which reference is not made in D[22], but to which attachment reference was made in D[18].
2. The Minister continued at D[23] and D[24] and concluded with his state of satisfaction at D[25]:

23. I have also given consideration to the fact that there is evidence to suggest that Mr DJOKOVIC has, in the past, shown an apparent disregard for the need to isolate following the receipt of a positive COVID-19 test result (Attachment N). On 18 December 2021, Mr DJOKOVIC knowingly attended an interview and photoshoot with L’Equipe. He states that he ensured that he socially distanced and wore a mask, but did not wear a mask while his photograph was being taken. Mr DJOKOVIC has publicly acknowledged that it was an ‘error of judgment’ to attend this interview, and that he should have rescheduled this commitment, given that he received a positive test result beforehand on 17 December 2021 (Attachment O).

24. Given Mr DJOKOVIC’s high profile status and position as a role model in the sporting and broader community, his ongoing presence in Australia may foster similar disregard for the precautionary requirements following receipt of a positive COVID-19 test in Australia. In particular, his behaviour may encourage or influence others to emulate his prior conduct and fail to comply with appropriate public health measures following a positive COVID-19 test result, which itself could lead to the transmission of the disease and serious risk to their health and others. I consider this to be an additional factor contributing to the possible risk to the health of the Australian community.

25. Accordingly, I am satisfied that the presence of Mr DJOKOVIC in Australia may be a risk to the health of the Australian community. I am so satisfied because his presence in Australia may be counterproductive to efforts at vaccination by others in Australia, which may be a risk to the Health of the Australian community.

1. It is convenient to make some observations about the findings and reasoning at D[17]–[25]. First, an important strand of reasoning was the Minister finding that Mr Djokovic was a high profile person with a position as a role model in the sporting and broader community. These descriptions appear in different paragraphs, but can be taken as permeating this part of the decision.
2. Secondly, the Minister found in a number of places using similar words that not only was Mr Djokovic unvaccinated, but that it was publicly and widely known that he was opposed to being vaccinated.
3. Thirdly, the Minister found that Mr Djokovic’s presence in Australia may foster anti‑vaccination sentiment.
4. Fourthly, and related to the third point, some of the material in the attachments made reference to anti-vaccination groups who have, or may have, participated in civil disturbances and unrest. Such groups were relevant, as will be seen below, in particular in relation to the “good order” limb in s 116(1)(e)(i). It is important, however, to recognise that in relation to health, D[17], D[18], D[22], D[24] and D[25] can be seen as directed to people who may simply be hesitant or wavering or unconvinced about the need for or the desirability of vaccination. The Minister’s reasons here were not directed only to persons with an entrenched view who may participate in acts of civil unrest or disturbance.

## The satisfaction as to the risk to the good order of the community

1. Whilst this risk was dealt with separately and independently: D[27], there was, as can be seen from D[31] and D[32] a relationship between good order and health:

31. COVID-19 has entered Australia and represents a severe and immediate threat to human health in Australia as it has the ability to cause high levels of morbidity and mortality and to disrupt the Australian community socially and economically.

32. With rising case numbers and increased pressure on the health system, it is important that the general community act consistently with requirements, recommendations and advice by the Commonwealth, State and Territory governments in responding to the COVID-19 pandemic. I consider that the orderly management of the pandemic by the Commonwealth, State and Territory governments is a component of the good order of the community, particularly bearing in mind the adverse community-wide consequences of a failure to appropriately manage the consequences of the pandemic. In broad terms, Commonwealth, State and Territory governments’ approaches to managing the pandemic have involved a number of aspects, including vaccination, testing, compliance with social distancing and other various public health and safety measures.

