

Registry: Melbourne

NOVAK DJOKOVIC

Applicant

MINISTER FOR HOME AFFAIRS

Respondent

APPLICANT'S OUTLINE OF SUBMISSIONS**A. Introduction and background**

1. The Applicant, Mr Djokovic, arrived in Australia just before midnight on 05 January 2022, with a view to competing in the Australian Tennis Open commencing on 17 January 2022.
2. Mr Djokovic held a Temporary Activity (subclass 408) visa ("**Visa**"), which was granted to him on 18 November 2021.¹ As the holder of the Visa, Mr Djokovic had positive permission to travel to, enter and remain in Australia.² That visa was subject to no condition having the effect that his right to enter and remain in Australia was qualified in any way in regard to his vaccination status.³
3. Mr Djokovic had received, on 30 December 2021, a letter from the Chief Medical Officer of Tennis Australia ("**Exemption Certificate**")⁴ recording that he had been provided with a "*Medical exemption from COVID vaccination*" on the ground that he had recently recovered from COVID. The Exemption Certificate also recorded that:

¹ Affidavit of Natalie Bannister dated 06 January 2022 ("**First Bannister Affidavit**"), Ann A (p 6).

² Section 29 of the *Migration Act 1958* (Cth).

³ Cf. clause 408.611 of Schedule 2 to the *Migration Regulations 1994* (Cth).

⁴ Affidavit of Novak Djokovic dated 07 January 2022 ("**Djokovic Affidavit**"), Ann ND-4, p 15.

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- (1) the date of the first positive COVID PCR test was recorded on 16 December 2021, it had now been 14 days, and Mr Djokovic had not had a fever or respiratory symptoms of COVID-19 in the last 72 hours;
 - (2) the Exemption Certificate had been provided by an Independent Expert Medical Review panel commissioned by Tennis Australia;
 - (3) the decision of that panel had been reviewed and endorsed by an independent Medical Exemptions Review Panel of the Victorian State Government;
 - (4) the conditions of the exemption are consistent with the recommendations of the Australian Technical Advisory Group on Immunisation (“**ATAGI**”).
4. Mr Djokovic had also received, on 01 January 2022, a document from the Department of Home Affairs (“**Department**”) in regard to his “*Australian Travel Declaration*” (“**Declaration Assessment**”).⁵ The Declaration Assessment told Mr Djokovic that, “[his] *Australia Travel Declaration [had] been assessed,*” and that “[his] responses indicate[d] that [he met] the requirements for a quarantine-free arrival into Australia where permitted by the jurisdiction of your arrival,” that jurisdiction being Victoria.
5. Understandably, given that he:
- (1) held a visa unqualified by any relevant condition;
 - (2) had received certification of a medical exemption from vaccination from the Tournament organiser, that certification being granted after review by a panel established by the Victorian State Government;
 - (3) had received from the Department of Home Affairs a document informing him that he met the requirements for quarantine-free arrival,

Mr Djokovic understood that he was entitled to enter Australia and Victoria and to compete in the Australian Tennis Open.⁶

6. However, Mr Djokovic’s Visa was purportedly cancelled by a delegate of the Respondent (“**Delegate**”) at Melbourne Airport, purportedly relying on

⁵ Djokovic Affidavit, Ann ND-5, p 17.

⁶ Djokovic Affidavit, [14].

section 116(1)(e)(i) of the *Migration Act 1958* (Cth) (“**Purported Decision**”; “**Act**”). This occurred after he was in immigration clearance—for the most part *incommunicado*⁷—for about eight hours, until just before 8:00 am on 06 January 2022.

7. A record of the Purported Decision (“**Decision Record**”) is annexure NB-3 to the affidavit of Natalie Bannister dated 07 January 2022 (“**Second Bannister Affidavit**”). The Decision Records shows that:

- (1) at or about 04:11 am on 06 January 2022, Mr Djokovic was purportedly given a notice of intention to consider cancellation under section 116 of the *Migration Act 1958* (“**Notice**”);⁸
- (2) an interview of Mr Djokovic commenced at about 06:07 am;⁹
- (3) at or about 07:29 am, the Delegate made the Purported Decision;¹⁰ and
- (4) at or about 07:42 am on 06 January 2022, Mr Djokovic was notified of it.¹¹

8. Thereafter, Mr Djokovic was taken to the Park Hotel, where he has been detained ever since, 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.

9. Mr Djokovic submits that the Purported Decision was affected by a variety of jurisdictional errors, as set out in his proposed Amended Originating Application dated 07 January 2022 (“**AOA**”), and as developed hereunder.¹² He seeks that this Court quash the Purported Decision and associated relief as set out in the AOA.

⁷ See, e.g., Djokovic Affidavit, [20], Transcript of interview, T-10.10–11 (hereafter, **T-X.X**).

⁸ Second Bannister Affidavit, Ann NB-3, p 37. The time is recorded on p 39.

⁹ Second Bannister Affidavit, Ann NB-3, p 43.

¹⁰ Second Bannister Affidavit, Ann NB-3, p 49.

¹¹ Second Bannister Affidavit, Ann NB-3, p 54

¹² The proposed Amended Originating Application on which Mr Djokovic seeks to rely is annexure NB-4 to the affidavit of Natalie Bannister dated 07 January 2022 (“**Third Bannister Affidavit**”).

B. Overview of key legislative provisions, and grounds

Migration Act

10. Section 116(1) of the Act (within Part 2 Division 3 Subdivision D) relevantly provides that, subject to subsections (2) and (3) (which are not relevant here), the Minister may cancel a visa if he or she is satisfied that:

- “(d) if its holder has not entered Australia or has so entered but has not been immigration cleared—it would be liable to be cancelled under Subdivision C (incorrect information given by holder) if its holder had so entered and been immigration cleared; or
- (e) the presence of its holder in Australia is or may be, or would or might be, a risk to:
 - (i) the health, safety or good order of the Australian community or a segment of the Australian community; or”

11. Part 2 Division 3 Subdivision E of the Act (comprising sections 118A to 127) is entitled “*Procedure for cancelling visas under Subdivision D in or outside Australia*”.

12. Section 118A(1) provides that Subdivision E is taken to be an exhaustive statement of the requirements of the natural justice hearing rule “*in relation to the matters it deals with.*”¹³ The partial code of the natural justice hearing rule relevantly includes sections 119, 121 and 124.

13. Section 119(1) provides that subject to Subdivision F (which is not relevant here):

- “(1) ... if the Minister is considering cancelling a visa, whether its holder is in or outside Australia, under section 116, the Minister must notify the holder that there appear to be grounds for cancelling it and:
 - (a) give particulars of those grounds and of the information (not being non-disclosable information) because of which the grounds appear to exist; and
 - (b) invite the holder to show within a specified time that:
 - (i) those grounds do not exist; or
 - (ii) there is a reason why it should not be cancelled.”

¹³ As to the effect of this qualifying expression, used in a number of analogue provisions in the Act, see for example *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [33]-[35].

14. Section 121(1) relevantly provides that an invitation under paragraph 119(1)(b) is to specify whether the response to the invitation may be given in writing, at an interview between the holder and an officer, or by telephone. Section 121(3)(b) has the effect that, if the invitation is to respond at an interview, the interview is to take place at a time specified in the invitation, being a time within a reasonable period. (There has been no prescription by regulation for the purposes of regulation 121(3)(b).)
15. Section 124(1) provides that, subject to sections 120 and subsection 124(2) (neither of which are relevant here):
 - “... the Minister may cancel a visa at any time after the notice about the cancellation has been given under section 119 and whichever one of the following happens first:
 - (a) the holder responds to the notice;
 - (b) the holder tells the Minister that the holder does not wish to respond;
 - (c) the time for responding to the notice passes.”
16. Accordingly, and as is elaborated below, the Minister only has a discretionary power under section 116(1)(e)(i) of the Act to cancel the applicant’s visa if:
 - (1) a valid notice has been issued under section 119(1) (Mr Djokovic says this did not occur: **ground 1A**);
 - (2) the Minister has lawfully formed the requisite state of satisfaction (Mr Djokovic says this did not occur: **grounds 1B to 1D**);
17. Further, the Minister can only exercise a discretion under section 116(1)(e)(i) to cancel Mr Djokovic’s visa: if he considers Mr Djokovic’s response to the notice that he issued under section 119(1) (Mr Djokovic says this did not occur: **ground 2A**); and otherwise if his consideration of the exercise of discretion is rational and reasonable (Mr Djokovic says that it was not: **ground 2B**).
18. Finally, a decision by the Minister to cancel Mr Djokovic’s visa can only lawfully be made at a time permitted by section 124(1) and otherwise within certain constraints of natural justice at general law (Mr Djokovic says that it was not: **ground 3A**), and in accordance with procedural decisions, including as to the duration of the interview process and the timing of the making of the decision, that are legally reasonable (Mr Djokovic says that it was not: **ground 3B**).

