

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 16/01/2022 9:51:00 AM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Reply - Form 34 - Rule 16.33
File Number: VID18/2022
File Title: NOVAK DJOKOVIC v MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 16/01/2022 9:52:52 AM AEDT

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



No. VID 18 of 2022

Federal Court of Australia
District Registry: Victoria
Division: General

NOVAK DJOKOVIC

Applicant

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

Respondents

APPLICANT'S OUTLINE OF REPLY SUBMISSIONS

1. Mr Djokovic replies as follows to the Minister's submissions dated 15 January 2022 ("RS [X]"), using corresponding headings (but not sub-headings), and using the same abbreviations as in Mr Djokovic's principal submissions.

B. BACKGROUND

2. RS [8] is not quite right. The Minister was not sure if there was a difference between "very low" risk and "negligible" risk (D [13]), but did not assume that it was negligible; he "accept[ed] that Mr DJOKOVIC pose[d] a negligible individual risk of transmitting COVID-19 to other persons" (D [17]). The same answer is given to RS [22].

3. The second sentence of RS [11] is correct in that the Minister did purport to note the existence of media reports regarding groups opposed to vaccination supporting Mr Djokovic's presence, but neither at RS [11] nor anywhere else in the Minister's submissions does he deal with the submission at AS [19]: the material cited at D [22(ii)] provided absolutely no support for that description. The media reports in **Attachments K and L** simply are not to the effect that the Minister describes. They do not refer to Mr Djokovic at all.

4. In regard to RS [21], the relevance of AS [8]–[14] is that they set the context in which the likely context of displeasure at Mr Djokovic's potential removal is to be assessed.

Filed on behalf of (name & role of party)	NOVAK DJOKOVIC, the Applicant		
Prepared by (name of person/lawyer)	Natalie Bannister		
Law firm (if applicable)	Hall & Wilcox		
Tel	03 9603 3155	Fax	03 9670 9632
Email	Natalie.Bannister@hallandwilcox.com.au		
Address for service	Level 11, 525 Collins St., Melbourne, Vic., 3000		

It would be one thing to remove a person who posed an individual health risk, had entered Australia without a medical exemption and inconsistently with ATAGI guidelines, *etc.* It is another to remove a person who poses negligible individual health risk, enters with an exemption and consistently with ATAGI guidelines, *etc.* This bears on inherent probability (the existence of which probability is in any event supported by evidence in the record),¹ of removal causing a negative reaction.

5. The first two sentences of **RS [24]** are right: the correct reading of **D [55]** is that the Minister regarded the issue of the Australian Travel Declaration as being at best neutral.

C. GROUND ONE

6. The Minister spends a lot of time (**RS [29]–[45]**) outlining why, at least in many cases, an inference cannot be drawn that a matter was not considered based on its absence in a statement of freely-given reasons. But what is relevant, which the Minister allows at **RS [37]**, is that sometimes such inferences can be drawn.
7. The starting point is that, importantly, the Minister concedes that nowhere in the Minister’s reasons does he address, “*in express terms*,” the consequences for health and good order were Mr Djokovic to be removed (**RS [51]**). (Mr Djokovic submits this is better termed the “**Counterfactual**,” rather than the Counterargument).
8. The first question, then, is whether, in that light, the inference can be drawn that the Counterfactual was not considered. That inference can plainly be drawn.
9. *Taulahi v Minister for Immigration and Border Protection* (2016) 246 FCR 146 at 165 [72] is directly on point, and *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 is distinguishable for the same reasons as identified there. That is, the Minister’s reasons in the present case are: (1) described as a “*statement of reasons*”; the reasons give a fulsome and apparently exhaustive account of matters that the Minister considered relevant.
10. The exhaustiveness of the reasons is apparent from its structure and content. At **D [71]**, the Minister says that his decision was made, “[*a*fter considering all the matters discussed above”—*i.e.*, not other matters. The reasons are carefully drafted, and

¹ Bannister Affidavit, NB-1, p 116 (Attachment H).

separated into headings relevant to subject matter. References are made to material in the Departmental brief. Where the Minister has expressly considered a thing not to be relevant, he has said so (see, *e.g.*, **D [13]–[14]**). Where he has chosen not to make an inquiry, he records that (**D [7]; D [19]**). He had “*ample time to cogitate on matters*” (**RS [47]**), so the absence of the Counterfactual cannot be explained by a rushed job in drafting reasons.

11. In this context, the total absence of the Counterfactual from the reasons is only explicable on the basis that the Minister did not consider it. The inference to that effect would comfortably be drawn.