1. The reasoning leading to the state of satisfaction is set out at D[33]–[36] with the state of satisfaction expressed at D[37]:

33. Consequently, I consider that behaviour by influential persons and role models, which demonstrates a failure to comply with, or a disregard of, public health measures has the potential to undermine the efficacy and consistency of the Australian Government’s and State and Territory Governments’ management of the evolving COVID-19 pandemic. As noted above, Mr DJOKOVIC is such a person of influence and status. Having regard to the matters set out above regarding Mr DJOKOVIC’s conduct after receiving a positive COVID-19 result, his publicly stated views, as well as his unvaccinated status, I consider that his ongoing presence in Australia may pose a risk to the good order of the Australian community. In particular, his presence in Australia may encourage other persons to disregard or 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.

34. In addition, I consider that Mr DJOKOVIC’s ongoing presence in Australia may lead to an increase in anti-vaccination sentiment generated in the Australian community, potentially leading to an increase in civil unrest of the kind previously experienced in Australia with rallies and protests which may themselves be a source of community transmission. I consider that those rallies and protests involve ‘something in the nature of unsettling public actions or activities’, as described by Goldberg J in *Tien*.

35. I also consider that there may be a risk of an adverse reaction by some members of the Australian community to Mr DJOKOVIC’s presence in Australia on the basis of their concerns about his unvaccinated status and his apparent disregard for the need to isolate following the receipt of a positive COVID-19 test result.

36. These opposing reactions may themselves be a source of discord and create public disruption. Mr DJOKOVIC has attracted a high level of press coverage and public interest at a critical juncture in the government’s management of a rapidly evolving public health emergency.

37. Accordingly, I am satisfied that the presence of Mr DJOKOVIC in Australia may be a risk to the good order of the Australian community.

## The satisfaction as to the public interest

1. At D[39]–[43] the Minister set out reasons that he considered weighed in favour of the public interest being served by the cancellation of the visa:

39. In considering the public interest, I have considered that unvaccinated persons create a greater health risk of contracting COVID-19 and spreading COVID‑19 to others than vaccinated persons, either of which will further burden the Australian health system. 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.

40. I note that the costs associated with treatment for those affected by COVID-19 are substantial. COVID-19 cases are having a significant impact on the health system in all states and territories, with significantly reduced medical resources in intensive care units and bed availability (Attachment M).

41. Mr DJOKOVIC has previously indicated publicly that he is opposed to becoming vaccinated against COVID-19 (Attachment H). He has also acknowledged that he knowingly failed to isolate following the receipt of a positive COVID-19 test result (Attachment O).

42. In light of Mr DJOKOVIC’s stance on vaccination and acknowledged failure to follow precautionary measures following receipt of a positive COVID-19 test result, I consider that cancelling his visa would be consistent with the Australian Government’s strong stance on the benefits of vaccination and appropriate measures directed to managing the COVID-19 pandemic.

43. Further, 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. The health and good order of the Australian community are matters of public interest.

1. At D[44]–[47] the Minister considered matters put by and on behalf of Mr Djokovic as to why it would not be in the public interest to cancel his visa:

44. In a letter dated 11 January 2022, Mr DJOKOVIC raises the following arguments as to why he considers it would not be in the public interest to cancel his visa (Attachment A):

• He poses ‘no risk to public health and safety’.

• He has made no attempt to contravene any Australian laws.

• ‘He is a person of good standing, and a diplomat of the nation of Serbia. In addition to being the best tennis player in the world, he is known for his philanthropic efforts, including his generous donations towards coronavirus relief, as well as towards Australian bushfire relief.’

• There is support in Australia and abroad for Mr DJOKOVIC to remain in Australia and play in the Australian Open in 2022.

• Cancelling Mr DJOKOVIC’s visa would be likely to adversely affect Australia’s global reputation and call into question its border security principles and policies.

• Cancelling Mr DJOKOVIC’s visa would prejudice Australia’s economic interests, and jeopardise the viability of Australia continuing to host the Australian Open.

• Cancelling Mr DJOKOVIC’s visa would create the appearance of politically motivated decision-making.

