



**IN THE FEDERAL CIRCUIT and
FAMILY COURT OF AUSTRALIA (DIVISION 2)
AT MELBOURNE**

File No: MLG116/2022

NOVAK DJOKOVIC
Applicant

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

ORDER

BEFORE: JUDGE A KELLY
DATE: 14 January 2022
MADE AT: MELBOURNE

APPEARANCES:

Mr P Holdenson QC, Mr N Wood SC, Mr J Hartley and Mr N Dragojlovic of counsel
for the Applicant,

Mr S Lloyd QC, Mr C. Tran, Ms N. Wootten and Ms J. Nolic of counsel for the
Respondent,

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 to be 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 attempting 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 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. In turn, the medical exemption provided by that panel to the applicant had also been assessed and endorsed by a separate Independent Expert Medical Review Panel commissioned by the government for the State of Victoria.
- E. It is the applicant's contention that he was accordingly entitled to quarantine-free entry into and travel in Australia for the duration of the permission granted by the visa.
- 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 subsection 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 jurisdictional error. The respondent to this proceeding 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 would favour 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, 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 the 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;



- (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 shortly.

By the Court

DATE ENTERED: 14 January 2022.

A handwritten signature in blue ink, consisting of a large, stylized loop with a small arrow-like stroke pointing downwards from the top of the loop.

Registrar