C.1.2 “The factual finding sought should not be made”

12. The above matters answer **RS [46]–[49]**. From **RS [50]–[60]**, the Minister seeks to find a textual or contextual basis for a finding that the Minister did consider the Counterfactual. These submissions would not be accepted.
13. As to **RS [50]**, let it be assumed for the moment (contrary to the fact) that the material cited in **D [22(ii)]** actually supported the conclusion the Minister there expressed, being that there were groups opposed to vaccination were supportive of Mr Djokovic’s presence in Australia. The point is that at **D [22]** the Minister is considering the likely reaction of any such people to Mr Djokovic’s presence, not to his removal. Similarly, the “*opposing reactions*” referred to at **D [36]** are expressly in regard to Mr Djokovic’s presence in Australia, not its absence because of removal (see **D [34], [35]**)
14. **RS [51]** is an important concession that there is no express reference to the Counterfactual in the reasons. And **RS [52]** supports Mr Djokovic’s position rather than detracts from it. At **D [46]**, the Minister expressly confines his consideration of “*unrest*” to things that have already happened. That is, he says that the fact that there has been some unrest which the Minister associates with Mr Djokovic’s presence in Australia is a factor against cancellation; this says absolutely nothing about the unrest that might follow from his absence, despite this perhaps being an obvious place to consider that very issue.
15. **RS [53]** likewise has a short answer. Mr Djokovic made submissions on public interest against the cancellation of his Visa. His submissions did not address the Counterfactual (not surprisingly, given that this “*anti-vaccination sentiment*” mode of reasoning is

wholly different from that adopted by the delegate of the Minister for Home Affairs). The fact that, at **D [44]–[45]**, the Minister referred to submissions against removal made by Mr Djokovic, and no other matters, plainly does not indicate that he did consider other matters (such as the Counterfactual); it indicates that he did not so consider.

16. **RS [55]–[58]** cite material that is totally irrelevant to the Counterfactual. **RS [55]** is expressly in relation to Mr Djokovic’s “*presence in Australia*,” not its absence. **RS [56]–[57]** refers to support for Mr Djokovic’s presence in Australia, but this says nothing about whether the Minister considered the consequences of cancellation. The second part of **RS [58]** is just an assertion. The Minister submits now that he was aware that people may react negatively if a decision were to be made to cancel Mr Djokovic’s reasons, but he does not say so in his reasons. Rather, at **D [45]** (third bullet point) that point is conspicuously absent. He just says that there is support for Mr Djokovic to stay and play tennis.
17. And, **RS [59]** supports Mr Djokovic’s submission. It is correct that there was material in the Departmental brief suggesting that anti-vaccination groups were upset at Mr Djokovic’s Visa cancellation and detention. Mr Djokovic’s point is that that material is not referred to or considered in the Minister’s reasons.

C.2.2 “No jurisdictional error in this case”

18. The answer to **RS [73]** is that it would be a perverse, illogical, or irrational approach (and one out of keeping with the proper exercise of a power the purpose of which is to reduce risk to health) to the issue of health risk (or good order risk), or public interest, or discretion, to cancel a visa to avoid a miniscule health risk (or good order risk) and ignore that the cancellation creates a much larger health risk (or good order risk).
19. As to **RS [75]**, Mr Djokovic obviously does not invite merits review. He does not submit that the Court should make some finding about whether the risks attendant upon cancellation outweigh those attendant upon non-cancellation. Rather, he submits that it involved error for the Minister not to consider the Counterfactual.
20. Finally, as to **RS [77]–[78]**, materiality is easily satisfied. If it be accepted that it was illogical for the Minister not to consider the consequences of his decision, and those consequences might (as the evidence suggested) be non-trivial, then it is obvious that at least public interest and discretion might have been affected by the error.

21. As to the evidence of non-trivial risk in the event of cancellation, Mr Djokovic repeats **AS [31]–[32]**. And cases like *Mackie v Minister for Home Affairs* [2021] FCA 1326 are readily distinguishable. It is not at all obvious from this Minister’s reasons, *cf. Mackie*, what might have been the effect on the balancing of public interest and discretionary factors in the event that the Minister considered the Counterfactual.
22. He does not say, for example, that factors in favour of cancellation overwhelmingly outweigh those against; he simply says “*outweighed*” (**D [48]**). It is the same with discretion (**D [69]**). If a further factor were added against cancellation, that balance might have shifted. The error was material

D. GROUND TWO

23. The submissions as to legal principle at **RS [81]–[88]** are basically uncontroversial, but none of them deny that there must be some basis for conjecturing and hypothesising. The Minister is not permitted to cancel a visa based on an evidence-free figment of his imagination.
24. Then, **RS [90]–[96]** reveal some serious confusion of approach. These paragraphs are all in support of a submission (in effect) that there was evidence for the Minister’s finding that Mr Djokovic was opposed to being vaccinated. But that finding is not the subject of Ground 2. Ground 2, as the Minister recognises (**RS [4]**) is about the finding that Mr Djokovic’s presence in Australia may foster sentiment against vaccination against COVID-19.
25. Thus, the punchline submission in **RS [92]**—an inference is open that Mr Djokovic would be perceived as being opposed to being vaccinated—does not address the point. The same is true of **RS [94]**. What is needed is evidence in support of the fostering of anti-vaccination sentiment, and that point is not even addressed until **RS [97]**.
26. **RS [97]**, belatedly, commences a submission that there was evidence in support of the “*fostering anti-vaccination sentiment*” finding, and does so by incorporating the submissions in **RS [11]–[12]** and **[16]**.
 - (1) **RS [12]** is irrelevant: it simply outlines what would be the consequence of people resisting vaccination, which does not address whether Mr Djokovic’s presence in Australia would cause them to so resist.