45. I have considered the points raised by Mr DJOKOVIC. Without intending to be exhaustive, I make the following comments on the specific points raised above:

• The issue of whether he poses a risk to public health and safety has been addressed above.

• I acknowledge that he has personally made no attempt to contravene any Australian law, that he is a person of good standing and is known for his philanthropic efforts.

• I acknowledge also that there is some support in Australia and abroad for Mr DJOKOVIC to remain in Australia to compete in the Australian Open.

• I acknowledge also that there are diplomatic considerations, which I address below.

• I do not accept, however, that cancelling Mr DJOKOVIC’s visa would create the appearance of politically motivated decision-making or that it would call into question Australia’s border security principles and policies.

• I also do not accept that cancelling Mr DJOKOVIC’s would prejudice Australia’s economic interests, and jeopardise the viability of Australia continuing to host the Australian Open.

46. I also acknowledge that Mr DJOKOVIC is now in the community, and that some unrest has already occurred, such that it is too late to avoid it. This weighs in my mind against the public interest in cancellation.

47. In addition, as mentioned above, I weighed the issue about whether Mr DJOKOVIC entered Australia consistently with the ATAGI documents as a factor against cancellation.

1. At D[48] the Minister concluded that the points raised against cancellation were outweighed by other factors in D[39]–[43], saying:

… Notwithstanding the issues raised by Mr DJOKOVIC and the substantial impact that a cancellation decision would have on him as an individual, which is discussed in Part C below, I have given significant weight to the matters of public health and good order discussed above, which are each separately relevant to whether it is in the public interest to cancel his visa. These matters go to the very preservation of life and health of many members of the general community and further are crucial to maintaining the health system in Australia, which is facing increasing strain in the current circumstances of the pandemic.

## Other considerations and discretion

1. The Minister then dealt with other factors which could be seen to bear upon the exercise of discretion: the purpose of Mr Djokovic’s visit, his compliance with visa conditions, a false answer to a question in his travel declaration form (that was apparently the fault of an assistant), the degree of hardship to Mr Djokovic and his family, Mr Djokovic’s previous compliance in dealing with the Department, the legal consequences of cancellation including the difficulty in obtaining a visa in the future for at least three years, and diplomatic considerations. The conclusions about weighing these matters and the decision were expressed at D[69]–[71] as follows:

69. I accept that there are some factors in favour of a decision not to cancel Mr DJOKOVIC’s visa. However, I consider that these factors are outweighed by either the public health or the good order considerations, considered separately and independently from each other, as discussed above, together with the public interest considerations discussed above.

70. Even if the factors discussed above which I have identified as ‘other considerations’ are properly understood to form part of the public interest, my conclusion that it is in the public interest to cancel Mr DJOKOVIC’s visa would remain the same. I would still consider it in the public interest to do so.

**PART D: DECISION**

71. After considering all the matters discussed above, I am satisfied that the reasons for cancelling Mr DJOKOVIC’s visa outweigh the reasons not to cancel the visa. I have therefore decided to cancel Mr DJOKOVIC’s Class GG subclass 408 Temporary Activity visa under subsection 133C(3) of the Act.