Biosecurity Act

19. For completeness, it is apt to refer to aspects of the *Biosecurity Act 2015* (Cth) (“**Biosecurity Act**”) and an instrument made under section 44(2) of that Act, being the *Biosecurity (Entry Requirements – Human Coronavirus with Pandemic Potential) Determination 2021* (Cth) (“**Biosecurity Determination**”).
20. Section 44 of the Biosecurity Act is entitled “*Entry requirements*”. Subsection (1) provides that the section applies for the purpose of preventing a “listed human disease” from entering, or establishing itself or spreading in, Australian territory or a party of Australian territory. Subsection (2) provides that the Health Minister may determine one or more requirements for individuals who are entering Australian territory at a landing place or port in accordance with Division 2 or 3 of Part 4 of Chapter 4.
21. The only (broadly) relevant determination that has been made under section 44(2) is the Biosecurity Determination. It is a short legislative instrument with only one operative provision: section 5. Section 5 applied to Mr Djokovic: see section 5(1).
22. Relevantly, section 5 otherwise provides as follows:

“Ability to produce evidence of statement made before boarding

- (2) The individual must be able to produce, to a relevant official, evidence that, before the individual boarded the aircraft, the individual made a written statement that included:
 - (a) a declaration mentioned in subsection (3); and
 - ...
- (3) For the purposes of paragraph 2(a), the declaration is a declaration of which of the following paragraphs apply to the individual:
 - (a) the individual:
 - (i) has received a course of vaccinations with one or more accepted COVID-19 vaccines in accordance with a schedule for receiving that course of vaccinations that is accepted by the Therapeutic Goods Administration; and
 - (ii) received the last vaccination in the course of vaccinations at least 7 days before the day the relevant international flight was scheduled to commence; and
 - (iii) can produce evidence of the matters mentioned in subparagraphs (i) and (ii);
 - (b) the individual:

- (i) has a medical contraindication to COVID-19 vaccines; and
 - (ii) can produce evidence provided by a medical practitioner of the matter mentioned in subparagraph (i);
- (c) neither paragraph (a) nor (b) applies to the individual.
- (i) has received a course of vaccinations with one or more accepted COVID-19 vaccines in accordance with a schedule for receiving that course of vaccinations that is accepted by the Therapeutic Goods Administration; and
 - (ii) received the last vaccination in the course of vaccinations at least 7 days before the day the relevant international flight was scheduled to commence; and
 - (iii) can produce evidence of the matters mentioned in subparagraphs (i) and (ii);

...

Producing evidence of electronic statements on request

- (6) If the individual made a statement as mentioned in subparagraph (2) electronically, the individual must produce evidence that the individual made the statement if a relevant official asks the individual to do so.

Producing evidence relating to declarations on request

- (7) If a relevant official asks the individual to do so, the individual must produce:

...

- (b) if the declaration included in the individual's statement was of the kind mentioned in paragraph (3)(b) – the evidence mentioned in subparagraph (3)(b)(ii)."

23. Neither the Biosecurity Act, nor the Biosecurity Determination, nor any other instrument made under the Biosecurity Act, imposes any kind of requirement or "rule" that a person—including a lawful non-citizen with the rights of entry *etc.*, that accrue from a visa under the Migration Act—may not enter Australia unless they are vaccinated, or unless they have some "exemption" from any such "requirement".

C. Proposed ground 1A: failure to give requisite notice under section 119(1)

24. In the Notice, the boxes corresponding with section 116(1)(e)(i) of the Act are checked.¹⁴ In the right-hand column on the same page, the Delegate was instructed to,

¹⁴ Second Bannister Affidavit, Ann NB-3, p 37.

“[i]nclude the specifics (particulars) of the ground and the information because of which the ground appears to exist.”¹⁵ The Delegate entered, “See attachment A.”

25. Attachment A contains a few paragraphs setting out the background to the actual purported ground for cancellation, which is stated by way of conclusion and as the final paragraph on the page, as follows (underlined and bolded emphasis added):

“Based on the above information, I am satisfied there appears to be a ground to consider cancelling your subclass GG-408 visa, due to you presenting a risk to the health, safety or good order of the Australian community or a segment of the Australian community. The ground is that, the Minister may cancel a visa if he or she is satisfied that: ... if its holder has not entered Australia or has so entered but has not been immigration cleared - it would be liable to be cancelled under Section 116(1)(e)(i) of the Migration Act 1958.”

26. The underlined text comes out of section 116(1)(d). The bolded text is, of course, a reference to section 116(1)(e)(i). There is no ground for cancellation which involves combining sections 116(1)(d) and (e) in the way stated by the Delegate.
27. In short, the Delegate gave Mr Djokovic notice of proposed cancellation where the notice specified a purported ground of cancellation that did not in fact exist. There is no ground of cancellation of the kind specified in Attachment A.
28. To be valid, a notice under section 119(1) would have needed to have given particulars of one of the actual grounds in section 116; further, the Delegate would have needed to have been satisfied “albeit on a provisional basis pending any response to the notice from the visa holder, in respect of one of the matters identified in paras (a) to (g) of s 116(1)”.¹⁶ It did not; and the Delegate was not.
29. It is established that, especially in light of the terms of section 118A and 124(1), the giving of a valid notice under section 119 of the Act is a jurisdictional pre-condition to the cancellation power under section 116 arising.¹⁷ The Notice was invalid. In

¹⁵ Second Bannister Affidavit, Ann NB-3, p 37.

¹⁶ *Uddin v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 149 FCR 1 at [37]-[39] (Wilcox and Branson JJ).

¹⁷ *Uddin v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 149 FCR 1 at [24]-[26], [36]-[49] (Wilcox and Branson JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v Ahmed* (2005) 143 FCR 314 at [27]-[28] (Full Court); *Commonwealth v Okwume* (2018) 263 FCR 604 at [101], [117] (Besanko J, White J agreeing at [284]).

consequence, there was no power to cancel the visa arose, and the Purported Decision is therefore necessarily invalid.

D. Proposed ground 1B: error in purported formation of state of satisfaction described in section 116(1)(e)(i) *simpliciter*

30. Part B in the Decision Record contains a record of decision whether to cancel the visa.¹⁸ At point 7,¹⁹ the Delegate sets out why he was satisfied that grounds for cancellation do exist. The final four paragraphs of text therein set out are nearly identical to the extract from Attachment A quoted under [25] above. The final paragraph is as follows (underlined and bolded emphasis added):

“Based on the above information, I am satisfied there are grounds to consider cancelling the visa holder’s subclass GG-408 visa. The ground is that, the Minister may cancel a visa if he or she is satisfied that: ... if its holder has not entered Australia or has so entered but has not been immigration cleared – it would be liable to be cancelled under Section 116(1)(e)(i) of the Migration Act 1958.”

31. Again, the ground relied upon by the Delegate did not exist. There is no ground of cancellation that conflates section 116(1)(d) and (1)(e)(i) in the way articulated by the Delegate. Accordingly, the subjective jurisdictional fact that must exist in order that a power to cancel is enlivened—satisfaction as to a ground of cancellation—did not exist.
32. And, if the requisite state of satisfaction was not reached by the Delegate, it necessarily follows that the Delegate had no power to cancel Mr Djokovic’s visa. As was explained by a Full Court of the Federal Court in *Guclukol v Minister for Home Affairs* in respect of a similarly-structured power in the Act, “*once a vitiating error in the formation of the state of mind is identified, the subsequent exercise of power will involve a jurisdictional error due to the non-existence of the circumstance on which the power was conditioned*”.²⁰

¹⁸ Commencing at Second Bannister Affidavit, Ann NB-3, p 43.

¹⁹ Second Bannister Affidavit, Ann NB-3, p 45.

²⁰ (2020) 279 FCR 611 at [16].

