

Liberty Victoria Comment on the Djokovic Case

The decision by the Hon Alex Hawke MP, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, to cancel Mr Novak Djokovic's visa and to deport him has drawn attention to Australia's dysfunctional visa cancellation and detention regimes and to the troubling use of the Minister's God-like personal powers.

Liberty Victoria has repeatedly warned about the dangers of such powers.¹

Background

Mr Djokovic has now been subject to two visa cancellations. The first cancellation, effected at Melbourne Airport in the early hours of the morning on 6 January 2022, occurred before Mr Djokovic was able to contact his lawyers and before the expiry of the period he was initially given by Border Force Officers to respond. The process was plainly unfair. The decision was made on the basis that Mr Djokovic himself presented a medical risk; that "unvaccinated persons create a greater risk of contracting COVID-19 and spreading COVID-19 to others". Mr Djokovic had the resources to challenge the legality of the decision and did so successfully. The Minister, in conceding the case in the Federal Circuit and Family Court of Australia, acknowledged that the decision was unreasonable.

The second cancellation was made by the Minister personally under s 133C of the *Migration Act 1958* (Cth) (*Migration Act*) on Friday 14 January 2022, after close of business, several days after the Court quashed the first decision. In reaching his decision, the Minister accepted that Mr Djokovic "poses a negligible individual risk of transmitting COVID-19", but 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 health risks. That reasoning starkly contradicted the first decision.

¹ See, eg, the report of Liberty Victoria's Rights Advocacy Project: <https://www.rightsadvocacyproject.org/playing-god>

Today, the Full Federal Court has found the Minister's decision was lawful, which highlights how broad and permissive the Minister's personal powers are, including the lack of an obligation to seek relevant information. Mr Djokovic did not have the opportunity for independent merits review of the decision, and unless he applies to the High Court, the decision will now stand.

The Djokovic decisions highlight Australia's dysfunctional visa cancellation regime; one that often leads to unlawful decisions and severe and unjust outcomes.

What are the implications?

There have been thousands of visa cancellations since the *Migration Act* was amended in 2014. The Djokovic case raises serious concerns about Australia's immigration system for the following reasons, amongst others:

- (1) **Visa cancellations are often legally defective, with severe consequences for those affected.** Visa cancellations have serious consequences, from family separation to protracted detention and even matters of life and death for refugees and people seeking asylum. Because of the regime's complexity, the timeframes, a lack of support and advice, and a lack of access to review, we cannot know how many people have been subject to unlawful decisions that they could not challenge. Even when people are able to challenge a decision, there is a clear inequality of arms given the vast resources of the Commonwealth. The system is failing people and there is inadequate oversight or access to review;
- (2) **Mr Djokovic's case is an exception.** Mr Djokovic has been treated differently than others subjected to visa cancellations. If he was someone with a different profile, he would likely have been either removed from Australia immediately or detained, not at the Park Hotel, but in one of Australia's notorious detention facilities. He would have been likely to have been detained for considerably longer. He would not have the luxury of time: people responding to notices under s 116 of the *Migration Act* often have as little as 10 minutes to consider their response. He may not have had the resources to challenge the decisions in court, so the unlawful cancellation would have stood;

- (3) **The Minister has inappropriately broad personal powers.** The Minister can make personal decisions even where a court or tribunal has quashed an initial decision, depriving people of access to merits review on the basis of his individual discretion. Courts regularly quash these decisions on the basis that they were made unlawfully, raising further concerns about the quality of this decision-making;
- (4) **Cancellation decisions may be made for political reasons.** Both decisions regarding Mr Djokovic were largely based on information known to the Australian government *before* he travelled to Australia, raising concerns about the grant of the visa and the timing of the cancellation. It is unacceptable for decisions with such serious consequences to be made for political and populist reasons. In the long term this will only erode public trust in government and undermine the rule of law;
- (5) **This case sets a dangerous precedent.** Deportation of a person because of a purported risk as to how others *might* perceive them can and will be used in the future to justify the suppression of legitimate political expression because others might engage in unrest. Mr Djokovic's case is a far way removed from examples of other people who have had their visas refused or cancelled for inciting violence, wilfully flouting quarantine, or engaging in hate speech; and
- (6) Coverage of this case has also highlighted that **many hundreds of people remain in Australia's notoriously harsh immigration detention facilities**, often for years, including people found to be refugees and people seeking asylum. Australia's migration system is inhumane and dysfunctional.

Liberty Victoria calls for fair and just processes and for appropriate oversight of processes and decision-making under the *Migration Act*. We join the calls by legal experts for an inquiry into Australia's visa cancellation regime.

Michael Stanton

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