# The amended application

1. The applicant raises three grounds of complaint. These grounds were expressed fully in the following terms:

**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, saving 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).

1. It is convenient to deal with the grounds in reverse order.

# Ground 3

1. We reject the proposition that it was not open to the Minister to find or conclude that Mr Djokovic had a stance that was well-known on vaccination and that he was opposed to it.
2. “Attachment H” referred to in the Minister’s reasons was an article entitled “What has Novak Djokovic actually said about vaccines?” which reported that, in April 2020, Mr Djokovic apparently said that he was “opposed to vaccination”. Although he had qualified this by saying that he was “no expert” and “would keep an open mind”, he apparently said that he wanted to have “an option to choose what’s best for my body”. He was reported also to have stated on Facebook that he “wouldn’t want to be forced by someone to take a vaccine” to travel or compete in tournaments. Further, he added that he was “curious about wellbeing and how we can empower our metabolism to be in the best shape to defend against imposters like Covid‑19”. His comments were apparently criticised by the Serbian Government epidemiologist at the time.
3. Whilst qualified, these views were expressed and publicly known even before there was a COVID-19 vaccine.
4. Further, there was no issue but that Mr Djokovic was not, by January 2022, vaccinated. It was plainly open to the Minister to infer that Mr Djokovic had for over a year chosen not to be vaccinated since vaccines became available. That he had a reason not to have a vaccination at the time of the decision in January 2022, apparently having contracted COVID‑19 on or about 16 December 2021, did not say anything as to the position for the many months from the availability of vaccines to December 2021. It was plainly open to the Minister to infer that Mr Djokovic had chosen not to be vaccinated because he was opposed to vaccination or did not wish to be vaccinated.
5. Whilst the Minister had not asked Mr Djokovic about his present attitude to vaccines: D[19] ([53] above), that only meant that there was no express statement to the contrary of what could be inferred to be his attitude up to January 2022. Mr Djokovic had not volunteered any information when interviewed at the airport by officers of the Department of Home Affairs. He did not give evidence of any apparent change of attitude.
6. It was also open to the Minister to infer that the public would view his attitude as the media had portrayed: that he was unwilling to be vaccinated.
7. Ground 3 should be dismissed.

# Ground 2

1. The central proposition of Mr Djokovic’s argument was that the Minister lacked any evidence and cited none that his presence may “foster anti‑vaccination sentiment”. There was no evidence, it was submitted, that he had urged people not to be vaccinated. Nor was there any evidence that in the past his circumstances had fostered such a sentiment in other countries.
2. However, it was open to infer that it was perceived by the public that Mr Djokovic was not in favour of vaccinations. It was known or at least perceived by the public that he had chosen not to be vaccinated. There was material (in Attachment H) before the Minister and to which he referred in the reasons that anti‑vaccination groups had portrayed Mr Djokovic as a hero and an icon of freedom of choice in relation to being vaccinated.
3. It is important to recognise, however, that the Minister’s reasons can be seen to encompass the encouragement not only to anti‑vaccination groups, some of whom may have extreme views and some of whom may be a risk to the good order or public order in the community, but also to people who may simply be uncertain or wavering as to whether they will be vaccinated.
4. The evidence concerning the support or galvanising of the former group concerned the circumstances of the cancellation of Mr Djokovic’s visa by the delegate of the Minister for Home Affairs, rather than Mr Djokovic’s views regarding vaccination. Nevertheless, the evidence did display an affinity of these groups with his views.
5. The possible influence on the second group comes from common sense and human experience: An iconic world tennis star may influence people of all ages, young or old, but perhaps especially the young and the impressionable, to emulate him. This is not fanciful; it does not need evidence. It is the recognition of human behaviour from a modest familiarity with human experience. Even if Mr Djokovic did not win the Australian Open, the capacity of his presence in Australia playing tennis to encourage those who would emulate or wish to be like him is a rational foundation for the view that he might foster anti‑vaccination sentiment.
6. The above considerations can be seen to underpin not only the state of satisfaction about health, but also good order and the public interest: see D[33], D[34] and D[39]. There is also the additional consideration of rallies and protests referred to in D[34]. Whilst it can be accepted that the evidence of these rallies and protests involving sentiment for Mr Djokovic arose at the time of the cancellation of his visa by the delegate of the Minister for Home Affairs, it was not irrational to infer that Mr Djokovic’s presence *may* be taken up by such groups in the future in support of their views.
7. There is a question, not explored in argument, as to the extent to which one can or should characterise lawful, even if robust, rallies and protests in the free expression of political or social views (even if unpopular or held only by a few people) as a threat to good order. In the absence of argument or of it being an issue, we do not comment any further on this. Common recent experience does, however, demonstrate that some rallies and demonstrations concerning COVID‑19 and measures to limit movement and activity of the public have involved some violent activity and have been the occasion for the spreading of the disease or at least that is open to be inferred.
8. It was not irrational for the Minister to be concerned that the asserted support of some anti‑vaccination groups for Mr Djokovic’s apparent position on vaccination *may* encourage rallies and protests that *may* lead to heightened community transmission.
9. Further, there was evidence at D[23] that Mr Djokovic had recently disregarded reasonable public health measures overseas by attending activities unmasked while COVID positive to his knowledge. It was open to infer that this, if emulated, *may* encourage an attitude of breach of public health regulations.
10. Whether or not such consideration should have weighed so heavily in the decision was a matter of weight and balance for the Minister.
11. An allied proposition was that it was illogical or irrational and so legally unreasonable to find that Mr Djokovic was opposed to COVID‑19 vaccination. We reject this for the reasons that ground 3 was rejected.
12. Some emphasis was placed in argument on behalf of Mr Djokovic on D[22(ii)]. It can be accepted that what is in parentheses (see [56] above) in D[22(ii)] was not supported by Attachments K and L. However it was supported by Attachment H which was before the Minister and to which he otherwise made reference.
13. Ground 2 should be dismissed.