- (2) **RS [16]** refers to **RS [11]**, and describes reasoning at **D [33]**. **D [33]** is not related to “*fostering anti-vaccination sentiment*” but rather relates to encouraging people to act inconsistently with public health advice.
- (3) That leaves **RS [11]**, which says that, “*the Minister noted that ‘there are some media reports that some groups opposed to vaccination have supported Mr DJOKOVIC’s presence in Australia, by reference to his unvaccinated status’ (Reasons at [22(ii)]).*” This submission is fatally undermined by the fact that, as submitted at **AS [19]** (to which there has been no response) the evidence cited at **D [22(ii)]** does not support the proposition for which it is cited. The media reports do not refer to Mr Djokovic at all.
27. Accordingly, **RS [97]** does not, in fact, establish that there was evidence in support of a finding that Mr Djokovic’s presence in Australia might foster anti-vaccination sentiment. There is no such evidence in the record. The only material that the Minister referred to (in **D [22(ii)]**) is totally irrelevant.
28. **RS [98]** is answered by footnote 3 in the Applicant’s submissions.

E. GROUND THREE

29. **RS [102]** fails to consider that the Minister’s reasoning is based not only on what Mr Djokovic’s views on vaccination are perceived to be, but further what they are. **RS [19]**. Plainly Mr Djokovic’s actual views are important to the Minister, because he relies on what he says to be a “*well-known stance*” (**RS [39]**)—rather than what is perceived to be his stance). Yet, the Minister acknowledges that he does not know what those views are (**RS [19]**). This is illogical
30. As to **RS [103]**, the Court can infer from Mr Djokovic’s statement (in the record) that his publicly-expressed views have been taken out of context,² that he does not accept the depiction by the “*international media*” of his views on vaccination, and therefore that he could have provided context and material to the Minister, if asked. That inference should be drawn despite the absence of affidavit evidence in this proceeding:

² Bannister Affidavit, NB-1, p 148.

which is readily to be explained by the shortness of available time (reasons to filing of material in about 18 hours, final hearing less than a day later).

31. As to **RS [105]–[110]**, Mr Djokovic’s ground is not a no-evidence ground; it is a ground to the effect of alleging that it is a perverse, illogical, or unreasonable approach to fact-finding to refer to and take into account only those parts of a quote that support a conclusion to which one is proceeding, and ignore any context that detracts from that conclusion.

ANNEXURE A

32. Annexure A is said to contain evidence showing consideration by the Minister of the “*counterargument*,” or what Mr Djokovic would call the Counterfactual: which is to say, the consequence of cancellation. But it does not. Every table item is irrelevant to that issue. In the same order as in the tables in Annexure A:

	REASONS FOR DECISION
<u>Page</u>	<u>Comment</u>
13	Refers to consequences of Mr Djokovic’s <u>presence</u> in Australia, not to consequences of cancellation.
15	Refers to perception of Mr Djokovic’s stance on vaccination, which is irrelevant to the consequences of cancellation
16	Refers to consequences of Mr Djokovic’s <u>presence</u> in Australia, not to consequences of cancellation.
18	Refers to consequences of Mr Djokovic’s <u>presence</u> in Australia, not to consequences of cancellation.
18	Refers to consequences of Mr Djokovic’s <u>presence</u> in Australia, not to consequences of cancellation.

19	Refers to consequences of Mr Djokovic's <u>presence</u> in Australia, not to consequences of cancellation.
19	Refers to the fact of unrest having occurred in the <u>past</u> , involves no consideration of the future position.
	SUBMISSION
26	Refers to consequences of Mr Djokovic's <u>presence</u> in Australia, not to consequences of cancellation.
	ATTACHMENTS
34–35	Refers to support for Mr Djokovic remaining present in Australia and playing tennis, not the consequences of his removal.
48 174	Shows support for Mr Djokovic remaining present in Australia and playing tennis, not the consequences of his removal
115– 116	This is the only evidence that is capable of bearing on the consequences of Mr Djokovic's removal. What is important about it, though, is precisely that the Minister does <u>not</u> refer to the evidence in his reasons.
126	Refers to anti-vaccination sentiment in Australia prior and unrelated to Mr Djokovic's arrival, does not refer to Mr Djokovic at all
127– 130	Refers to anti-vaccination sentiment in Australia prior and unrelated to Mr Djokovic's arrival, does not refer to Mr Djokovic at all

33. In short, none of this evidence in relation the Counterfactual, with the exception of the material appearing in Attachment H—to which the Minister nowhere referred. Annexure A supports Mr Djokovic's, rather than the Minister's, submissions about Ground 1.

ANNEXURE A

34. The material herein listed was doubtless in the record. The complaint in Ground 3 is that the Minister's approach to this material involved cherry-picking (including within single sentences) parts that he considered to support his conclusion, while ignoring everything else.

O P HOLDENSON QC

N M WOOD SC

N DRAGOJLOVIC

J E HARTLEY

Counsel for the Applicant

HALL & WILCOX

Solicitors for the Applicant

16 January 2022