

The Novak Djokovic Saga

Barrie Goldsmith

College (1975), Liverpool, United Kingdom
Rostron Carlyle Rojas Lawyers, Sydney, Australia

Joshua Miller

Macquarie University, Sydney, Australia
Rostron Carlyle Rojas Lawyers, Sydney, Australia

This paper examines the events in early 2022 surrounding the arrival in Australia of the men's world Number 1 tennis player Novak Djokovic and his subsequent forced departure without having had the opportunity to play in the Australian Open tennis tournament. The authors of this paper address, in chronological order, the facts and a summary of the legal issues that arose. The events that unfolded arose less as a result of the visa that had been granted to Mr. Djokovic and more as a result of the information and documents provided by him in relation to his medical exemption from the requirement for vaccination. This paper identifies the detention of Mr. Djokovic upon his arrival into Australia, the decision by Australian Border Force to cancel his visa, Mr. Djokovic's successful first legal challenge, the decision by the Minister to exercise his personal discretion, and Mr. Djokovic's unsuccessful second legal challenge. Finally, this paper examines the potential negative impacts that these events may have had, and may still have, on international tourism to Australia and its global reputation.

Keywords: Novak Djokovic, Australia, tennis, vaccinations

Introduction

The recent events, even saga, concerning Novak Djokovic when he arrived in Australia to play in the Australian Open Tennis Championship (www.ausopen.com) received global and extensive media attention. It was remarkable that such a globally renowned sportsperson, being the world's number one ranked men's tennis player, should have had the issues that he had and should subsequently have been required to leave Australia without having played in the tournament. It was an unheard of situation. The events that occurred drew significant criticism of a number of stakeholders including the Australian Government, Tennis Australia (being the tournament organiser), and Mr. Djokovic's management team.

The events that unfolded prompted many questions to be asked and the authors have prepared this paper with a view to trying to provide some answers and some explanations. The paper constitutes a summary of events. It also addresses the potential negative impact that the events may have had, and may have, on international tourism to Australia.

Barrie Goldsmith, College (1975), Liverpool, United Kingdom; special counsel, Rostron Carlyle Rojas Lawyers, Sydney, Australia.

Joshua Miller, law student, Macquarie University; law clerk, Rostron Carlyle Rojas Lawyers, Sydney, Australia.

The Factual and Legal Issues

A Visa and a Medical Exemption

All entrants to Australia need to have a visa. There are a variety of types of visa that can be issued. The grant of a visa to Mr. Djokovic was never an issue in this case, and visas are routinely granted almost automatically to any participant in the Australian Open, or similar events. The problem lay with the information and documents provided by Mr. Djokovic in relation to the medical exemption that he claimed from the requirement that all entrants to Australia had to be double vaccinated. The requirement for double vaccination for any entrant to Australia has been in place for some significant time prior to Mr. Djokovic's entry into the country and that requirement has been strictly enforced by the Government, with a view to trying to control and restrict the number of Covid related infections in Australia.

Mr. Djokovic, like many other people, had expressed his own anti-vaccination views and, to some degree, was held in very high esteem by members of the anti-vaccination movement. Much was made in the media and in commentary of those views but, so far as concerns the legal aspects of the events that transpired, his personal views became irrelevant. All that mattered was whether or not he had complied with the necessary legal requirements.

Mr. Djokovic's Entry Into Australia

Mr. Djokovic arrived in Melbourne on 5 January 2022 at about midnight. Prior to his departure from the Middle East for Australia, Mr. Djokovic, on 4 January, uploaded a post in which he stated that he would be going to Australia as he had obtained a medical exemption. When he arrived, he was questioned, in immigration clearance, by Officers from the Australian Border Force (the ABF). They questioned the grounds and the validity of the medical exemption. Mr. Djokovic was kept in immigration clearance until the early hours of 6 January when the ABF decided that the information and material that had been provided by Mr. Djokovic was not sufficient to justify the grant of the medical exemption. The Government's guidelines for the grant of an exemption had been openly and clearly published online for some time. As with all regulations or requirements, sometimes there is scope for argument as to the correct interpretation of them.

Following the decision of the ABF, they cancelled his visa and Mr. Djokovic was taken to a quarantine hotel in Melbourne where he stayed. The decision to cancel was made by Officers of the ABF pursuant to delegated powers held by them.

Mr. Djokovic's First Application to the Federal Circuit and Family Court of Australia (the FCFCFA)

On 6 January 2022, Mr. Djokovic applied to the FCFCFA to challenge the decision made earlier that day cancelling his visa. The hearing of the application was, understandably so, heard on an urgent basis and a Judge of the FCFCFA granted an interim injunction restraining Mr. Djokovic's removal from Australia. The application was listed for final hearing on 10 January. On that day, the Court found in favour of Mr. Djokovic and ordered that the cancellation of his visa be set aside. The Court found that Mr. Djokovic had been denied procedural fairness, or, alternatively described, natural justice...

The Exercise of Ministerial Discretion

Pursuant to Section 133C of the *Migration Act 1958*, the Minister for Home Affairs has a discretion to cancel a visa. This is a power vested in the Minister personally, it is not a power that can be delegated (unlike in respect of the earlier cancellation). The Minister may cancel a visa if satisfied that it would be in the public

interest to do so. Section 133C of the Act expressly provides that the Ministerial power is not subject to the rules of natural justice (unlike the earlier decision to cancel, which was).