E. Proposed ground 1C: error in purported formation of state of satisfaction described in section 116(1)(e)(i)—illogicality / irrationality in regard to the ATAGI Principles

33. Both in regard to: (1) particulars of why the Delegate purportedly considered a ground of cancellation existed; (2) the Delegate’s reasons as to why he was purportedly satisfied that a ground of cancellation did exist, the Decision Record contains the following paragraph (bold and underlined emphasis added):

“Under the Biosecurity Act 2015, there are requirements for entry into Australian territory. These requirements include that international travellers make a declaration as to their vaccination status (vaccinated, unvaccinated, or medically contraindicated). Travellers may make a declaration that they have a medical contraindication and must provide evidence of that medical contraindication provided by their medical practitioner. Previous infection with COVID-19 is not considered a medical contraindication for COVID-19 vaccination in Australia.”²¹

34. “*Medical contraindication*” is nowhere defined by the Delegate. The delegate referred to the Biosecurity Act, but the requirement that he was purporting to summarise are presumably those in in the Biosecurity Determination. The phrase “*medical contraindication*” is not defined there, either.

35. This ground is put in three ways:

- (1) *First*, the Delegate’s reference to what is “*considered*” a medical contraindication was intended to pick up what ATAGI considered to be a medical contraindication, and the Delegate then radically misconstrued ATAGI’s guidance in that connection;
- (2) *Second*, in any event, it is plain from the documents Mr Djokovic provided to the Delegate that Mr Djokovic was putting a representation that the Delegate should use ATAGI’s guidance in order to give content to the term, “*medical contraindication*,” and that representation was not considered;
- (3) *Third*, if “*medical contraindication*” simply has its ordinary meaning—*i.e.*, “(of a symptom or condition) to give indication against the advisability of (a particular or usual remedy or treatment),”²² Mr Djokovic presented compelling

²¹ See Second Bannister Affidavit, Ann NB-3, p 37 (incorporating Attachment A), p 41 (being Attachment A, where the quoted text appears, and p 45 (where the text again appears).

²² Macquarie Dictionary, definition of “*contraindication*.”

evidence that he had such a contraindication (recent COVID-19 infection), and the Delegate both failed to address that evidence, and (impliedly, but not expressly) made a finding that recent COVID-19 infection was not a contraindication in the absence of any evidence to support that finding.

E.1 The Delegate was referring to ATAGI guidance

36. The Delegate’s use of the passive voice in the phrase “*is not considered*” (considered by whom?) strongly suggests that the Delegate is relying on information or guidance derived from another source, or a policy. That inference is further strengthened by the statement put out by the Respondent on 05 January 2022, while Mr Djokovic was in the air on his way to Australia. That statement refers on several occasions to Australia’s “*strict border requirements*,” and says that unvaccinated persons are able to access the same travel arrangements as fully vaccinated travellers only if they “*provide acceptable proof that they cannot be vaccinated for medical reasons*.”²³
37. As outlined above, there is no “*strict border requirement*” that a person be vaccinated in order to enter Australia. None of the Act, the Regulations, the conditions of Mr Djokovic’s visa, the Biosecurity Act, or the Biosecurity Determination contain any such requirement. Again, then, the reference to “*strict border requirements*” suggests that there is some other policy or principle being applied.
38. Contextually, it becomes clear what policy or principle is being applied by tracking through the way in which a person submits an Australian Travel Declaration. This process of tracking through involves a few steps.
39. *First*, when the traveller completes the Australian Travel Declaration form, question 9.1.1 allows the person to answer “*yes*” to the proposition, “*I declare I cannot be vaccinated for medical reasons*,” and the same prompt continues:²⁴

“See Proof of medical exemption when coming to Australia [<https://covid19.homeaffairs.gov.au/vaccinated-travellers#toc-6>].”

²³ First Bannister Affidavit, Ann L.

²⁴ This document is annexed to the affidavit of Natalie Bannister dated 08 January 2022 (“**Fourth Bannister Affidavit**”).

40. *Second*, that webpage is in evidence.²⁵ Under the heading, “*Proof that you cannot be vaccinated for medical reasons when coming to Australia,*” there appears the following (emphasis added):

“If you are coming to Australia and have a medical contraindication recorded in the Australian Immunisation Register (AIR) you can show an Australian COVID-19 digital certificate ... to airline staff. You can otherwise show your immunisation history statement. If you do not have your medical contraindication recorded in the AIR you will need to show airline staff a medical certificate that indicates you are unable to be vaccinated with a COVID-19 vaccine because of a medical condition.”

41. *Third*, the form submitted to the Australian Immunisation Register (“**AIR**”) in order to have a medical contraindication recorded is also in evidence.²⁶ On page 1 second paragraph, it provides that “[y]ou can record a vaccine exemption due to a medical contraindication .. .” Page 1 right-hand column is headed “*Vaccines exempt due to medical contraindication,*” and continues (emphasis added):

“The medical basis for vaccine exemption is to be based on guidance in *The Australian Immunisation Handbook*. Advice on what constitutes a valid medical exemption to vaccination is provided on page 3 of this form.”

42. One sees later in the same column that one can register a temporary vaccine exemption due to a non-permanent contraindication due to, relevantly, an “*acute major medical illness.*”

43. Page 3 of the form then provides guidance as to what constitutes a valid exemption, as the form foreshadowed on page 1. It says, relevantly (emphasis added):

“The Australian Technical Advisory Group on Immunisation has released expanded guidance on acute major medical conditions that warrant a temporary medical contraindication relevant for COVID-19 vaccines. This information is available on the Department of Health website health.gov.au/resources/collections/covid-19-vaccination-provider-resources”

44. *Fourth*, that health.gov.au webpage, and the ATAGI expanded guidance, is also in evidence.²⁷ The second link on the health.gov.au page is entitled, “*ATAGI Expanded Guidance on temporary medical exemptions for COVID-19 vaccines,*” and the First Bannister Affidavit explains that the document, “*ATAGI expanded guidance on acute major medical conditions that warrant a temporary medical exemption relevant for*

²⁵ First Bannister Affidavit, Ann I.

²⁶ First Bannister Affidavit, Ann K.

²⁷ First Bannister Affidavit, Ann J.

COVID-19 vaccines” (“**ATAGI Exemption Guidance**”) was downloaded from that health.gov.au page.²⁸

45. The ATAGI Exemption Guidance²⁹ is then pellucidly clear in identifying “*acute major medical conditions that warrant a temporary medical exemption relevant for COVID-19 vaccines,*” and that a temporary exemption, “[f]or all COVID-19 vaccines” is “*PCR-confirmed SARS-CoV-2 infection, where vaccination can be deferred until 6 months after the infection.*”
46. Summarising: (1) the Australian Travel Declaration directs attention to a Departmental website; (2) the Departmental website directs attention, in defining, “*medical contraindication,*” to the contraindications that may be recorded on the AIR; (3) the relevant AIR form directs attention to ATAGI expanded guidance (*i.e.*, to the ATAGI Exemption Guidance in particular); (4) the ATAGI Exemption Guidance expressly provides that PCR-confirmed COVID infection within the last six months justifies temporary exemption for all COVID-19 vaccines.
47. ATAGI advice on the definition of “*fully vaccinated*” (“**ATAGI Vaccination Advice**”) also appears on the health.gov.au webpage referred to above.³⁰ The ATAGI Vaccination advice is also pellucid in stating that: (1) past SARS-CoV-2 infection at any time in the past “*is not a contraindication to vaccination*”;³¹ but, (2) past SARS-CoV-2 infection within the last six months is a contraindication. As the ATAGI Vaccination Advice puts it (emphasis added):
- “COVID-19 vaccination in people who have had PCR-confirmed SARS-CoV-2 infection can be deferred for a maximum of six months after the acute illness, as a temporary exemption due to acute major medical illness.”
48. In this context, it is plain that the Delegate’s reference to what is or is not considered (evidently as a matter of policy) a “medical contraindication” is purportedly based on ATAGI guidance, and specifically the ATAGI Exemption Guidance. But the Delegate’s application of that ATAGI Exemption Guidance was radically wrong. It is possible, based on the content of the ATAGI Vaccination Advice, that the Delegate in

²⁸ First Bannister Affidavit, [5(j)].

²⁹ First Bannister Affidavit, Ann C.

³⁰ First Bannister Affidavit, [5(j)].

³¹ First Bannister Affidavit, Ann B, p 11.

stating that “*Previous infection with COVID-19 is not considered a medical contraindication for COVID-19 vaccination in Australia*” was referring in effect to the content of page 3 of the ATAGI Vaccination Advice (past infection at any time in the past), while overlooking page 4 of the same document (past infection within the last six months).