# Ground 1

1. The Minister cancelled Mr Djokovic’s visa because he was “satisfied” that the presence of Mr Djokovic in Australia may be a risk to the health or good order of the Australian community: D[25] and D[37].
2. In substance, Mr Djokovic contended that that decision was affected by jurisdictional error because the Minister reached the state of satisfaction illogically, irrationally or unreasonably and the discretion to cancel the visa was unreasonably exercised, because the Minister did not consider whether cancelling Mr Djokovic’s visa may itself foster anti-vaccination sentiment in Australia.
3. In their written submissions, counsel for Mr Djokovic put their contention as follows (emphasis in original):

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 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.

1. It was further contended that “[i]t 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’”, in circumstances where the Minister assumed or found that Mr Djokovic posed a negligible COVID-19 risk to others, had a medical reason for not being vaccinated, had entered Australia lawfully and consistently with ATAGI documents and in circumstances where almost every discretionary factor weighed against cancellation.
2. Ground 1 should be dismissed. It was not necessary for the Minister to consider and weigh in the balance the two “binary” choices contended for by Mr Djokovic. The power to cancel relied upon by the Minister in this case arose once he was “satisfied” that “the *presence* of [the visa] holder in Australia … may be … a risk to … the health, safety or good order of the Australian community”. The words of the statute direct attention to the “presence” of the visa holder in Australia. No statutory obligation arose to consider what risks may arise if the holder were removed from, or not present in, Australia. The provision cannot be interpreted as requiring the Minister to examine the consequences of cancellation by way of a counterfactual, directed as it is to the considerations of risk by reference to *presence*.
3. That the statute does not require such a consideration to be examined does not foreclose the possibility that not to do so in a given circumstance would or might be irrational or unreasonable. However, it is not easy to contemplate such a circumstance. There is nothing by way of logic that demands it, bearing in mind that the statute refers to the consequences of *presence* of the visa holder in Australia. It may be that there would be an even greater risk to good order or health by the fostering of demonstrations if the visa was cancelled and the erstwhile visa holder removed from Australia, but that says nothing about the risk arising from the visa holder’s *presence* in Australia, which is the statutory enquiry. The notion that the Minister must, to be logical, examine both hypotheses is only to force the Minister to adopt one way of approaching the exercise of the discretion.
4. That is not to say that if the Minister chose to examine the risk in the posited counterfactual, he could not do so (given the terms of the provision are directed to *presence*, it would be in evaluating the public interest or the exercise of the discretion to exercise the power). The Minister would not be prohibited by the section from doing so; and it is not an irrelevant consideration for these purposes in the sense discussed in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40;162 CLR 24.
5. In any event, the Minister was, because he recognised it in his reasons, aware of the fact that “unrest” in the community occurred following the decision of the Minister for Home Affairs to cancel Mr Djokovic’s visa on the day following his arrival into Australia. At D[46] the Minister said as follows: “I also acknowledge that Mr DJOKOVIC is now in the community, and that some unrest has already occurred, such that it is too late to avoid it. This weighs in my mind against the public interest in cancellation”. Whilst it is far from clear to what event this is a reference, the Minister can be taken to be aware of protests that occurred in Melbourne on 11 January 2022 involving supporters of Mr Djokovic.
6. The Minister also, at D[44], recited arguments raised by Mr Djokovic’s lawyers as to why he considered it would not be in the public interest to cancel his visa. Those reasons included that cancelling the visa would “be likely to adversely affect Australia’s global reputation and call into question its border security principles and policies”, “prejudice Australia’s economic interests, and jeopardise the viability of Australia continuing to host the Australian Open”, and “create the appearance of politically motivated decision-making”.
7. Although the Minister did not weigh in the balance the binary choices contended for by Mr Djokovic, it can be taken that he was aware of any number of different consequences that might ensue if the visa were cancelled, including unrest, but that having noted each of those matters referred to, the Minister is to be taken as not having regarded them as something that, within the exercise of his discretion, he regarded as necessary to weigh in the balance of things.
8. Further, the weighing of the counterfactual as to unrest and encouragement of anti‑vaccination sentiment would not affect the second group of people to whom we have referred as the hesitant or wavering. These people, who may, it can be inferred, be influenced by Mr Djokovic’s presence, would not be influenced relevantly in the way we have described by his absence.
9. For the above reasons ground 1 must fail.

