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Tennis Player Novak Djokovic Versus the Australian Commonwealth

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January 10, 2022 will be remembered as one of the odder days in the annals of sport. For one, it had little to do with physical exertion. Tennis proved secondary to the claims of one ***Novak Djokovic****, currently the world's number one ranked player. Instead of finding himself training on court in preparation for the Australian Open, he found himself with a legal team in the recently created Federal Circuit and Family Court of Australia. His purpose: to challenge the decision to cancel his Temporary Activity visa (subclass 408 in bureaucratic lingo), after his arrival in Australia just prior to midnight on January 5.*

The visa was granted on November 18 last year and, according to his court submission, "was subject to no condition having the effect that his right to enter and remain in Australia was qualified in any way in regard his vaccination status." On December 30, 2021 the player received a letter from the Chief Medical Officer of Tennis Australia noting that he had been granted a "Medical exemption from COVID vaccination" on the grounds that he had recently recovered from COVID-19.

The letter also noted a range of salient points. Djokovic, for instance, recorded the first positive COVID PCR test on December 16, 2021. Fourteen days had expired; the player had shown no relevant symptoms of a fever or respiratory symptoms in the last 72 hours. The exemption certificate had been provided by an Independent Medical Review panel commissioned by Tennis Australia and duly reviewed and approved by an independent Medical Exemptions Review Panel of the Victorian State Government. These exemption conditions were also deemed consistent with the Australian Technical Advisory Group on Immunisation (ATAGI).

On January 1, 2021, the Department of Home Affairs informed Djokovic that his Australia Travel Declaration had been assessed and approved. His "responses [i]ndicated that [he met] the requirements for a quarantine-free travel into Australia where permitted by the jurisdiction of your travel."

It then came as quite a shock that his visa was cancelled after arriving in Melbourne International airport by a delegate of the Australian Border Force. He had been held, incommunicado, for eight hours (till approximately 8 am, January 6). After being notified of the decision, Djokovic was hurried off to the infamous Park Hotel in Melbourne where he, in his defence team's words, was detained "notwithstanding his requests to be moved to a more suitable place of detention that would enable him to train and condition for the Australian Tennis Open should this present challenge to the Purported Decision be successful."

Judge Anthony Kelly had to confront a veritable blizzard of legal grounds, eight in all. Among other things, these focused on the purported invalidity of the notice given to Djokovic in cancelling the visa. The immigration minister could only exercise a discretion to cancel the visa after considering that notice. There were also time constraints in making that decision, and considerations of natural justice.

The cardinal point remained the differing readings by Djokovic and the Commonwealth government on the nature of the medical exemption. For the tennis player, testing positive on December 16 exempted him from the vaccination requirement for six months, a reading based on ATAGI's statement to that effect.

The Commonwealth rejected this interpretation, claiming that having a previous infection did not dispense with the need to be vaccinated before entering Australia. A deferral of vaccination should not have been read as an excuse *not* to get vaccinated. Placing such heavy reliance on the Tennis Australia exemption letter did not constitute sufficient information for the purpose of entering the country unvaccinated. The government also disputed whether Djokovic had an "acute major medical illness" last month. "All he said is that he tested positive for COVID-19. This is not the same." (Djokovic did himself few favours in that regard, having been photographed at public events following the positive test.)

In terms of the constitutional pecking order, the government lawyers were eager to pull rank. It did not ultimately matter what Tennis Australia had concluded, or, for that matter, what the Victorian government had done. In submissions to the court, the government asserted that there was "no such thing as an assurance of entry by a non-citizen into Australia". The Commonwealth had the final say.

Remarkably, and disturbingly, it is also clear that the same thing applies to Australian citizens, who have no formal constitutional guarantee of a right to return or re-enter their country despite such a position being protected at international law.

At points, the denseness of the legal argument struck a nerve. The number of acronyms used stirred the judicial bench. "You're going to have to drag yourself back to the last century," stated the judge pointedly to Djokovic's lawyer, Nick Wood. "I hate acronyms."

But the government lawyers fared worse, being told witheringly that, "Here, a professor and a physician have produced and provided to (Djokovic) a medical exemption. Further to that, that medical exemption and the basis on which it was given was separately given by a further independent expert specialist panel established by the Victorian state government […] The point I am agitated about is, what more could this man have done?"

Both sides eventually agreed that the notice requirement for Djokovic had not been

adequately satisfied. In the words of the court order, the "decision to proceed with the interview and make a decision to cancel the applicant's visa pursuant to s.116 of the *Migration Act 1958* (Cth) was unreasonable". This was because Djokovic had been told at 5.20am on January 6 that he would have until 8.30am to "provide comments in response to a notice of intention to consider cancellation" under that same provision. Impatiently, the authorities had sought comments at 6.14am, with the decision to cancel the visa being made at 7.42am.

Despite quashing the cancellation decision and mandating that Djokovic be released from immigration detention "without limitation thereto [...] by no later than 30 minutes after them making of this Order", counsel representing the Commonwealth made an ominous promise. The Minister for Immigration "may consider whether to exercise a personal power of cancellation" under the *Migration Act*.

In response, Judge Kelly insisted that he be "fully informed in advance" of such developments, warning that "the stakes had risen rather than receded." Any cancellation will promise further litigation and the prospect that Djokovic be barred from entering the country for three years, though this requirement can be waived.

In this episode of pandemic bureaucracy has seen a number of inglorious achievements. The Commonwealth has done its bit to conjure up a monster of its own making. It failed to follow its own notice requirements of visa cancellation in shabby fashion. It created an exemption system lacking in clarity and liable to be interpreted, at points freely, by state and sporting bodies. It aided the tarnishing of tennis and an international tournament whilst almost causing a diplomatic incident with Serbia.

Even as the threat of cancellation for Djokovic hovers, the one thing that will not be cancelled will be the indefinite detention regime for refugees of which the tennis star sampled, if only briefly. That the prominent Serbian was ever asked to be an impromptu spokesman for those detained for years in Australia's very own minted concentration camp system suggested, in Behrouz Boochani's words, "that politics is broken there." His advice: that true power lay within the borders of a country with its citizens, rather than that of a celebrity.

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