49. In any event, the ATAGI Exemption Guidance and the ATAGI Vaccination Advice are each clear, with no room for misinterpretation, that COVID-19 infection within the past six months unequivocally is a medical contraindication to vaccination. The Delegate radically and fundamentally, in a way that no reasonable decision-maker could have done, misapplied that advice to Mr Djokovic’s situation. That involves jurisdictional error, even if the Delegate was not bound to consider the ATAGI Exemption Guidance or the ATAGI Vaccination Advice.³²

E.2 Mr Djokovic was referring to ATAGI guidance

50. Mr Djokovic’s Australian Travel Declaration form attached the Exemption Certificate.³³ The Exemption Certificate said, *inter alia*, that Mr Djokovic had a medical exemption from COVID vaccination on the grounds that he had recently recovered from COVID, and (with emphasis added) that:

“This certificate for exemption has been provided by an Independent Expert Medical Review panel commissioned by Tennis Australia. The decision of the panel has been reviewed and endorsed by an independent Medical Exemptions Review Panel of the Victorian State Government. The conditions of the exemption are consistent with the recommendations of the Australian Technical Advisory Group on Immunisation (ATAGI).”

51. The Exemption Certificate was also provided directly to the Delegate (T-5.13–20).
52. Mr Djokovic also referred repeatedly during the Delegate’s interview of him that his exemption was based on infection in the last six months (T-11.30; T-14.1; T-14.17; T-15.51; T-20.22). He referred to “*the Covid 6 months regulation for the medical exemption*” (T-14.17, see also T-15.51).

³² See, e.g., *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189 at 208 (French and Drummond JJ), frequently applied including for example in *Elliot v Minister for Immigration and Multicultural Affairs* [2007] FCAFC 22 at [41] (Full Court).

³³ Fourth Bannister Affidavit. The Exemption Certificate is at Djokovic Affidavit, Ann ND-4.

53. In context, it was totally clear that Mr Djokovic was representing, by reference to “*the recommendations of [ATAGI]*,” that there was a medical contraindication applicable for people who had, within the last six months, had a COVID infection.
54. If, contrary to the first way in which this ground is put, the Delegate did not have regard to the ATAGI Exemption Guidance or the ATAGI Vaccination Advice, then he fell into error in one of a number of ways.
55. *First*, he fell into error in that he failed to consider a clearly-articulated submission made by Mr Djokovic about a material (in fact, the central) matter.³⁴
56. *Second*, alternatively, he failed to make an obvious inquiry about a critical fact, the existence of which is easily ascertained.³⁵ Namely, he failed to make an inquiry as to whether, as Mr Djokovic represented, ATAGI guidance was that COVID infection within the last six months was a medical contraindication to vaccination. Given that Mr Djokovic’s Exemption Certificate expressly relied on ATAGI guidance, and Mr Djokovic repeatedly referred to a “*six month*” exemption, the inquiry was obvious. The question whether there existed a medical contraindication was plainly critical, and guidance from Australia’s peak body on vaccination was highly probative thereof. As to ease of ascertainment, thirty seconds on Google would have produced the Department of Health webpage that links to all relevant ATAGI guidance.³⁶
57. Accordingly, the Delegate fell into jurisdictional error.

E.3 Medical contraindication in the ordinary sense

58. Assuming (contrary to the submissions above) that neither the Delegate nor Mr Djokovic had ATAGI in mind in considering medical contraindications, the

³⁴ *AYY17 v Minister for Immigration & Border Protection* (2018) 261 FCR 503 at 509–510 [18] (Collier, McKerracher and Banks-Smith JJ), applied in a section 116 context in *BW120 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 518 at [21] (Jagot J). See also *Cai v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 90 at [55] (Wheelahan J), citing *Dranichnikov v Minister for Immigration & Multicultural Affairs* [2003] HCA 26; 197 ALR 389 at [24]–[25] (Gummow and Callinan JJ) and [95] (Hayne J). See also, for example, by analogy, *BFMV v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 199 at [18] (Full Court) and the cases there referred to.

³⁵ *Minister for Immigration and Citizenship v SZLAI* (2009) 83 ALJR 1123 at 1129 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also *SZNBX v Minister for Immigration and Citizenship* (2009) 112 ALD 475 at [21] (Bennett J), *MZABA v Minister for Immigration and Border Protection* (2015) 234 FCR 425 at 442–443 [61] (Bromberg J)

³⁶ The page at First Bannister Affidavit, Ann J.

question would then remain what is meant by “*medical contraindication*,” and what evidence was available to the Delegate in regard to whether Mr Djokovic had one.

59. On that question, the only evidence before the Delegate in regard to the question was the Exemption Certificate. That Exemption Certificate expressly stated that the question of whether Mr Djokovic’s recent COVID infection merited a vaccination exemption had been examined by:
- (1) a Professor with these qualifications: MBBS, B.Med.Sci., FRACP, FFTM (RCPS Glasgow) FISTM, PhD, Professor of Infectious Diseases and Virology, COVID Advisor: Healthscope, Epworth Health, AFL, Tennis Australia, ICC, FIBA;
 - (2) a doctor with these qualifications: MBBS, MA (Bioinf), FRACP, PhD, Infectious Disease Physician, COVID Advisor: Epworth Health, Tennis Australia.
60. It also stated that the decision of those doctors had been reviewed by other doctors, and that the conditions of exemption were consistent with ATAGI’s recommendations.
61. That was highly probative evidence that Mr Djokovic had a medical exemption from vaccination, which can only have been on the basis of a contraindication. Shortly after the Delegate said that previous COVID infection “[*was*] *not considered*” to be a contraindication, Mr Djokovic responded, “*I’m sorry to interrupt but that’s not true*,” and referred to what the various medical practitioners had certified as distilled in the Exemption Certificate (T-11.5–37).
62. The position, then, was that Mr Djokovic advanced highly probative evidence that he had a medical contraindication. The Delegate nowhere addressed or referred to the actual content of that evidence. That was a jurisdictional error.³⁷ And, the Delegate’s finding that recent COVID infection was not a medical contraindication was not supported by any probative material—there was not a skerrick of evidence before the

³⁷ See again cases cited in ft 34.

Delegate supporting a proposition that it was not a contraindication. That was another jurisdictional error.³⁸

E.4 Conclusion: ground 1C

63. No matter how one construes the Delegate's reference to medical contraindication, then, jurisdictional error was involved:

- (1) If the Delegate intended to pick up ATAGI guidance, he radically and fundamentally, in a way that no decision-maker could reasonably have done, misapplied ATAGI's advice;
- (2) If the Delegate did not intend to pick up ATAGI guidance, then:
 - (a) he failed to address Mr Djokovic's clearly-articulated submission that he should have regard to ATAGI guidance; and/or
 - (b) he failed to make an obvious inquiry about a critical fact the existence of which was easily ascertained, namely whether ATAGI guidance was that COVID infection in the previous six months was a medical contraindication; or
 - (c) he failed to address Mr Djokovic's clearly-articulated submission that Mr Djokovic had a medical contraindication in a sense divorced from ATAGI's guidelines;
 - (d) his finding that COVID infection in the previous six months was not a medical contraindication was not supported by any evidence at all (let alone probative evidence), and was contrary to the only evidence before him—the evidence Mr Djokovic relied upon based on the opinions of eminent doctors.

³⁸ See, e.g., *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41 at [17] (Keane, Gordon, Edelman, Steward and Gleeson JJ); *Guclukol v Minister for Home Affairs* (2020) 279 FCR 611 at 618 [20]–[22] (Katzmann, O'Callaghan and Derrington JJ).

F. Proposed ground 1D: error in purported formation of state of satisfaction described in section 116(1)(e)(i)—“must” provide evidence of medical contraindication

64. The Decision Record contains a box, at point 7, in which the Delegate set out his or her “[d]etails of the evidence and findings about why the delegate is satisfied *FOUNDATIONS for cancellation DO EXIST*”.
65. In that box, the Delegate sets out some matters and then records, in the final paragraph, that “[b]ased on the above information, I am satisfied that there are grounds to consider cancelling the visa holder’s subclass GG-408 visa”.³⁹ Having regard to this way in which the Delegate “framed” his reasons, it is clear that all of the “information” (or reasons or matters) set out above in the box were material to his or her conclusion recorded in the final paragraph.⁴⁰
66. Relevantly, the Delegate reasoned as follows (emphasis added):⁴¹

“Under the Biosecurity Act 2015, there are requirements for entry into Australian territory. These requirements include that international travellers make a declaration as to their vaccination status (vaccinated, unvaccinated, or medical contraindicated). Travellers may make a declaration that they have a medical contraindication and must provide evidence of that medical contraindication provided by their medical practitioner.