# Further matters

1. Considerable debate took place as to how to approach the Minister’s statement of reasons in this case. We do not consider that the resolution of that debate is necessary to reach the views we have. The Minister was not obliged to give reasons, but he did so. They were evidently carefully drafted. The Court has no doubt that in respect of a matter of high public profile, care and consideration was given to the formulation of the reasons in the four days in which the Minister took to consider the matter and finalise and deliver the reasons. Nevertheless, some weight is to be given to the fact that there was no obligation to give the reasons. Further, the stricture that the reasons should not be parsed and analysed with a fine tooth comb with an eye to identification of error is always to be followed. There was a clear interrelationship among all parts of the Minister’s reasons. The themes of encouragement and emulation of a sporting hero and icon run through the reasons for satisfaction as to health and good order and the public interest.
2. Parliament has made clear in s 116 that the Minister may cancel a visa if he or she is satisfied that presence of its holder in Australia may be a risk to the health or good order of the Australian community. The Minister reached that state of satisfaction on grounds that cannot be said to be irrational or illogical or not based on relevant material. Whether or not others would have formed that state of satisfaction and the state of satisfaction as to the public interest is a consideration not to the point. The relevant states of satisfaction were of matters which involved questions of fact, projections of the future and evaluations in the nature of opinion. As Gummow J said in *Eshetu* 197 CLR at 654 [137]: “where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question”.
3. That is the position in this case. Another person in the position of the Minister may have not cancelled Mr Djokovic’s visa. The Minister did. The complaints made in the proceeding do not found a conclusion that the satisfaction of the relevant factors and the exercise of discretion were reached and made unlawfully.
4. As the Court said at the conclusion of argument on Sunday, the Court was and is grateful to all counsel and solicitors for the comprehensive, erudite and clear submissions prepared under very tight time constraints, and for the economy and despatch of the oral argument. Such contributed significantly to the ability of the Court to deal with the matter in a timely way.

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| I certify that the preceding one hundred and six (106) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop, Justices Besanko and O'Callaghan. |

Associate:

Dated: 20 January 2022