After lengthy and careful consideration, on 14 January, the Minister decided to exercise his discretion and decided to cancel Mr. Djokovic's visa. As is clear, the grounds upon which the Minister decided to exercise his personal discretion differed from the grounds upon which the ABF originally cancelled Mr. Djokovic's visa. That decision was one of enormous importance given the imminence of the commencement of the tennis tournament and given the wider debate about the extent to which Governments around the world impose restrictions upon the freedoms of their citizens. The potential for political backlash was enormous.

Mr. Djokovic's Second Application to the FCFCA

On 14 January, Mr. Djokovic made oral application in the FCFCA challenging the decision by the Minister to cancel his visa, with written material to be provided very promptly. Given the significant importance of the challenge, both in relation to Mr. Djokovic personally and the consequences of a judicial ruling in so far as it may have concerned others, the FCFCA transferred the matter for determination to the Federal Court of Australia (the FCA), a superior Court to the FCFCA. In the normal course, applications to the FCA are heard by a single Judge. However, on this occasion, with a view to excluding the possibility of an appeal, the Chief Judge of the FCA decided that the application should be heard by three Judges of that Court.

On 16 January, the FCA dismissed Mr. Djokovic's application. The Court emphasised that, in giving its judgment, it expressed no view whatsoever on the merit of the various pro and anti-vaccine arguments. The hearing before the Court was simply to determine whether or not the Minister, in exercising his personal discretion, had made any error of law. The Court was only concerned with any errors of law on the part of the Minister. The Court did not find any such errors. The Court hearing was not concerned with any issue as to whether or not the medical exemption held by Mr. Djokovic was valid or otherwise.

Mr. Djokovic's Departure From Australia

In view of the decision of the Court, Mr. Djokovic left Australia. The media frequently suggested that Mr. Djokovic had been deported but, so far as is known, that was not the case. A person is only deported once a deportation order has been signed by the Minister. Deportation orders are routinely not issued when a person decides to voluntarily leave the country. Given the events that occurred, undoubtedly Mr. Djokovic simply decided to voluntarily leave the country.

The Potential Negative Impacts Upon International Tourism to Australia

Statistics

Before Covid 19, international tourism was a very important contributor to the Australian economy and workforce. In 2019, being the last full year prior to the spread of the coronavirus, Australia had more than 9 million international visitors. The tourism industry employed more than 600,000 people, comprising about 5% of the total employment within the country. Tourism contributed more than \$60 billion to the country's Gross Domestic Product.

As with all countries, international tourism suffered dramatically following the spread of the coronavirus. The major source countries for international tourists were China, New Zealand, the United States, the United Kingdom, Japan, and Singapore. China was, by far, the largest source country and tourism from that country effectively stopped as a result of the Chinese Government's own travel restrictions as well as the inability of

international travellers to come to Australia unless they had obtained a travel exemption, which would only have been granted if compelling circumstances existed.

International tourism plays a very important part in the Australian economy and life, and as with many countries, Australia was badly affected by the international border closures that were imposed as a result of the spread of the coronavirus.

A Country's Reputation

International tourism has strong regard to the reputation of a country. For example, scenes of violence or some form of demonstration in a location may deter international tourists not only from going to the location in which the violence or demonstration has taken place, regardless of how temporary it may have been, but may also deter international tourists from going anywhere else in the particular country. It remains remarkable that a 30 second or one minute video from a location can have such a profound effect on tourism to a country.

Prior to the arrival in Australia of Mr. Djokovic, Australia still enjoyed a reputation as a wonderful country to visit but it also tended to have a global reputation of being an impenetrable country, one that was not welcoming, not even for overseas temporary workers in the country. Whilst it is the case that international borders were closed for a period of two years, there were stringent reasons for that. As is the case throughout the world, some people agree with the strict measures that were imposed and others do not. Nonetheless, the reputation that Australia had as being an impenetrable country certainly did not, in the minds of many overseas people, generate a positive reputation. The country has, during recent years, also had its reputation tarnished as a result of criticism made of it (irrespective of whether or not such criticism was justified) in relation to its treatment of refugees and asylum seekers.

Accordingly, whilst Australia has always enjoyed a reputation of being an exciting, clean, healthy, safe, fun loving, and geographically and environmentally diverse country, it has had suffered some hits to its reputation. A further blow would not be helpful.

Australia has, like all other countries, had to fight in order to achieve a higher number of international tourists. It has always known that the long distances and cost of flights can act as a deterrent to many people wishing to visit from the northern hemisphere. Further, Australia is surrounded by cheaper travel destinations in its region, including Indonesia and Thailand. The adverse publicity from the situation involving Mr. Djokovic certainly has not been helpful.

The Impact Upon International Tourism of the Djokovic Saga

As is noted earlier, the events that unfolded certainly will not have helped Australia's reputation. Fortunately, any damage caused to its reputation will diminish, and will inevitably be forgotten other than by a few, over time. At the time that the events occurred, the situation was considered to be very embarrassing to the Australian Government although subsequent events (including the nondisclosure or the incorrect disclosure of certain events) have tended to justify the Government's position. As with all issues that have a political characteristic, some people will always think that the Government was right and others will always think that it was wrong.

Fortunately for Australia, it is likely that the events in question will disappear into history and no doubt other events will dominate the global conversation.

We welcome back Mr. Djokovic in 2023.

Summary

The events that occurred caused considerable consternation in many respects. It caused consternation politically, both domestically and internationally, it caused consternation within the tennis community, it caused consternation between pro-vaccination groups and anti-vaccination groups and otherwise detracted from one of the world's major sporting events. This paper does not seek to attribute blame to any individuals or any organisations. It appears that, upon reflection, a number of interested stakeholders could and should have attended to matters in a more effective way, and which would have avoided the events that occurred.

References

Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs. (2022a). FedCFamC2G 7.
Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs. (2022b). FCAFC 3.