...

All visa holders, whether permanent or temporary are expected to abide by all public health directives issued by both Commonwealth and state and territory jurisdictions. A breach of these directions is considered a potential risk to the health, safety or good order of the Australian community.”

67. Accordingly, it appears that at least part of the Delegate’s basis for being satisfied that a ground existed for cancellation that there had been “*a breach of ... directions,*” being (by inference) the “directive” referred to in the first quoted paragraph and made under the Biosecurity Act. That is obviously a reference to the Biosecurity Determination, which is made clearer still by the provision of section 5(3) of the Biosecurity

³⁹ The Delegate then refers to a purported ground of cancellation that does not in fact exist (see ground 1B above). But let it be assumed in the Minister’s favour, for the purpose of considering proposed ground 1D of the application, that that in itself does not give rise to jurisdictional error.

⁴⁰ See *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109 at [72]-[74] (Full Court), approving and applying *SZOOR v Minister for Immigration and Citizenship* (2012) 202 FCR 1 at [102] (McKerracher J).

⁴¹ Second Bannister Affidavit, Ann NB-3, p 28.

Determination as an attachment to the notice of intention to consider cancellation.⁴² (No other “directive”, for example issued by the Victorian Government, is identified. And there was no tenable basis upon which it could be suggested Mr Djokovic had breached any such directive.)

68. But section 5(3) does not provide that Mr Djokovic “*must provide evidence of [his] medical contraindication.*” Rather, it (read with section 5(2)) provides only that Mr Djokovic must declare that he can provide evidence provided by a medical practitioner of his medical contraindication. Mr Djokovic did not breach that requirement; he did so declare.
69. Accordingly, the Delegate has erred in purporting to form a state of satisfaction that a ground of cancellation exists by a patent misunderstanding the Biosecurity Determination, or making a finding about Mr Djokovic’s compliance with that determination that was not open on the evidence.⁴³
70. For completeness, section 5(7) of the Biosecurity Determination (which the Delegate did not cite, extract or rely on) had the effect that it is only if a “*relevant official*” asked Mr Djokovic to do so that he was required to produce the evidence to which he referred. The Delegate did not so ask. Mr Djokovic produced his recent positive COVID test unprompted (T-3.37–4.16), and produced the Exemption Certificate in response to a question whether he had documentation of his exemption, rather than a request that he produce it (T.5.13–20).
71. But let it be supposed for the sake of argument that the Delegate did “*ask*” for evidence from a medical practitioner of Mr Djokovic’s medical contraindication within the meaning of section 5(7). “*Medical contraindication*” is not defined in either the Biosecurity Act or in the Biosecurity Determination. Its ordinary meaning is, “(of a symptom or condition) to give indication against the advisability of (a particular or usual remedy or treatment).”⁴⁴

⁴² Second Bannister Affidavit, Ann NB-3, see p 24 third paragraph and p 25.

⁴³ Compare, in a different context, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [202] FCAFC 152 at [86] (Mortimer and Kerr JJ, Allsop CJ agreeing at [1]).

⁴⁴ Macquarie Dictionary, definition of “*contraindication.*”

72. This is consistent, as well, with the meaning given in the ATAGI Exemption Guidance. The ATAGI Exemption Guidance provides guidance as to “*acute major medical conditions that warrant a temporary medical exemption.*”⁴⁵ They do this including for the purpose of Form IM011,⁴⁶ page 3 of which expressly refers to the ATAGI Expanded Guidance, and which is a form that is to be completed (relevantly) for exemptions “*due to medical contraindication*” (see page 1, top of right-hand column). The ATAGI Exemption Guidance itself uses the language of “*contraindication.*”⁴⁷
73. Mr Djokovic produced evidence of a recent positive COVID test from the Institute of Public Health of Serbia.⁴⁸ He also produced a declaration from one medical practitioner (Dr Broderick) that two other medical practitioners (those referred to at [**Error! Bookmark not defined.**] above) had provided him with an exemption consistently with ATAGI recommendations,⁴⁹ which exemption decision had been reviewed and endorsed by still other medical practitioners on a panel “*of the Victorian State Government.*”⁵⁰ He also produced the Exemption Certificate, itself signed by the Chief Medical Officer of Tennis Australia.
74. Accordingly, if the Delegate did ask for evidence of a medical contraindication within the meaning of section 5(7) of the Biosecurity Determination, then, Mr Djokovic provided ample such evidence. There was, therefore, simply no basis for a conclusion that Mr Djokovic had breached section 5(7) even if (both of which are denied): (a) there had been a relevant request by a relevant official for the production of such evidence; and (b) in any event, the Delegate found that Mr Djokovic had breached section 5(7) (rather than section 5(3) read with (2)).
75. In summary:
- (1) the Delegate erred in law in finding stating that the Biosecurity Determination required Mr Djokovic to provide evidence of his medical contraindication and

⁴⁵ First Bannister Affidavit, Ann B, p 15.

⁴⁶ First Bannister Affidavit, Ann K.

⁴⁷ First Bannister Affidavit, Ann C, p 15.

⁴⁸ Djokovic Affidavit, Ann ND-2, p 13.

⁴⁹ Djokovic Affidavit, Ann ND-4, p 15.

⁵⁰ Djokovic Affidavit, Ann ND-4, p 15.

accordingly erred in law in reasoning that Mr Djokovic had breached that direction;

- (2) alternatively, if Mr Djokovic was so required (because the Delegate asked for such evidence to be produced), the Delegate made the illogical or irrational finding that Mr Djokovic had not produced evidence of a medical contraindication when, in fact, he plainly had provided ample such evidence.

76. In the premises, the purported formation of the state of satisfaction of the matter in section 116(1)(e)(i) was seriously illogical or irrational, or legally unreasonable, and was not lawfully formed.

G. Proposed ground 2A: error in purported exercise of discretion under section 116(1)(e)(i)—failure to consider representations made by the Applicant in response to Notice

77. This ground proceeds on the assumption, contrary to what is submitted above, that the Delegate did lawfully reach a state of satisfaction that a ground for cancellation existed under section 116 of the Act. In that event, the Delegate then had a discretion to cancel the Visa; he was plainly not required to cancel the Visa.

78. Section 119(1)(b)(ii) of the Act required the Delegate to invite Mr Djokovic to show that (relevantly) there was a reason why his Visa “should not” be cancelled (which particular requirement is distinctly directed to the *discretion* in section 116(1), assuming that a ground of cancellation exists). The Delegate was required, in deciding whether to cancel Mr Djokovic’s visa, to consider any such submissions or representations made by Mr Djokovic.⁵¹ A failure to consider a clearly-articulated representation as to why a visa should not be cancelled is a jurisdictional error.

79. The Delegate recorded that Mr Djokovic had offered such reasons in response to the Notice, as outlined in Part B point 8 of the Decision Record (which again was distinctly directed to the *discretion* in section 116(1)), as follows:⁵²

“The visa holder stated that he had received a medical exemption from Tennis Australia.

The visa holder stated he received his Australian Travel Declaration from the

⁵¹ See ft 34 above.

⁵² Second Bannister Affidavit, Ann NB-3, p 47.

Federal government.

The visa holder stated he provided all his medical reports / PCR test reports to Tennis Australia, which were assessed by an Independent Expert Medical Review Panel Commissioned by Tennis Australia.”

80. Mr Djokovic’s reasons are also described in his affidavit, consistently but in more detail, as follows:

“[21] ... When he read to me the page headed ‘ATTACHMENT A (Part A)’, I made some comments. When he said that previous infection with COVID-19 is not considered a medical contraindication for COVID-19 vaccination in Australia, I said that that’s not true, and I told him that the Independent State Government medical panel had said and I explained why. I then referred to the two medical panels and the Travel Declaration (which had been assessed by the Commonwealth Government and indicated that I could lawfully enter into Australia).

...

[25] ... I explained that I had been recently infected with COVID in December 2021 and on this basis I was entitled to a medical exemption in accordance with Australian Government rules and guidance. I further explained that my medical exemption had been granted by the Independent Expert Medical Review Panel, that I had previously provided all relevant medical reports to TA, including my COVID-PCR test results, and that accordingly the visa should not be cancelled. I told the ABF officers that I had correctly made my Australian Travel Declaration and otherwise satisfied all necessary requirements in order to lawfully enter Australia on my visa.”

81. The reasons given by Mr Djokovic included, then, that he had received the Exemption Certificate, which he produced to the Delegate (and he explained some of the process leading to its granting), and that he had received the Declaration Assessment, which he also produced.
82. The documents submitted to the Department in support the Australian Travel Declaration included the Exemption Certificate, which contained a statement by a medical practitioner (Dr Broderick) that Mr Djokovic was exempt (based on assessments from other medical practitioners) from mandatory vaccination on the basis of recent COVID infection, as assessed in accordance with recommendations of ATAGI. That is to say, the information was not generic; it was specific to Mr Djokovic.
83. The Declaration Assessment did not simply say that Mr Djokovic’s declaration had been received; it said that it had been assessed, and that his responses indicated that he met the requirements for quarantine-free arrival into Australia. Mr Djokovic expressly

relied on this in saying that his declaration “*had been assessed by the Commonwealth Government [which] indicated that I could lawfully enter into Australia.*”⁵³

84. The reasons proffered by Mr Djokovic in Part B point 8 of the Decision Record amounted to a representation by Mr Djokovic that: (1) he had done everything he been asked to do in order to ensure his entry into Australia; and, more importantly (2) material given to him including by the Department informed him that he had done everything that he had been asked to do to ensure his entry into Australia.
85. The only reference to material of this kind comes in Part B point 9 of the Decision Record, in regard to “*extenuating circumstances beyond the visa holder’s control*” (emphasis added). The delegate summarises the submission as being that, “*Tennis Australia facilitated his medical exemption from COVID19 vaccination requirement and completed the Australian Travel Declaration on his behalf.*” The Delegate addresses this by saying that Tennis Australia would simply have facilitated his exemption and submitted his Australian Travel Declaration based on information that he provided, so that extenuating circumstances did not exist.
86. In at least four ways, this demonstrates a failure to consider Mr Djokovic’s representations.
87. *First*, Mr Djokovic’s representation—in effect, “*you, the Department, led me to believe, on the same information that I am giving you now, that I was authorised to enter Australia quarantine-free*”—had nothing to do with circumstances beyond his control. The fact that it was addressed in the part of the form dealing with extenuating circumstances beyond Mr Djokovic’s control demonstrates that the Delegate misunderstood the representation.
88. *Second*, beyond the section of the form in which the reasoning appears, the reasoning—Tennis Australia would only have been acting on information you gave them—likewise demonstrates that misunderstanding. Mr Djokovic was plainly not claiming otherwise than that Tennis Australia was acting on the basis of the information provided by him. He was claiming that the Department in particular, but also Tennis Australia via the independent medical review process he described, had told him that he had a medical

⁵³ Djokovic Affidavit, [21].

contra-indication that met ATAGI's guidelines and therefore that he was permitted to enter Australia quarantine-free.

89. *Third*, it is a grossly inadequate summary of the representations Mr Djokovic made. In particular, the Delegate does not (at least expressly) refer to Mr Djokovic having relied on the content rather than the mere fact of the Declaration Assessment. But it is the content of that document that is most important: it informs Mr Djokovic that his declaration had been assessed and that he met applicable requirements. Failing to identify this as a critical part of Mr Djokovic's representation reveals the same misunderstanding.
90. *Fourth*, the natural place to address the representation Mr Djokovic made would have been in Part B point 10 of the form—"Other relevant reasons (including mandatory legal consequences." Yet, the representation is not there addressed at all.
91. In these circumstances, the Court would be comfortably satisfied that the Delegate failed to understand and to consider the representation that Mr Djokovic made as a reason why his visa should not be cancelled.

H. Proposed ground 2B: error in purported exercise of discretion under section 116(1)(e)(i)—illogicality / irrationality as to extenuating circumstances

92. The next point arises out of the part of Part B point 9 in the Decision Record dealing with extenuating circumstances beyond the visa-holder's control.⁵⁴ As outlined above, the Delegate here set out some reasoning in relation to Tennis Australia having facilitated a medical exemption. (As outlined above, that missed Mr Djokovic's point, but that is not relevant to this ground.)
93. What is relevant for this ground is that, having reasoned as he did, the Delegate found that the matters Mr Djokovic relied upon did not "*constitute extenuating circumstances beyond the visa holder's control.*" The Delegate's conclusion was that, "[b]ased on the above, [he] applied significant weight in favour of visa cancellation for this factor."

⁵⁴ Second Bannister Affidavit, Ann NB-3, p 49.

94. Reasoning that an absence of extenuating circumstances is a compelling reason in favour of cancellation is a seriously irrational or illogical step in reasoning, and one that affected a material conclusion.⁵⁵
95. An extenuating circumstance, beyond the visa-holder's control, is something that militates against cancellation of a visa. That is, it is a factor in mitigation. The absence of an extenuating circumstance is simply the absence of a factor in mitigation. It is not a factor in aggravation. It is simply neutral. It leaves the situation as being simply that there is a ground for cancellation. This concept was explained as follows in *Republic of Croatia v Snedden* (2010) 241 CLR 461 at 484 [79] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added):
- “Conceptually, the absence of a mitigating factor does not constitute or attract punishment. In particular, the absence of a mitigating factor is not an aggravating factor. Thus, while a plea of guilty is a mitigating factor, a plea of not guilty is not an aggravating factor.”
96. By way of further analogy, this principle is also well established in the law of criminal sentencing: “*a failure to prove the existence of mitigating circumstances does not prove the existence of aggravating circumstances.*”⁵⁶
97. No reasonable decision-maker could treat the absence of a particular mitigating circumstance as being an aggravating circumstance. It was seriously illogical or irrational for this Delegate to have done so. That this reasoning affected a material conclusion is apparent from the fact that the Delegate himself described the factor as bearing “*significant weight*” in favour of cancellation. Based on a comparison of language this was, in fact, for the Delegate the weightiest consideration.⁵⁷ And, it was the only consideration that the Delegate considered to have been in favour of cancellation of the visa.⁵⁸

⁵⁵ *MZZGE v Minister for Home Affairs* [2019] FCAFC 72 at [22(3)] (Besanko, Farrell and Thawley JJ), citing *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 648 [132] (Crennan and Bell JJ).

⁵⁶ See Judicial College of Victoria, *Victorian Sentencing Manual*, [2.3.2.1 – Burden and standard of proof] (page 17), and cases there cited.

⁵⁷ Purpose of travel was given “*reasonable weight*”; general compliance with visa conditions given “*some weight*”; degree of hardship if there were cancellation given “*some weight*”; co-operative dealings with the Department given “*some weight*”; mandatory legal consequences given “*reasonable weight*.”

⁵⁸ Purpose of travel, general compliance, degree of hardship, co-operation, and mandatory legal consequences all counted against cancellation, with varying degrees of weight.

98. In short, the Delegate’s reasoning in relation to extenuating circumstances was illogical or irrational and led to the Delegate treating a neutral or irrelevant factor as a significant, and the only, factor in favour of visa cancellation. This amounts to jurisdictional error.

I. Proposed grounds 3A (procedural fairness) and 3B (unreasonableness)

I.1 Evidence

99. The evidence establishes, relevantly, the following chronology of 06 January 2022.

100. Between about 00:21 and 00:52, with a few brief suspensions of a few minutes, the Delegate interviewed Mr Djokovic (T-1-8).

101. At or about 03:55, the delegate informed Mr Djokovic that the Delegate was going to issue the Notice. The Notice was in fact issued about 04:11.⁵⁹ The Delegate informed Mr Djokovic that Mr Djokovic would be given 20 minutes to give any further explanation (T-9.34–35).

102. Mr Djokovic asked the Delegate to wait until about 08:00 so that he could call Tennis Australia to try to “*figure this out*” (T-10.5–8). After a further exchange, Mr Djokovic again asked to have more time to acquire information from his agent (T-16.11, see also T-16.33–42). The Delegate said that would “*speak to [his] bosses*” (T-16.25–26, see also T-15.44).

103. At 05:20 am, the Delegate confirmed that Mr Djokovic has asked for more time to rest and to “*talk to [his] solicitor again,*” and that he had asked for a period to 08:00 or 08:30 am (T-17.15–18). The Delegate said, “[*s*]o that’s absolutely fine, I have spoken with my supervisors and they’re more than happy to allow you have to rest” (T-17.22–24). The interview was suspended at 05:22 am, and Mr Djokovic was taken out of the interview room (T-17.44).

104. The next period appearing on transcript is at 06:07 am (T.17.28). But Mr Djokovic’s evidence establishes significant events occurring in the interim, which are not recorded on transcript because they did not occur in the interview room. While Mr Djokovic was waiting on a sofa outside the interview room for a bed to be prepared, he was

⁵⁹ Second Bannister Affidavit, Ann NB-3, p 37. The time is recorded on p 39.

approached by two of the Delegate's supervisors.⁶⁰ They asked whether Mr Djokovic wanted until 8:30 in order to rest. The following words were then exchanged:⁶¹

- (1) Mr Djokovic said that, yes, he wanted to rest, but (as he had said earlier), he also "*wanted some help and legal support and advice from [his] representatives that [were] currently sleeping and [were] difficult to get a hold of at this early hour*";
- (2) The supervisors said that Mr Djokovic's legal representatives wouldn't be able to make an appeal, in the event that his Visa were cancelled, until the cancellation decision is made.
- (3) The supervisors said, "*the sooner that they make a decision, the better for [Mr Djokovic] and [his] representatives,*" in that "*if they did not cancel my visa, then [Mr Djokovic] would be free to go and [he] could go to where [he] was to stay while in Melbourne,*" whereas "*if they cancelled my visa, then my lawyers would know what they had to deal with, and could do their legal work to challenge the cancellation.*"

105. Mr Djokovic said that he needed to speak with someone and think about what had been put to him, because he was confused.⁶² The supervisors left him, and he was taken to a bed that had been prepared in a nearby room.⁶³ This would likely have been around 5:30 am.

106. Not long after, and well before 8:30 am (in fact probably at around 6:00 am), the Delegate and his superiors both woke Mr Djokovic.⁶⁴ There was then another exchange in which Mr Djokovic expressed a desire to wait until 08:30, whereas one of the supervisors pressured him to agree to a decision being made immediately. For example, Mr Djokovic said that he wanted to postpone until 08:30 (T-18.7); the supervisor said that Mr Djokovic had already said he had nothing further to add (T-18.9-10);

⁶⁰ Djokovic Affidavit, [23].

⁶¹ All of this from Djokovic Affidavit, [23].

⁶² Djokovic Affidavit, [23].

⁶³ Djokovic Affidavit, [23]-[24].

⁶⁴ Djokovic Affidavit, [24].

Mr Djokovic said that he might have something in a few hours (*i.e.*, after he'd spoken with his lawyers) (T-18.12).

107. Over several pages of transcript the supervisor pressured Mr Djokovic to simply continue the interview immediately (T-18–20). Mr Djokovic, having formed the view that “[*they were*] going to cancel [*his*] visa, it’s obvious” (T-18.26) relented, feeling he had no choice,⁶⁵ and on the basis of an understanding based on what they had said to him that it was better for him if the interview was done right away.⁶⁶
108. The interview was suspended at 06:14 (T-20.35–36). At or about 07:29 am, the Delegate made the Purported Decision.⁶⁷ At 07:39, the Delegate returned to the interview room, and at about 07:42, Mr Djokovic was notified of the Purported Decision.⁶⁸
109. The evidence, then, establishes the following matters concerning the process leading to the Purported Decision:
110. *First*, Mr Djokovic had just been in transit for about 25 hours including layovers,⁶⁹ and from viewing Mr Djokovic’s incoming passenger card and passport (T-2.25) the Delegate knew that Mr Djokovic had just made the lengthy flight from Dubai;
111. *Second*, Mr Djokovic expressed “*shock*” (T-9.48), “*surprise*” (T-14.12; T-20.17), “*confusion*” (T-14.4), and otherwise expressed puzzlement at his situation, given that (as he understood it) he had done everything he was required to do to enter Australia (see, *e.g.*, T-9.17–29, 27–42, 46–49, T-14.4–18). He did not know what further information the Delegate wanted (see, *e.g.*, T-9.59, T-10.3-13).
112. *Third*, as outlined above, Mr Djokovic repeatedly requested additional time to speak with (variously) Tennis Australia, his agent, and his lawyers, to get further information to put before the Delegate.

⁶⁵ Djokovic Affidavit, [25].

⁶⁶ Djokovic Affidavit, [25].

⁶⁷ Second Bannister Affidavit, Ann NB-3, p 49.

⁶⁸ Second Bannister Affidavit, Ann NB-3, p 54.

⁶⁹ Djokovic Affidavit, [17].

113. *Fourth*, the Delegate agreed to grant Mr Djokovic until 08:30, both so that he could rest, and so that he could speak with Tennis Australia, his agent, and his lawyers;
114. *Fifth*, Mr Djokovic was then pressured by the Delegate’s supervisors to go along with the Delegate reneging on that representation. The basis that the supervisors proffered as to why Mr Djokovic should go along with that reneging was patently spurious and mischievous—*i.e.*, it would actually be better for Mr Djokovic and his representatives if the decision were made quickly and before Mr Djokovic rested or consulted with his representatives.
115. The basis for reneging proffered by the supervisor was spurious because it plainly was not, and would never have been, better for Mr Djokovic if a visa cancellation decision were made while he was unrested and without consulting with his representatives.
116. If Mr Djokovic had been given the time that it was represented to him that he would have (*i.e.*, to 08:30), his representatives could have made obvious further submissions and presented obvious further material to the Delegate, as relevant to why his visa should not be cancelled:
 - (1) that ATAGI had recognised that past infection reduces the risk of re-infection for at least six months,⁷⁰ and further information in that connection;
 - (2) that in fact ATAGI recommended that people who had PCR-confirmed SARS-CoV-2 infection can be deferred for a maximum of six months as a temporary exemption “due to acute major medical illness”;⁷¹
 - (3) further information concerning the independence and anonymity of the medical exemption process he had already undergone, and the eminence of the panel members, being information of the kind set out in the affidavit of Dr Broderick;
 - (4) further information concerning the extremely damaging effect for him personally of a visa cancellation decision—financially, reputationally, professionally—as well as the disruptive (to say the least) consequences for the Australian Tennis Open and for tennis fans;

⁷⁰ First Bannister Affidavit, Ann B, p 11.

⁷¹ First Bannister Affidavit, Ann B, p 12; Ann C page 15.

- (5) further information concerning his long and unproblematic history of visiting Victoria to compete in previous Australian Open events;⁷²
- (6) the complete disproportion between the serious consequences of cancellation (on the one hand), as compared with the miniscule or non-existent risk to health he posed if permitted to enter Australia, given:
 - (a) as mentioned above ([116(1)]) Mr Djokovic was at reduced risk of re-infection on account of recent COVID, and if because of that reduced risk he did not contract COVID then he could not spread it; and
 - (b) in any event (as is notorious) the number of COVID cases per day in Australia and in Victoria specifically were, at the time of cancellation, measured in the tens of thousands.

I.2 Procedural unfairness (ground 3A)

117. In the circumstances described above, it was procedurally unfair for the Delegate to make the Purported Decision when he did, rather than wait until 08:30 to enable Mr Djokovic to rest and consult with his representatives, as he had earlier been told he could. This ground is expressed in two alternative ways: a breach of section 124(1) of the Act (an element in the partial code of the natural justice hearing rule), or as involving a denial of an aspect of procedural fairness at general law that is not a “matter” “dealt with” in the partial code of natural justice.

Breach of section 124(1)

118. By operation of section 124(1) of the Act, the Minister could only be empowered to cancel Mr Djokovic’s visa under section 116(1)(e) after a valid notice had been given under section 119 (the subject of ground 1A) and “after whichever one of the following [events described in paragraphs (a) to (c)] happens first (the present focus).
119. It is convenient to deal with the event in (c) at the outset: it is that “the time for responding to the notice passes”. Whether there is such a “time” that “passes” depends on the mode that is specified in the section 119(1) notice as to how a response to the

⁷² Djokovic Affidavit, [5].

invitation is to be given: “in writing” (paragraph (a)); “at an interview” (paragraph (b)); or “by telephone” (paragraph (c)).

- (1) Section 121(2) provides that, subject to subsection (4), if the invitation is respond “otherwise than at an interview”, then the response is to be given “within a period specified in the invitation”. There will thus be a clear envelope of time, the outer edge of which defines “the time for responding to the notice”.
- (2) However, if the invitation is to respond “at an interview” (as was the case here), there is no defined or ascertainable duration of the interview and (therefore) there is no which is capable of defined or ascertainable a “time for responding to the notice”.⁷³ (Certainly, none was specified in the Notice.) It could not be the case that the “time for responding” here is defined simply by whenever the *officer* elects to terminate the interview, for that would undermine the central role of section 119 and the importance of the opportunity for the non-citizen to give *their* response to the matters the subject of a notice under that section and give rise to perverse outcomes. Of course, the interview ends when the non-citizen completes their response; but that engages section 124(1)(a) not (c).

120. Accordingly, in the circumstances of this case where the Notice specified interview as to the mode by which Mr Djokovic was to respond, the event in section 124(1)(c) could not occur: there was no “time for responding to the notice” that could “pass”.

121. As to section 124(1)(a), clearly that section must be understood as referring to the non-citizen having *completed* their response to the notice. (It would be obviously perverse if, during an interview, after a non-citizen had said *something* but where it was clear that he or she had not said *everything* he wanted to say, the Minister or her delegate could make a decision.) Accordingly, section 124(1)(a) invites a question of an (objective) characterisation of the circumstances. Had Mr Djokovic indicated that he had given his complete “response to the Notice”, when the Delegate made his Purported Decision before 8:00am?

122. The answer is “no”. It is sufficiently clear (and ought to have been clear to the Delegate) that Mr Djokovic had not given his complete response to the Notice when the Delegate

⁷³ Cf. *BMV16 v Minister for Home Affairs* (2018) 261 FCR 476 at [73(9)] (Full Court)

made the Purported Decision: Mr Djokovic wished to speak to his legal representatives before completing his response. Accordingly, the event in section 124(1)(a) had not yet occurred when the Delegate made the Purported Decision.

123. As to section 124(1)(b), that event plainly did not occur. Mr Djokovic did not “tell[] the [Delegate] that [he] does not wish to respond” to the Notice. To the contrary, Mr Djokovic had been responding, but had not yet completed his response.
124. In the premises, by operation of section 124(1), the Delegate had no power to make the Purported Decision when he did.

Procedural fairness at general law

125. When one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.⁷⁴ Within statutory constraints, the Delegate was required to adopt a procedure that was reasonable in the circumstances to afford an opportunity to be heard to Mr Djokovic.⁷⁵ If the procedure adopted so constrained Mr Djokovic’s opportunity to propound his case as to amount to practical injustice, that would amount to a denial of procedural fairness.⁷⁶
126. Also relevant, by way of analogy, is *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, in which the WZARH was informed that a particular decision-making procedure would be adopted, and then that procedure was changed without WZARH having been given an opportunity to comment. This amounted to jurisdictional error.
127. In an analogous way, Mr Djokovic sought until 08:30 to rest and to speak with his advisors. The Delegate represented to Mr Djokovic that he could have that time. There was no cogent reason for the Delegate to depart from that representation—there was no prejudice to the Respondent in delay for a further few hours, Mr Djokovic’s request was reasonable and based on cogent reasons, and the consequences of a possible

⁷⁴ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 13–14 [37] (Gleeson CJ);

⁷⁵ *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 206–207 [82].

⁷⁶ *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 206–207 [82].

cancellation decision were very serious. Yet the Delegate did depart from that representation.

128. Unlike in *WZARH*, the proposed departure was discussed with Mr Djokovic. But it was discussed with him:
- (1) in circumstances that the Delegate knew were of serious disadvantage to him (*i.e.*, unrested, and in part having been awakened from attempted sleep);
 - (2) on premises that the Delegate must have known were (at best) misleading (*i.e.*, no prejudice to him from renegeing when in fact, as outlined above, there was likely to be and was considerable prejudice from so renegeing).
129. The result in *WZARH* cannot be limited just to circumstances of inability to comment. It extends to a circumstance where the way in which the opportunity to comment afforded to the affected person is itself practically unjust. That is this case.

I.3 Legal unreasonableness (ground 3B)

130. Further or alternatively, in the circumstances described above, the procedural decision made by the Delegate to make the Purported Decision when he did rather than wait until 08:30 to enable Mr Djokovic to rest and consult with his representatives, as he had earlier been told he could, was a decision that was legally unreasonable in the sense contemplated in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 and subsequent case law.
131. In particular, it is to be noted that the High Court has confirmed that:
- (1) “*The implied condition of reasonableness is not confined to why a statutory decision is made; it extends to how a statutory decision is made*”.⁷⁷
 - (2) Legal unreasonableness is “*not to be assessed through the lens of procedural fairness to the applicant*”⁷⁸ (and therefore, even if the Court were to dismiss the complaint of procedural unfairness ground 3A, that would not determine the distinct complaint of unreasonableness with respect to the procedural decision).

⁷⁷ *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439; at [19], approving *Li* (2013) 249 CLR 332 at [91].

⁷⁸ *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54 at [26].

132. No sensible decision-maker acting with due appreciation of his responsibilities would have decided to make the Purported Decision rather than wait until 08:30 to enable Mr Djokovic to rest and consult with his representatives, as he had been told he could.⁷⁹ It was manifestly unjust.⁸⁰ In all the circumstances of the case as outlined above: and (as in *Li*) the absence of any urgency to make any decision under section 116;⁸¹ and (as the Delegate accepted at point 9) the “*compelling need*” that Mr Djokovic had to travel to Australia to “*participate in the Australian Open*”; and the obviously broad and significant impact of a decision to cancel Mr Djokovic’s visa, it was perverse for the Delegate to proceed to make the “*procedural decision*” to make the Purported Decision when he did on the basis that he did.

J. Relief

133. If any of the above grounds is established then relief quashing the Purported Decision would follow.
134. Mr Djokovic’s evidence establishes that the timeframes relevant to his possible participation in the Australian Tennis Open are very tight.⁸² Further, if the Purported Decision is quashed then Mr Djokovic’s Visa has effect and it permits him to enter Australia and to remain in Australia (Act, section 29). In these circumstances, an order of the kind made by Griffiths J in *CZW20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 171 ALD 646 would be appropriate, *i.e.*, an order that:

“The Minister is to take appropriate steps to ensure that the applicant is released immediately and forthwith from immigration detention and, without limitation thereto, such release must occur by no later than 5:00 pm today.”

135. Further, in Mr Djokovic’s respectful submission, the present case is one in which the Court would be content to make Orders at the earliest possible time, with reasons to follow when the Court has had an opportunity of crafting those reasons. This course is

⁷⁹ *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at 4 [5] (Allsop CJ), citing *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064.

⁸⁰ *Stretton* (2016) 237 FCR 1 at 4 [5], citing *Kruse v Johnson* [1898] 2 QB 91 at 99–100.

⁸¹ The only conceivable prejudice arising from allowing further time was to Mr Djokovic (rather than the Minister or anyone else), being the prolongation of his “immigration clearance”.

⁸² Djokovic Affidavit, [8].

common in urgent cases.⁸³ As Chernov JA said in *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd* (2001) 4 VR 28 at 42–43 [38]:⁸⁴

“Judges are frequently requested to grant relief as a matter of urgency. Many such applications raise difficult issues and call for complex reasons for the decision to grant or refuse the remedy sought. If the court were to wait before making the appropriate orders in such applications until the reasons have been formulated to the point where they can be published, the delay may defeat the whole purpose of seeking the order in the first place. It is not uncommon, therefore, in appropriate cases, for judges to grant the relief sought and to deliver reasons for it later.”

136. This is precisely such a case.

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N M WOOD SC

N DRAGOJLOVIC

J E HARTLEY

HALL & WILCOX

8 January 2022

⁸³ See recently *e.g.*, *Ormarc Engineering v Downer Edi Mining-Blasting Services* [2020] WASC 7 at [1] (Fiannaca J); *PNJ Investment Holding Pty Ltd v STK Family Pty Ltd atf STK Family Trust* [2021] NSWSC 530 at [2] (Henry J); *Barclay Finance Pty Ltd v Manning* [2017] NSWSC 1050 at [5] (Lonergan J); *Attwells v White (No 3)* [2021] NSWSC 1569 at [7] (Lonergan J)

⁸⁴ Applied in the context of the Federal Magistrates’ Court (as the Court was then called) in *Rollings v Rollings* (2009) 230 FLR 396 at 434 [127]–[128] (Boland, O’Ryan and Murphy JJ), see also *The Owners - Strata Plan No 18027 v Clark* [2015] FCCA 2185 at [21] (Street J).